

Court File No. 31-2822739  
Estate No. 31-2822739

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

*IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
TOBMAR INVESTMENTS INC. OF THE CITY OF TORONTO IN THE PROVINCE OF  
ONTARIO*

-and-

Court File No. 31-2822741  
Estate No. 31-2822741

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

*IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
TOBMAR INVESTMENTS INTERNATIONAL INC. OF THE CITY OF TORONTO IN  
THE PROVINCE OF ONTARIO*

-and-

Court File No. 31-2822735  
Estate No. 31-2822735

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

*IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
GATEWAY MARKET CANADA INC. OF THE CITY OF TORONTO IN THE PROVINCE  
OF ONTARIO*

**MOVING PARTIES' FACTUM**

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Lawyers for the Moving Parties

TO: **SERVICE LIST**

## MOVING PARTIES' FACTUM

### PART I - INTRODUCTION

1. This Factum is filed in support of the motions made by three related corporations – Tobmar Investments Inc. (“**Tobmar Investments**”), Tobmar Investments International Inc. (“**Tobmar International**”) and Gateway Market Canada Inc. (“**Gateway Market**” and, together with Tobmar Investments and Tobmar International, the “**Corporations**”) – in the following related proceedings (collectively, the “**Proposal Proceedings**”):

- (a) In the matter of the Notice of Intention to Make a Proposal of Gateway Market Canada Inc. of the City of Toronto in the Province of Ontario, Court File/Estate No. 31-2822735;
- (b) In the matter of the Notice of Intention to Make a Proposal of Tobmar Investments Inc. of the City of Toronto in the Province of Ontario, Court File/Estate No. 31-2822739; and
- (c) In the matter of the Notice of Intention to Make a Proposal of Tobmar Investments International Inc. of the City of Toronto in the Province of Ontario, Court File/Estate No. 31-2822741.

2. On April 19, 2022, the Corporations filed Notices of Intention to Make a Proposal (the “**NOIs**”) under section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-

3, as amended (the “**BIA**”) and appointed Albert Gelman Inc. as proposal trustee (the “**Proposal Trustee**”).<sup>1</sup>

3. On these motions, the Corporations seek (i) an Order extending the period within which the Corporations may file proposals to their creditors in accordance with the BIA (the “**Proposals**”) by 45 days to July 3, 2022; (ii) an administrative consolidation of the Proposal Proceedings; and (iii) an administrative charge securing the fees and expenses of the Proposal Trustee in its capacity as Proposal Trustee and Trustee in Bankruptcy and its counsel.

## **PART II - SUMMARY OF FACTS**

### **A. THE GATEWAY NEWSTANDS SYSTEM**

4. The Corporations jointly operate a franchise system of approximately 150 convenience stores, bakeries and lottery booths (each, a “**Gateway Store**”) across Canada (the “**System**”). Most Gateway Stores are located in Ontario. The majority of Gateway Stores in the System operate under the “Gateway Newstands” brand and most franchisees are owner/operators.<sup>2</sup>

5. Gateway Market is the operating entity and, as franchisor, enters into franchise agreements with franchisees in the System.<sup>3</sup> Gateway Market’s sources of revenue are:

- (a) royalties payable by the franchisees in the System, based on their sales;

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<sup>1</sup> Affidavit of Mary Kelly sworn May 2, 2022 (“**Kelly Affidavit**”) at Exhibit “E”, Motion Record filed in Court File No. 31-2822735 (the “**Motion Record**”), Tab 2-E, pp 67-69.

<sup>2</sup> Kelly Affidavit at paras 1-3, Motion Record, Tab 2, p 21.

<sup>3</sup> Kelly Affidavit at para 5, Motion Record, Tab 2, p 22.

- (b) supplier revenues payable pursuant to various agreements with individual suppliers of product to Gateway Stores; and
- (c) franchise fees earned when a new franchise location is opened or a location's lease is renewed.<sup>4</sup>

6. Tobmar Investments and Tobmar International hold various leases (collectively, the "**Leases**") with approximately 50 separate landlords which include public transit authorities such as the Toronto Transit Commission ("**TTC**") and Metrolinx, as well as landlords of office and retail buildings.<sup>5</sup> Tobmar Investments and Tobmar International sublet the premises they lease pursuant to the Leases to franchisees which, in turn, operate Gateway Stores at those locations.

