

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE
A PROPOSAL TO CREDITORS OF IGLOO INDUSTRIES
GROUP LTD.**

FACTUM OF MOVING PARTY, IGLOO INDUSTRIES GROUP LTD.

(motion for administrative consolidation, extension of stay of proceedings, administrative charge, and approval of auction and use of proceeds)
(motion returnable march 20, 2024)

March 16, 2024

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TO: THE SERVICE LIST

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PART I – INTRODUCTION AND OVERVIEW

A. Relief Sought

1. The moving party and debtor company in this proceeding, Igloo Industries Group Ltd. (the “**Company**”), brings this motion for an order in the form of the draft order included at tab 2 of the Company’s motion record, that:

- a. administratively consolidates the Company’s notice of intention to make a proposal to creditors (“**NOI**”) proceeding with the NOI proceedings of the Company’s principal, Mr. Stanislaw Snieg, and his wife, Ms. Maria Snieg (together, the “**Individuals**”), bearing court file numbers BK-24-03046353-0031 and BK-24-03046342-0031, respectively (collectively, the “**NOI Proceedings**”);
- b. extends the time for the Company and the Individuals to make proposals to their respective creditors by 45 days, to and including May 6, 2024 pursuant to subsection 50.4(9) of the *Bankruptcy and Insolvency Act*¹ (the “**BIA**”);
- c. grants a charge (the “**Administrative Charge**”), in the maximum amount of \$150,000, on the current and future assets, undertakings and properties of every nature and kind whatsoever and wherever situated, of the Company (and not, for avoidance of doubt, the Individuals), including all proceeds thereof (collectively, the “**Property**”), ranking in priority to all Encumbrances (as defined in the draft order), as security for the payment of the professional fees and disbursements of Albert Gelman Inc. in its capacity as trustee to the NOI Proceedings (in such capacity, the “**Proposal Trustee**”), counsel to the Proposal Trustee, and counsel to the Company incurred in connection with the NOI Proceedings, pursuant to section 64.2 of the BIA; and

¹ R.S.C., 1985, c. B-3 (the “**BIA**”).

- d. approves,
 - i. the Auction Contract among the Company and Benaco Sales Ltd. (the “**Auctioneer**”) dated February 16, 2024 (the “**Auction Agreement**”);
 - ii. the transactions entered into by the Company in the auction completed pursuant to the Auction Agreement on February 22, 2024, being one day after the filing of the NOIs (the “**February Auction**”), pursuant to section 65.13 of the BIA; and
 - iii. the Company’s use of the proceeds of the February Auction, being approximately \$300,000 (which the Company currently holds unused) (the “**Auction Proceeds**”), (a) in accordance with the disbursements in the cash flow forecast (the “**Cash Flow Forecast**”) appended to the first report of the Proposal Trustee, to be filed and served separately (the “**First Report**”), and (b) with the approval of the Proposal Trustee; and
- e. approves the First Report and the activities of the Proposal Trustee set out in the First Report.

B. Overview of Bases for Relief Sought

- 2. The Proposal Trustee recommends the relief sought. At the time of this factum, the Company is not aware of opposition. An overview of the bases for the relief sought is as follows:
 - a. administration consolidation: this will provide a streamlined and more efficient manner of managing the NOI Proceedings, and is reflective of the fact that the Individuals’ NOI proceedings are principally driven by their guarantees of the Company’s obligations under lending facilities.
 - b. NOI extension: the Company has taken appropriate restructuring steps to date and continues to do so. The Company and the Individuals require more time through the breathing room of a continued stay of proceedings in order to evaluate and develop a restructuring plan and then engage with stakeholders about potential proposals.

- c. Administrative Charge: the Company is unable to pay, or fully pay, the Proposal Trustee, its counsel, and counsel for the Company in the forthcoming NOI period. A first-ranking charge to secure the payment of professionals is common and appropriate relief to enable and support a debtor company's restructuring efforts.
- d. February Auction: this auction was set up prior to the filing of the Company's NOI in order to sell redundant assets through a reputable liquidator. Due to the timing of creditor demands, the scheduled date of the auction ended up being one day after the Company was compelled to file an NOI. After seeking the input of the Auctioneer and the Proposal Trustee, the Company concluded that postponing the auction would lead to increased marketing costs and lost sale opportunities, such that proceeding with the auction and seeking approval on this motion, while holding the auction proceeds aside, was the best course of action in the circumstances.
- e. approval of First Report and activities of Proposal Trustee: the Proposal Trustee seeks approval of its report and activities, which is relief regularly granted in restructuring proceedings on terms that it is limited to the court officer personally, and the Company supports this relief.

