Court File No. CV-19-612116-0000

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VARI-FORM INC.

APPLICANT

FACTUM OF THE APPLICANT

January 8, 2019

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TO: **SERVICE LIST**

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PART I - NATURE OF THIS APPLICATION

1. Vari-Form Inc. ("**Vari-Form**") seeks relief under the *Companies' Creditors Arrangement Act*[1] (the "**CCAA**"), so that it can maintain operations for a limited period while pursuing the going concern sale of its business on an expedited basis. Doing so is expected to maximize creditor recoveries, preserve hundreds of jobs, and allow Vari-Form's customers to avoid enormous delays and production issues that would be caused by any interruption in Vari-Form's supply of highly specialized auto parts.

2. Vari-Form is seeking, *inter alia*, the following relief:

   (a) an initial stay of proceedings;

   (b) authorization to pay pre-filing amounts to critical suppliers;

   (c) approval of the DIP Facility, including allowing the proceeds to be used to repay certain pre-filing debt owing under the ABL Agreement (as defined below); and

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[1] RSC 1985, c C-36, as amended.

(d) approval of a comprehensive marketing and sales process for the sale of its business, including approval of Vari-Form's execution of the Stalking Horse APA (as defined below) with an affiliate of Vari-Form's primary customer.

PART II - FACTS

3. The facts with respect to this Application are more fully set out in the Affidavit of Pillar Tarry.[2] Capitalized terms in this Factum not otherwise defined have the same meanings as in the Tarry Affidavit.

4. Vari-Form is a leading manufacturer of hydroformed automotive and industrial components. Its operational facilities are in Strathroy, Ontario, where it produces structures for vehicles such as chassis, frame rails, front-ends, and roof rails. Vari-Form is the primary provider of hydroformed components to the Fiat Chrysler Automotive business known as FCA Group ("**FCA**") on certain Dodge Ram and Jeep lines. Vari-Form employs approximately 700 people in Strathroy, Ontario, including up to approximately 200 temporary employees.[3]

5. In early 2018, Vari-Form began experiencing serious financial difficulties. It attempted to launch several new programs in parallel, including programs that used a new type of higher-tension steel that significantly increased the burden on Vari-Form's equipment and processes. Due to engineering and mechanical challenges arising from the new steel and significant unplanned downtime and other issues, management hired supplemental employees, expedited part deliveries

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2 Affidavit of Pillar Tarry, sworn January 8, 2019 [Tarry Affidavit].

3 Tarry Affidavit, para 5.

by third party suppliers, and funded significant cost over-runs to protect customer schedules. Vari-Form incurred millions of dollars in excess program launch costs, severely straining its liquidity.[4]

6. Vari-Form's primary funded debt obligations consist of amounts owed under an ABL Credit Facility, a Term Loan and the 2018 Subordinated Indebtedness.[5] Vari-Form's obligations under the ABL Agreement and the Term Loan Agreement are secured by first- and second-priority liens on substantially all of Vari-Form's assets, subject to the terms of the Intercreditor Agreement between the ABL Lender and the Term Loan Lender.[6] The ABL Lender and the Term Loan Lender entered into forbearance agreements with Vari-Form on or about August 24, 2018, which are set to expire on January 11, 2019.[7]

7. In addition, over the past few months, the Vari-Form Group has been forced to negotiate with certain key customers and other stakeholders to obtain additional incremental funding to sustain operations through the forbearance period and to permit Vari-Form's ongoing negotiations with its creditors. Since August 2018, the Vari-Form Group has obtained three rounds of additional funding from certain key customers totalling, in the aggregate, $26.3 million[8] in unsecured subordinated financing, and the controlling shareholder of the Vari-Form Group has contributed $2 million of additional financing in the form of unsecured subordinated notes.[9]

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4 Tarry Affidavit, para 8.

5 Tarry Affidavit, para 66.

6 Tarry Affidavit, paras 68 and 72.

7 Tarry Affidavit, paras 70, 73 and 97.

8 All amounts in this Factum are denominated in USD unless otherwise identified.

9 Tarry Affidavit, paras 78-79.

8. Despite widespread efforts over the recent months to resolve operational issues and reduce costs, and extensive negotiations with its secured lenders, key customers and other stakeholders, Vari-Form and its related companies (collectively, the "**Vari-Form Group**") have been unable to negotiate a sustainable solution. Vari-Form therefore decided to pursue a potential sale path. In November 2018, the Vari-Form Group retained Angle Advisors LLC ("**Angle**"), a U.S. based investment banking firm, to conduct a marketing and sale process for their businesses.[10]

9. Vari-Form has reached a critical point. Based on recent cash flow statements, Vari-Form estimates that its operations are sustaining a cash burn of more than $1 million per week. Vari-Form is unable to meet its liabilities as they become due and is therefore insolvent. Vari-Form urgently requires the protections of the CCAA to obtain the breathing space and liquidity that is needed to maintain operations while pursuing the going concern sale of its business on an expedited basis.[11]

10. In particular, Vari-Form proposes to continue, under the Court's supervision, the comprehensive marketing and sale process that was launched in November 2018 for the sale of its business. The objective of this process is to complete the sale by April 2019 to maximize creditor recoveries. Vari-Form recognizes that this is a compressed timeline, but believes that it is necessary to maintain stable business operations while it pursues an expediated sale and to minimize the losses that are being incurred in the business. Given the liquidity constraints and the need to maintain customer confidence, the proposed sale process must be completed within an expedited timeframe.[12]

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[10] Tarry Affidavit, paras 9-10.