7. In the majority of cases, arrangements exist whereby the franchisees are required to remit rent payments directly to the respective landlords, rather than through Tobmar Investments or Tobmar International.<sup>6</sup> As a result, while Tobmar Investments and Tobmar International have been and remain legally liable for rent payments under the Leases, the majority of those liabilities and the corresponding accounts receivable from the various franchisees are not reflected in the two companies' financial statements.<sup>7</sup>

## **B. FINANCIAL DIFFICULTIES AND INSOLVENCY**

8. The onset of the COVID-19 pandemic (the "**Pandemic**") brought immediate and severe challenges to the viability of the System and the solvency of the Corporations.<sup>8</sup>

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<sup>4</sup> Kelly Affidavit at para 6, Motion Record, Tab 2, p 22.

<sup>5</sup> Kelly Affidavit at paras 7-9, Motion Record, Tab 2, pp 22-23.

<sup>6</sup> Kelly Affidavit at para 10, Motion Record, Tab 2, p 23.

<sup>7</sup> Kelly Affidavit at para 11, Motion Record, Tab 2, p 23.

<sup>8</sup> Kelly Affidavit at para 14, Motion Record, Tab 2, p 24.

Public health restrictions imposed by various levels of government forced franchisees to close down their locations completely and for prolonged period of times. When Gateway Stores were permitted to reopen, the foot traffic from commuters, office workers and people shopping at brick-and-mortar stores and shopping malls remained significantly below pre-Pandemic levels.<sup>9</sup> As a result, franchisee sales declined by between approximately 62% and 92% compared to the pre-Pandemic timeframe.<sup>10</sup> This led to a sharp decline in Gateway Market's key source of revenue, being royalty payments, which declined by approximately 69%.<sup>11</sup>

9. The depressed store-level sales also caused a reduction in Gateway Market's revenues from supplier payments, which declined from \$3,435,311.00 in the fiscal year ending December 31, 2019<sup>12</sup> to \$2,155,738.00 for the entire period from March 2020 to December 31, 2021.<sup>13</sup>

10. The steep decline in sales also crippled the franchisees' ability to honour their obligations under their respective sub-leases and, given the decline in revenues at Gateway Market, the Corporations that held the Leases were also not in a position to fully satisfy their obligations under the Leases.<sup>14</sup>

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<sup>9</sup> Kelly Affidavit at paras 14 and 16, Motion Record, Tab 2, pp 24-25.

<sup>10</sup> Kelly Affidavit at Exhibit "B", Motion Record, Tab 2-B, p 61.

<sup>11</sup> Kelly Affidavit at para 15, Motion Record, Tab 2, p 24.

<sup>12</sup> Kelly Affidavit at Exhibit "A", Motion Record, Tab 2-A, p 48.

<sup>13</sup> Kelly Affidavit at Exhibit "C", Motion Record, Tab 2-C, p 63.

<sup>14</sup> Kelly Affidavit at para 21, Motion Record, Tab 2, pp 26.

11. Throughout the Pandemic, the Corporations remained in regular contact with creditors, including major landlords such as the TTC and secured creditors such as the Toronto Dominion Bank (“TD”).<sup>15</sup> In the course of this, the Corporations were able to:

- (a) reach temporary accommodations with most major creditors, including landlords;
- (b) take advantage of available government subsidies for rent obligations; and
- (c) reach a forbearance agreement with TD, which was renewed and revised on several occasions.<sup>16</sup>

12. Despite these accommodations, it became clear that the Corporations could not continue to operate without fundamentally restructuring their collective affairs and indebtedness<sup>17</sup> Accordingly, the Corporations filed the NOIs on April 19, 2022.<sup>18</sup>

### **C. NEED FOR EXTENSION OF THE PERIOD FOR FILING PROPOSALS**

13. The Corporations are in the process of formulating the Proposals. As this requires a detailed review of sales and obligations at each franchisee location in relation to the Corporations’ obligations under the Leases, which involve approximately 50 separate landlords, and obligations to other creditors, the process is expected to require more than 30 days from the date of filing the NOIs.<sup>19</sup>

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<sup>15</sup> Kelly Affidavit at para 22, Motion Record, Tab 2, p 26.