PART II – FACTS

A. The Company and the Individuals

3. The Company is a corporation incorporated under the *Business Corporations Act* (Ontario), with its main office in Toronto, Ontario. The Company operates a commercial food equipment sale and distribution business. It employs approximately 30 full-time employees and 10 contractors and has a total payroll of approximately \$3.1 million per year.²

4. The Individuals are, respectively, the Company's principal and owner, and his wife.³

² Affidavit of Stanislaw Snieg sworn March 14, 2024, tab 3 of Company's motion record (the "**Snieg Affidavit**"), paras. 5-8, 14-17 [Caselines ref. [E31](#); [E34](#)].

³ Snieg Affidavit, para. 56 [Caselines ref. [E46](#)].

B. Company and Individuals' Key Creditors

5. The key secured creditors of the Company are its main secured lenders, Royal Bank of Canada (“**RBC**”) and Business Development Bank of Canada (“**BDC**”). RBC and BDC are also the Individuals’ main creditors by virtue of guarantees of the Company’s obligations to those banks.⁴

6. The Company’s total creditor debt is approximately \$13 million. Of that amount, the Company owes \$6.53 million to RBC and \$1.3 million to BDC.⁵

7. The RBC facilities are secured by security interests totaling \$16.1 million. Those include (i) a general security interest (“**GSA**”) over the Company’s property, having a total book value of approximately \$18.9 million; (ii) \$5.47 million guarantees from each of the Individuals; (iii) a \$1 million collateral mortgage on a development property owned by the Individuals; (iv) a \$3.25 million guarantee from Export Development Canada; and (v) a security interest, registered in New Jersey, over the inventory of the Company’s US branch corporation, NDG North America, LLC (“**NDG**”), which inventory has a book value of \$900,000 CAD.⁶

8. The BDC facilities are secured by (i) a GSA over the Company’s property; and (ii) joint and several guarantees from the Individuals.⁷

C. Reasons for Insolvency

9. The Company is facing an urgent liquidity crisis. Its net income fell from \$1.429 million for the financial year ended April 30, 2023 to \$59,000 for the period ended December 30, 2023. The Company

⁴ Snieg Affidavit, paras. 22-24; 56-59 [Caselines ref. [E36](#); [E46](#)].

⁵ Snieg Affidavit, para. 23 [Caselines ref. [E36](#)].

⁶ Snieg Affidavit, paras. 26-39 [Caselines ref. [E37](#)].

⁷ Snieg Affidavit, paras. 31-36 [Caselines ref. [E39](#)].

now has less than \$15,000 in its bank account and is unable to meet its obligations as they become due. Without an urgent injection of capital, the business will collapse.⁸

10. Key reasons for the Company's financial challenges include:

i. Rising Interest Rates Causing Reduced Sales

11. Most of the Company's customers finance their purchase. Rising interest rate have caused them to defer purchases, buy used, or repair old equipment, thereby reducing the Company's sales of new equipment.⁹

ii. Costs and Delays of US Expansion

12. The Company has invested about \$1.05 million in US expansion efforts since 2020.¹⁰ NDG has not yet, however, begun generating revenues. As a result, the US expansion has so far been a matter of expense without revenue. Moreover, the Company continues to finance NDG's operational costs, including payroll and rent. This is currently about \$86,000 USD per month and is reflected in the Cash Flow Forecast.¹¹

13. NDG is now finally commencing operations. NDG has secured distribution contracts and buyer representation agreements covering most of the US. The Company anticipates that NDG will begin registering sales shortly. The Company estimates that NDG will be self-sustainable and likely profitable within three months. This will alleviate cashflow pressure.¹²

⁸ Snieg Affidavit, paras. 18, 19 [Caselines ref. [E35](#)].

⁹ Snieg Affidavit, paras. 41-43 [Caselines ref. [E42](#)].

¹⁰ Note: reference in the notice of motion to this number being \$1.5 million is a typographical error.

¹¹ Snieg Affidavit, paras. 44-49 [Caselines ref. [E43](#)].