<sup>16</sup> Kelly Affidavit at para 23, Motion Record, Tab 2, p 26.

<sup>17</sup> *Ibid.*

<sup>18</sup> Kelly Affidavit at para 24 and Exhibit “E”, Motion Record, Tab 2, pp 26-27 and Tab 2-E, pp 67-69.

<sup>19</sup> Kelly Affidavit at paras 35-37, Motion Record, Tab 2, p 30.

14. It is not expected that any creditor will be materially prejudiced by the extension if it were to be granted and it appears that the Corporations' single largest creditor – The Peninsula Fund VI Limited Partnership (“**Peninsula**”) – and the Corporations' other secured creditor, being TD, do not oppose the extension request.<sup>20</sup>

15. By contrast, if the extension sought is not granted, it is expected that the Corporations will be unable to make viable Proposals to their creditors and will become bankrupt. In view of the financial circumstances of the Corporations, this will likely result in the secured creditors not being fully paid, the unsecured creditors receiving no recovery and the viability of the independently owned and operated franchised businesses being put at risk.<sup>21</sup>

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

16. The moving parties seek the same relief in each of the three Proposal Proceedings, namely:

- (a) an Order extending the time within which the Corporations may make a proposal to their creditors by 45 days to July 3, 2022;
- (b) an Order granting a first priority charge on all of the Corporations' assets, property and undertaking in the amount of \$200,000.00 in favour of the Proposal Trustee in its capacity as Proposal Trustee and Trustee in Bankruptcy, inclusive of the fees and disbursements of its counsel; and

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<sup>20</sup> Kelly Affidavit at paras 40-42, Motion Record, Tab 2, p 31.

<sup>21</sup> Kelly Affidavit at para 43, Motion Record, Tab 2, p 31.



- (c) an Order administratively consolidating the Proposal Proceedings and:
  - (i) authorizing that same continue under the joint title of proceedings set out in the draft Orders filed as part of the Motion Records filed in the Proposal Proceedings; and
  - (ii) authorising all further materials in the Proposal Proceedings to be filed in the court and estate file under Court File No. 31-2822735 and Estate No. 31-2822735.

**A. EXTENSION OF TIME**

17. Section 50.4(9) allows an insolvent person to bring a motion for an extension of the time within which the insolvent person may file a proposal to its creditors and sets out a three-part test in that regard. The Court may grant an extension if satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.<sup>22</sup>

18. The Corporations have acted and continue to act in good faith and with due diligence in order to formulate the Proposals.<sup>23</sup> In order to do so, the Corporations must,

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<sup>22</sup> [Bankruptcy and Insolvency Act, RSC 1985, c B-3](#), as amended (“BIA”), [s 50.4\(9\)](#).

<sup>23</sup> Kelly Affidavit at para 35, Motion Record, Tab 2, p 30.

with the assistance of the Proposal Trustee, perform a rigorous analysis of the financial viability of each franchised location considering past and projected sales, corresponding projected royalty and supplier revenues as well as the Corporations' other indebtedness.

19. Given the scope of the System, including approximately 150 franchised locations and approximately 50 separate landlords,<sup>24</sup> this process is expected to take a considerable amount of time. Further, the extension of the 30-day period within which proposals under the BIA must be filed is sought in order to allow for the Corporations to:

- (a) stabilize operations and evaluate cash flows on a go-forward basis;
- (b) analyze the viability of all franchised locations and disclaim the leases and franchise agreements of non-viable locations; and
- (c) enter into informal discussions with landlords, including the TTC and the City of Toronto, as well as other creditors, regarding the potential terms of the Proposals and the creditors' position with respect to same.

20. The purpose of the proposal process under the BIA is rehabilitative and the 30-day statutory period for filing a proposal under section 50.4(8) of the BIA is intended to provide the insolvent debtor with an opportunity to put forward a plan. The availability of extensions to the initial 30-day period is indicative of and consistent with the legislative purpose that insolvent persons be afforded the chance to put forward a proposal.<sup>25</sup>

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<sup>24</sup> Kelly Affidavit at paras 3 and 9, Motion Record, Tab 2, pp 21 and 23.

<sup>25</sup> [In the Matter of the Proposal of Cogent Fibre Inc.](#), 2015 ONSC 5139 (CanLII) at [para 8](#).

21. It is expected that if the extension sought were granted, the Corporations will be able to formulate and file viable Proposals to their creditors.<sup>26</sup> As was the case in *Colossus Minerals Inc. (Re)*, (“**Colossus Minerals**”) where Justice Wilton-Siegel granted the moving party’s request for an extension under section 50.4(9) of the BIA, granting the extension would increase the likelihood of a feasible proposal.<sup>27</sup>

22. Furthermore, if the extension sought were granted, the status quo would be effectively preserved for the duration of the extension period which is not expected to materially prejudice any creditor. Indeed, the Corporations’ largest creditors, Peninsula and TD, do not oppose the request for an extension<sup>28</sup> and the Proposal Trustee is supportive of the request,<sup>29</sup> as was the proposal trustee in *Colossus Minerals*.<sup>30</sup>

23. By contrast, in the event that the extension sought is not granted, the Corporations will likely be unable to make viable Proposals to their creditors, causing them to become bankrupt.<sup>31</sup> Given the financial position of the Corporations, this will result in a shortfall for the secured creditors, no recovery for all unsecured creditors, and the demise of the System along with approximately 150 franchised small businesses.

24. It is respectfully submitted that granting the extension would maximize the chances of (i) recovery for the Corporations’ creditors and (ii) preserving the viable locations in the System and is, therefore, just and appropriate in the circumstances.

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<sup>26</sup> Kelly Affidavit at para 39, Motion Record, Tab 2, p 30.

<sup>27</sup> [Colossus Minerals Inc. \(Re\)](#), 2014 ONSC 514 (CanLII) at [para 40](#) (“**Colossus Minerals**”).

<sup>28</sup> Kelly Affidavit at paras 40-42, Motion Record, Tab 2, p 31.

<sup>29</sup> Kelly Affidavit at para 44, Motion Record, Tab 2, p 31.

<sup>30</sup> [Colossus Minerals](#) at [para 43](#).

<sup>31</sup> Kelly Affidavit at para 43, Motion Record, Tab 2, p 31.

**B. ADMINISTRATIVE CHARGE**

25. While Peninsula has provided a limited retainer to the Proposal Trustee, the fees and disbursements of the Proposal Trustee and of its counsel may exceed this funding.<sup>32</sup> Accordingly, the Corporations propose to secure the fees and disbursements of the Proposal Trustee and its counsel by a first priority charge in the amount of \$200,000.00 (the “**Administrative Charge**”).

26. The court’s jurisdiction to grant such a charge arises from section 64.2 of the BIA. The courts have held that, where the relevant professionals’ participation and services are integral to ensure the success of the proceedings in issue, such a charge is appropriate and ought to be granted.<sup>33</sup>

27. The Proposal Trustee’s services will be required in its capacity as proposal trustee throughout the proposal process and, in the event that one or more of the Corporations become bankrupt, in its capacity as Trustee in Bankruptcy.<sup>34</sup>

28. The Proposal Trustee’s efforts are aimed at benefitting all creditors through the proposal process and, if necessary, in bankruptcy. In view of this, the Administrative Charge is appropriate in the circumstances and its quantum is reasonable and appropriate given the scale and complexity of the Corporations’ business. It is therefore respectfully submitted that the Administrative Charge should be granted.

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<sup>32</sup> Kelly Affidavit at para 49, Motion Record, Tab 2, pp 32-33.

<sup>33</sup> [Colossus Minerals](#) at [paras 11-15](#); see also [In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.](#), 2021 BCSC 783 (CanLII) at [paras 49-53](#).