¹² Snieg Affidavit, paras. 50-51 [Caselines ref. [E44](#)].

iii. RBC Demands and Freezing Credit Facilities

14. RBC made demands on the Company and the Individuals on February 12, 2024. The RBC demands included notices to enforce security under s. 244 of the BIA, both on the Company's property and the Individuals'.¹³

15. The RBC demands did not mention that the Company is in default, but stated that RBC declared all amounts owing to it immediately due and froze the facilities. Neither the Company nor the Individuals could satisfy the RBC demands within the time imparted.¹⁴

16. The combination of the above compelled the Company and the Individuals to file NOIs on February 21, 2024, appointing Albert Gelman Inc. as Proposal Trustee.¹⁵

D. Purpose of NOI Proceedings, and Restructuring Initiatives to Date

17. The purpose of the NOI Proceedings is to afford the Company and the Individuals the breathing room necessary to evaluate restructuring options and formulate a viable proposal to their respective creditors.¹⁶

18. The Company believes that US operations, through its NDG affiliate, will begin generating inflows shortly. This, in combination with other restructuring initiatives, is expected to improve cash flow, which will then assist in formulating a viable proposal to creditors for the Company and the Individuals. As discussed below, the Company has already taken meaningful restructuring steps to reduce costs and generate cash, including lease terminations and sales of non-core assets.¹⁷

¹³ Snieg Affidavit, paras. 52-55 [Caselines ref. [E45](#)].

¹⁴ Snieg Affidavit, paras. 52-55 [Caselines ref. [E45](#)].

¹⁵ Snieg Affidavit, paras. 52-55 [Caselines ref. [E45](#)].

¹⁶ Snieg Affidavit, paras. 64, 65 [Caselines ref. [E47](#)].

¹⁷ Snieg Affidavit, paras. 64, 65 [Caselines ref. [E47](#)].

i. Lease Terminations

19. Prior to filing its NOI, on January 25, 2024, the Company entered into a lease termination agreement with the landlord for one of its warehouse locations in Toronto, pursuant to which the lease was terminated effective February 28, 2024 and the landlord agreed to pay the Company a \$50,000 departing fee.¹⁸

20. On March 11, 2024, the Company disclaimed the lease for a warehouse in Barrie under s. 65.2 of the BIA.¹⁹

21. On March 14, 2024, the Company entered into lease termination terms with the landlord for a warehouse space in Concord whereby the lease will be terminated on April 15, 2024, without penalty.²⁰

22. After the above come into effect, the Company's only remaining lease will be the one for its headquarters and main showroom located in Toronto. Going from four to one leased premises will reduce the Company's expenses significantly.²¹

ii. Sale of Non-Core Assets

23. Prior to the filing of its NOI and the RBC demands, the Company identified non-core assets which it intended to sell to generate revenue, and which also needed to be disposed of in order to vacate the warehouse locations that the Company was exiting as noted above. The Company communicated with several auctioneers and decided to retain the services of the Auctioneer prior to the RBC demands. Also prior to the RBC demands, the Auctioneer commenced broad marketing efforts to generate interest in two auctions set for February 12, 2024 and March 7, 2024 (together, the "**Auctions**").²²

¹⁸ Snieg Affidavit, paras. 67-70 [Caselines ref. [E48](#)].

¹⁹ Snieg Affidavit, paras. 67-70 [Caselines ref. [E48](#)].

²⁰ Snieg Affidavit, paras. 67-70 [Caselines ref. [E48](#)].

²¹ Snieg Affidavit, paras. 67-70 [Caselines ref. [E48](#)].

²² Snieg Affidavit, paras. 71, 72 [Caselines ref. [E49](#)].

24. The Company was compelled to file an NOI on February 21, 2024 to stay RBC's s. 244 notice. The February Auction was scheduled for the next day. The Company considered postponing the February Auction, but the Auctioneer advised against it because the specialized nature of the assets and the small pool of potential purchasers meant that cancelling or delaying the Auctions could significantly affect attendance and sales.²³

25. The Company concluded that it was in the best interest of creditors, in the circumstances, to proceed with the Auctions. The Company informed the Proposal Trustee and RBC that the Auctions would be going ahead as planned, but also committed to holding the proceeds of the February Auction aside until the Company obtained the Court's approval of that auction and of the Company's use of those proceeds.²⁴

26. The February Auction generated Auction Proceeds of approximately \$300,000, which the Company continues to set aside.²⁵

27. The marketing efforts and the conduct of the February Auction are summarized in the First Report and include:

- a. initial preparation of marketing materials and identification of assets in January 2024;
- b. Auctioneer sent 10 blast emails each to more than 11,500 email addresses;
- c. Company reached out to contacts potentially interested;
- d. Auctioneer advertised the February Auction in the Toronto Star and on social media;
- e. February Auction was conducted through HiBid, an online auction platform;
- f. HiBid themselves also marketed the February Auction on its website and to its subscriber base;

²³ Snieg Affidavit, paras. 74, 75 [Caselines ref. [E50](#)].

²⁴ Snieg Affidavit, paras. 74, 75 [Caselines ref. [E50](#)].

²⁵ Snieg Affidavit, para. 76 [Caselines ref. [E50](#)].

- g. 315 parties registered for the February Auction;
- h. 267 different parties made bids;
- i. February Auction generation approximately 83,000 lot views and 17,000 bids.²⁶

28. As to the March Auction, in the end, no acceptable offers were received, so no relief is being sought in that regard on this motion.²⁷

PART III - ISSUES

29. The issues on this motion are whether the Court should:
- a. administratively consolidate the NOI Proceedings;
 - b. approve the Auction Agreement and the transactions entered into pursuant to the February Auction;
 - c. authorize the Company to use the Auction Proceeds in accordance with the Cash Flow Forecast and with the approval of the Proposal Trustee;
 - d. grant the Administrative Charge on the Company's Property, in the maximum amount of \$150,000;
 - e. extend the time for the Company and the Individuals to file proposals by 45 days, to May 6, 2024; and
 - f. approve the First Report and the activities of the Proposal Trustee set out in the First Report.

²⁶ First Report, para. 52.

²⁷ Snieg Affidavit, paras. 78-82 [Caselines ref. [E51](#)].

PART IV - LAW AND ARGUMENT

A. The Court Should Administratively Consolidate the NOI Proceedings

30. The consolidation that is sought is procedural only. It is to allow stakeholders to deal with the NOI Proceedings pursuant to consolidated steps, such as consolidated reports, notices, meetings and mailings. The draft order also provides that motions and documents can be brought and filed in the consolidated court file.

31. The Court has jurisdiction to order administrative consolidation pursuant to its inherent power to control its own processes. This power is informed by, among other provisions, section 138 of the *Courts of Justice Act* (the “CJA”), which provides that “*As far as possible, multiplicity of legal proceedings shall be avoided.*”²⁸

32. This Court often orders the administrative consolidation of insolvency matters to streamline their administration and avoid the costs of producing, serving and filing multiple sets of (redundant) materials at each stage of the proceedings.²⁹

33. The draft order expressly provides that the consolidation is procedural only and not substantive. It does not result in the substantive merger or consolidation of the estates.³⁰

34. Administrative consolidation of the NOI Proceedings is appropriate. The NOI Proceedings largely relate to the same facts and creditors, and the insolvency of the Individuals is closely intertwined with that of the Company. There is no benefit in duplicating administrative matters. There is also no prejudice in administratively consolidating the NOI Proceedings.

²⁸ *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”), [s. 138](#).

²⁹ See *Re Mustang GP Ltd*, 2015 ONSC 6562, [para. 25](#).

³⁰ See *Re Electro Sonic Inc*, 2014 ONSC 942, [para. 4](#).

B. The Court Should Approve the Auction Agreement and the Transactions Entered into Pursuant to the February Auction

35. The Court has jurisdiction to approve the Auction Agreement, and the sales completed at the February Auction (collectively, the “**Auction Sales**”), pursuant to section 65.13 of the BIA.³¹ This section provides that the Court may approve a sale of a debtor company’s assets outside of the ordinary course of business, including before a proposal is presented.³² It is not in dispute that the Auction Sales were outside of the ordinary course of the Company’s Business.

36. Section 65.13(4) provides that the Court will consider the following non-exhaustive criteria in deciding whether to approve the sale:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.³³

37. Courts also consider the *Soundair* factors in deciding whether to approve sales under s. 65.13 of the BIA. Those well-known factors are: (i) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity

³¹ BIA, [s. 65.13](#).

³² *Komtech Inc (Re)*, 2011 ONSC 3230, [para. 33](#).