<sup>34</sup> Kelly Affidavit at para 48, Motion Record, Tab 2, p 32.

### C. ADMINISTRATIVE CONSOLIDATION

29. The Corporations' business and management are intertwined and, consequently, so are the Proposal Proceedings,<sup>35</sup> which were commenced and are proceeding concurrently.

30. Based on the general principle that the court should adopt processes that avoid multiplicity of proceedings, duplication and unnecessary cost and result in the most expeditious and least expensive determination on the merits, the courts have consolidated related bankruptcy matters for administrative purposes only.<sup>36</sup>

31. Such consolidation does not merge or substantively consolidate the Proposal Proceedings or the respective estates but is akin to bringing multiple civil actions under common case management<sup>37</sup> and the court's jurisdiction to grant such relief stems from the Rule 1.04(1) of the *Rules of Civil Procedure*,<sup>38</sup> which is incorporated into the BIA context via section 3 of the *Bankruptcy and Insolvency General Rules*.<sup>39</sup>

32. Given the substantial overlap in creditors across the three Corporations, and the possibility of further relief being sought in the Proposal Proceedings in the future, it is reasonable and appropriate for the Proposal Proceedings to be administratively consolidated and treated as a single proceeding going forward, for administrative purposes only

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<sup>35</sup> Kelly Affidavit at para 45, Motion Record, Tab 2, p 32.

<sup>36</sup> [Electro Sonic Inc. \(Re\)](#), 2014 ONSC 942 (CanLII) at [para 6](#).

<sup>37</sup> *Ibid* at para 4.

<sup>38</sup> [Rules of Civil Procedure](#), RRO 1990, Reg 194, r 1.04(1).

<sup>39</sup> [Bankruptcy and Insolvency General Rules](#), CRC, c 368, s 3.

**PART IV - ORDER REQUESTED**

33. The Corporations therefore respectfully request Orders substantially in the form filed as part of the Motion Records in the Proposal Proceedings.<sup>40</sup>

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3rd day of May, 2022.



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<sup>40</sup> Motion Record, Tab 3, pp 95-100.

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. [\*Colossus Minerals Inc. \(Re\)\*, 2014 ONSC 514 \(CanLII\)](#).
2. [\*Electro Sonic Inc. \(Re\)\*, 2014 ONSC 942 \(CanLII\)](#).
3. [\*In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.\*, 2021 BCSC 783 \(CanLII\)](#).
4. [\*In the Matter of the Proposal of Cogent Fibre Inc.\*, 2015 ONSC 5139 \(CanLII\)](#).

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. [Bankruptcy and Insolvency Act, RSC 1985, c B-3.](#)

#### **Extension of time for filing proposal**

**50.4(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

[...]

#### **Court may order security or charge to cover certain costs**

**64.2 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under [section 50.4](#) or a proposal is filed under [subsection 62\(1\)](#) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.



### **Priority**

**(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

### **Individual**

**(3)** In the case of an individual,

**(a)** the court may not make the order unless the individual is carrying on a business; and

**(b)** only property acquired for or used in relation to the business may be subject to a security or charge.

[...]

### **Courts vested with jurisdiction**

**183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

**(a)** in the Province of Ontario, the Superior Court of Justice;

**(b)** [Repealed, [2001, c. 4, s. 33](#)]

**(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

**(d)** in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

**(e)** in the Province of Prince Edward Island, the Supreme Court of the Province;

**(f)** in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

**(g)** in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

**(h)** in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

[...]

### **Court may extend time**

**187(11)** Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

2. [Bankruptcy and Insolvency General Rules, CRC, c 368.](#)

**3** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

3. [Rules of Civil Procedure, RRO 1990, Reg 194.](#)

**General Principle**

**1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, [r. 1.04 \(1\).](#)

**IN THE MATTER OF** THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TOBMAR INVESTMENTS INC. OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

-and-

**IN THE MATTER OF** THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TOBMAR INVESTMENTS INTERNATIONAL INC. OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

-and-

**IN THE MATTER OF** THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GATEWAY MARKET CANADA INC. OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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RCP-E 4C (July 1, 2007)