³³ BIA, [s. 65.13\(4\)](#).

of the process by which offers have been obtained; and (iv) whether there has been unfairness in working out of the process.³⁴

38. In this case, much of the process leading to the Auction Sales took place before the NOI filing but the February Auction itself took place thereafter (and without prior Court approval). This Court has applied the same principles for approval of transactions out of the ordinary course of business where the efforts leading to the sale were wholly or partially conducted before the insolvency filing.³⁵

39. The Company was faced with a timing issue. On one hand, it could postpone or cancel the Auctions to seek prior approval by the Court. However, the Auctioneer advised that postponing the Auctions ran the risk of significantly reduced attendance and increased costs for further marketing.

40. On the other hand, the Company could proceed with the Auctions and seek the Court's approval of the Auction Sales as soon as possible thereafter, while keeping the Auction Proceeds aside.

41. The criteria provided in subsection 65.13(4) and the *Soundair* principles support the approval of the Auction Sales, including for the following reasons:

- a. the Auctioneer is a professional, experienced and reputable auctioneer;³⁶
- b. the Proposal Trustee believes that the terms of the Auction Agreement are commercially reasonable;³⁷
- c. the Proposal Trustee and RBC were advised that the February Auction would proceed;³⁸

³⁴ *Feronia Inc (Re)*, 2020 BCSC 1372 (“*Feronia*”), [para. 39](#), citing *Royal Bank v Soundair Corp*, [1991 CanLII 2727 \(ON CA\)](#).

³⁵ *Feronia*, [para. 49](#); *Re Nelson Education Limited (Re)*, 2015 ONSC 5557, [paras. 31-39](#); *Elleway Acquisitions Limited v 4358376 Canada Inc*, 2013 ONSC 7009, [paras. 27](#) and [31-32](#).

³⁶ See the First Report, para. 55(a).

³⁷ See the First Report, para. 50.

³⁸ See the First Report, para. 55(c).

d. the February Auction was conducted in a commercially reasonable manner, including among other things, the timeline, marketing and conduct of the auction itself;³⁹

e. the February Auction was well attended, garnered significant interest from prospective bidders, and generated more than 17,000 bids through a competitive auction process which maximized exposure and the value obtained for the assets in the circumstances;

f. the February Auction allowed the monetization of redundant and non-core assets, generating more than \$300,000 in Auction Proceeds, which the Company appropriately set aside pending approval of the Court;⁴⁰

g. The Proposal Trustee believes that the Auction Proceeds (i) are reasonable proceeds considering the specialized nature of the assets; and (ii) represent critical funding to support the Company during these NOI proceedings;⁴¹

h. the Proposal Trustee is of the view that the actions and activities of the Company as it relates to the February Auction were reasonable in the circumstances;⁴² and

i. the purchasers in the Auction Sales are good faith, arm's length third-party purchasers, and it would be in their interest to "regularize", to the extent necessary, the transactions they entered into for value received.

42. The manner in which the February Auction proceeded is similar to, if not the same as, how an auction would have proceeded with prior Court approval. The lack of prior approval was driven by timing pressures and not an intent to evade Court supervision.

³⁹ See the First Report, para. 55(a).

⁴⁰ See the First Report, para. 55(d).

⁴¹ See the First Report, paras. 53, 55(b) & (e).

⁴² See the First Report, para. 55.

43. In the circumstances, it is appropriate that the Auction Agreement and the Auction Sales be approved.

C. The Court Should Approve the Company's Use of the Auction Proceeds in Accordance with the Cash Flow Forecast

44. The Company seeks relief authorizing it to use the Auction Proceeds, provided that such use is in accordance with the Cash Flow Forecast and approved by the Proposal Trustee.

45. Such relief is not expressly provided for in the BIA. There also appears to be no reported direct precedent in the caselaw. The relief, however, is similar to approval of interim financing under s. 50.6 of the BIA,⁴³ in that the collateral of creditors is affected to enable the debtor company to access emergency funding. Section 183 of the BIA expressly confirms the Court's inherent jurisdiction to grant relief that is not expressly contemplated by a provision of the BIA but that is appropriate in the circumstances, especially where, as in this case, the relief achieves a purpose and result that is expressly contemplated by the Act.⁴⁴

46. Section 50.6 of the BIA lists factors that the Court is to consider in deciding whether to approve interim financing and grant a super-priority charge. Those factors are applied below to the facts of this case, *mutatis mutandis*:

a. the period during which the debtor is expected to be subject to proceedings under this Act:
while it is too early to tell with certainty how long these proceedings will be, the Company is acting in good faith and with due diligence so that these proceedings are not unduly protracted.

b. how the debtor's business and financial affairs are to be managed during the proceedings:
the Company proposes to use the Auction Proceeds in accordance with the Cash Flow Forecast, which sets out certain projected amounts for categories of disbursements on an itemized basis. The

⁴³ BIA, [s. 50.6](#).

⁴⁴ BIA, [s. 183](#); see *Urbancorp Cumberland I GP Inc. (Re)*, 2020 ONSC 7920, [paras. 32-34](#), and *Kitchener Frame Limited (Re)*, 2012 ONSC 234, [paras. 46, 53](#).

Company will manage its business and financial affairs, including the use of the Auction Funds, under the supervision of the Proposal Trustee.

c. whether the debtor's management has the confidence of its major creditors: the Company is not aware of any opposition to this relief as of the date of this factum, but has not yet received affirmative statements from creditors such as RBC and BDC.

d. whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor: the Company is facing an urgent liquidity crisis. Without an injection of funds, it will likely not be able to continue as a going concern, which would detrimentally affect the prospects of a viable proposal. In accordance with the Cash Flow Forecast, which was developed with the assistance of the Proposal Trustee, the Company is expected to incur a deficit of \$221,000 over the next 13-week period. The Auction Proceeds are therefore anticipated to be sufficient to balance the Company's cashflow. By allowing the Company to attempt a restructuring, the Auction Proceeds will enhance the prospects of a viable proposal.

e. the nature and value of the debtor's property: the Auction Proceeds, being proceeds of property of the Company, constitute property of the Company. The nature and value of that property are respectively cash and approximately \$300,000. Furthermore, compared to the Company's assets and affairs overall, such quantum is not large.

f. whether any creditor would be materially prejudiced as a result of the security or charge: no creditor would be materially prejudiced as a result of the Company being allowed to use the Auction Proceeds. As seen above, such relief is better for creditors than interim financing. Moreover, the book value of the Company's property exceeds known creditor claims. Finally, as seen above, RBC and BDC hold security beyond the Company's assets, including, in the case of RBC, security interests in the assets of three additional parties (namely, the Individuals and NDG).

g. the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be: the Proposal Trustee supports the relief sought, including the approval of the Company's use of the Auction Proceeds,⁴⁵ and is of the view that, among other things: (i) the Auction Proceeds will provide critical funding to support the Company during the NOI proceedings;⁴⁶ and (ii) only if the Auction Proceeds are made available to the Company will the Company have sufficient liquidity to fund operating costs and the costs of these NOI proceedings.⁴⁷

47. It is therefore respectfully submitted that the Court should approve the Company's use of the Auction Proceeds on the terms provided.

D. The Court Should Grant the Administrative Charge

48. The Court has jurisdiction to grant the Administrative Charge under s. 64.2 of the BIA. This section provides that the Court may order such a charge if (i) notice is given to secured creditors who are likely to be affected by the charge; and (ii) the Court considers the amount of the charge to be appropriate.⁴⁸

49. Courts have considered the following non-exhaustive factors in determining whether an administrative charge is appropriate:

- a. the size and complexity of the business being restructured;
- b. the proposed role of the beneficiaries of the charge;
- c. whether there is any unwarranted duplication of roles;
- d. whether the quantum of the proposed charge appears to be fair and reasonable;
- e. the position of the secured creditors likely to be affected by the charge; and

⁴⁵ First Report, paras. 55, 65.

⁴⁶ First Report, para. 53.

⁴⁷ First Report, para. 62.

⁴⁸ BIA, [s. 64.2](#).

f. the position of the proposal trustee.⁴⁹

50. The application of those factors to the facts of this case support granting the Administrative Charge.

51. The Company requires the expertise and involvement of restructuring professionals to advance the restructuring process for the benefit of creditors and stakeholders. The beneficiaries of the Administrative Charge, being the Company's counsel, the Proposal Trustee, and the Proposal Trustee's counsel, have already engaged in a significant amount of work in connection with the initial phase of the NOI Proceeds and in connection with this motion. This includes, among other things, providing restructuring and insolvency advice, assisting in the development of a restructuring plan, preparing the Cash Flow Forecast, and preparing the materials for this motion, including the First Report. The professionals will continue to play a key role in advance the restructuring, and there is no unwarranted duplication of roles.

52. Courts acknowledge that estimating the quantum of an administrative charge is "*an inexact exercise.*" An administrative charge is considered fair and reasonable where its quantum is not, on a balance, disproportionate to the complexity of the business and restructuring.⁵⁰ The amount of the Administrative Charge, being \$150,000, was determined in consultation with the Proposal Trustee and RBC.⁵¹ It is reasonable and proportionate to professional fee projections included in the Cash Flow Forecast and is not inordinate having regard to the assets and liabilities of the Company.

53. Notice of this motion was given to all secured creditors of the Company. The Proposal Trustee recommends the relief sought, including the Administrative Charge.

⁴⁹ See *Canwest Publishing Inc*, 2010 ONSC 222, [para. 54](#); *Springer Aerospace Holdings Limited*, 2022 ONSC 6581 ("*Springer*"), [paras. 18, 19](#); *Laurentian University of Sudbury*, 2021 ONSC 3545, [paras. 49, 50](#); and *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) ("*Canwest 2009*"), [para. 40](#).

⁵⁰ See *Canwest 2009*, [para. 40](#); *Springer*, [para. 19](#).

⁵¹ First Report, paras. 72-74.

54. Accordingly, the Administrative Charge is appropriate and reasonable, meets the applicable criteria, and should be approved by the Court.

E. The Court Should Extend the Time to File Proposals

55. Under section 50.4(9) of the BIA, the Court has the authority to extend the period for filing a proposal and the stay of proceedings for a period of 45 days where it is 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 were granted.⁵²

56. Those factors support granting the extension sought.

57. The Company and the Individuals are acting in good faith and with due diligence to explore restructuring options. Already at this early stage, the Company has implemented meaningful restructuring steps including, among other things, reducing costs by terminating 75% of its lease obligations. An extension of time will allow the Company and the Individuals to continue good faith efforts towards a viable proposal. No creditor will be materially prejudiced by the extension.

58. Extending the time for the Individuals to file proposals will allow the Company's principal to focus on directing the Company's restructuring efforts, which is in the interest of all stakeholders of the Company, including creditors, employees, customers and suppliers – as well as the Individuals themselves as creditors, guarantors and investors.

⁵² BIA, [s. 50.4\(9\)](#).

F. The Court Should Approve the First Report and the Activities of the Proposal Trustee

59. The Applicants respectfully support the Proposal Trustee's request for Court approval of the First Report as well as the actions, conduct and activities described therein. Such relief is commonly granted for well-established policy reasons including the stability of ongoing insolvency proceedings.⁵³

PART V - RELIEF REQUESTED

60. The Company therefore seeks an order in the form appended at tab 2 of the Company's motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of March, 2024.

/s Joel Turgeon

RECONSTRUCT LLP
Lawyers for the Applicants

⁵³ See, for example, *Target Canada Co. (Re)*, 2015 ONSC 7574, [paras. 22, 23](#).

SCHEDULE A – LIST OF AUTHORITIES

- 1 *Komtech Inc (Re)*, [2011 ONSC 3230](#)
- 2 *Feronia Inc (Re)*, [2020 BCSC 1372](#)
- 3 *Royal Bank v Soundair Corp*, [1991 CanLII 2727 \(ON CA\)](#)
- 4 *Re Nelson Education Limited (Re)*, [2015 ONSC 5557](#)
- 5 *Elleway Acquisitions Limited v 4358376 Canada Inc*, [2013 ONSC 7009](#)
- 6 *Urbancorp Cumberland 1 GP Inc. (Re)*, [2020 ONSC 7920](#)
- 7 *Kitchener Frame Limited (Re)*, [2012 ONSC 234](#)
- 8 *Canwest Publishing Inc*, [2010 ONSC 222](#)
- 9 *Springer Aerospace Holdings Limited*, [2022 ONSC 6581](#)
- 10 *Laurentian University of Sudbury*, [2021 ONSC 3545](#)
- 11 *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114 \(ON SC\)](#)
- 13 *Target Canada Co. (Re)*, [2015 ONSC 7574](#)

SCHEDULE B – RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3:

50.4 (8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

(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.

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

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

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

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.

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

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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;

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

Proceedings commenced at Toronto

FACTUM OF MOVING PARTY

(motion for administrative consolidation, extension of stay of proceedings, administrative charge, and approval of auction and use of proceeds)

(motion returnable march 20, 2024)

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