[11] Tarry Affidavit, para 11.

[12] Tarry Affidavit, para 12.

11. The proposed restructuring in this CCAA proceeding has been negotiated in consultation with Vari-Form's secured lenders, who support the proposed sale process, and would achieve the following:

(a) Vari-Form would use proceeds from the first draws under the DIP Facility to repay outstanding amounts that Vari-Form directly owes under the Canadian ABL Facility;[13] and

(b) Vari-Form will distribute to the Term Loan Lenders on or shortly following the closing of the sale of Vari-Form's assets a payment of $50 million from proceeds of that sale, subject to the terms of the Stalking Horse APA, in partial satisfaction of the Canadian Term Loan.[14]

12. Given that the anticipated Purchase Price under the Stalking Horse APA does not exceed Vari-Form's secured obligations, Vari-Form does not intend to conduct a claims process in this CCAA proceeding. Unless the consideration received significantly exceeds the consideration in the Stalking Horse APA, then, after the $50 million distribution to the Term Loan Lenders, Vari-Form will not have any cash other than what it is permitted to draw under the DIP Facility. Following the sale process, Vari-Form would immediately seek to wind-down any of the remaining aspects of its business in an orderly manner that would minimize further costs. Vari-Form intends to seek an Order terminating this CCAA proceeding by early April.[15]

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[13] Tarry Affidavit, para 13. Vari-Form anticipates that the remainder of the obligations under the Canadian ABL Facility will be paid by Post Meridiem in January 2019 from proceeds received in the anticipated sale of the Post Meridiem business, which is happening outside of this CCAA proceeding.

[14] Tarry Affidavit, para 13.

[15] Tarry Affidavit, paras 20-21.

PART III - ISSUES AND THE LAW

13. This Application addresses the following issues:

(a) The Applicant is entitled to seek protection under the CCAA:

(i) the Applicant is insolvent; and

(ii) the Applicant's chief place of business is Ontario.

(b) The Applicant is entitled to an initial stay of proceedings.

(c) This Court should exercise its discretion to authorize the payment of pre-filing amounts to critical suppliers.

(d) This Court should exercise its discretion to approve the DIP Facility and allow the proceeds to be used to repay certain pre-filing debt to the ABL Lender.

(e) This Court should exercise its discretion to approve the comprehensive marketing and sales process, including:

(i) the Stalking Horse APA; and

(ii) the Bidding Procedures.

A. The Applicant is Entitled to Seek Protection Under the CCAA

1. The Applicant is Insolvent

14. The CCAA applies to a "debtor company" where the total of claims against the debtor exceeds CAD $5 million.[16] The Applicant has total claims against it that far exceed CAD $5 million.

15. Pursuant to section 2(1) of the CCAA, a "debtor company" means, *inter alia*, a company that is insolvent.[17] Whether a company is insolvent for the purposes of this definition is evaluated by reference to the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*[18] (the "**BIA**"). The definition of "insolvent person" in the BIA is as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;[19]

16. In *Stelco,*[20] Farley J. held that the test for "insolvency" under the CCAA should be given an expanded meaning in order to give effect to the objectives of the CCAA of allowing the debtor

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16 CCAA, s 3(1).

17 CCAA, s 2(1).

18 RSC 1985, c B-3, as amended.

19 BIA, s 2.

20 *Re Stelco Inc*, 2004 CarswellOnt 1211 (Sup Ct) [*Stelco*].

company some breathing room in order to restructure. Under the *Stelco* approach, a Court will determine whether there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the applicant running out of money to pay its debts as they become due in the future without the benefit of a stay of proceedings. As Farley J. wrote:

> It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[21] [Emphasis added.]

17. The Applicant is insolvent. Vari-Form estimates that its operations are sustaining a cash burn of more than $1 million per week. The limited waiver under certain of the Vari-Form Group's forbearance arrangements with its lenders is set to expire on January 11, 2019 and Vari-Form faces imminent breaches of covenants under both the ABL Agreement and the Term Loan Agreement. Vari-Form is unable to meet its liabilities as they become due.[22]

18. The Applicant is therefore insolvent and is a debtor company to which the CCAA applies under either the BIA or the *Stelco* test.

2. The Applicant's Chief Place of Business is Ontario;

19. Section 9(1) of the CCAA permits an application under the CCAA to be made in the province in which the head office or chief place of business of the company in Canada is situated.[23]

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21 *Stelco*, at para 26. *Stelco* has been consistently applied by subsequent CCAA courts, including recently by this Court in *Re Target Canada Co*, 2015 ONSC 303 at paras 26-27.

22 Tarry Affidavit, para 11.

23 CCAA, s 9(1).

20. Vari-Form's chief place of business is Ontario. Among other factors, Vari-Form's head office and all of Vari-Form's operational facilities are in Strathroy, Ontario. All of Vari-Form's employees are based in Ontario. In addition, Vari-Form is an Ontario corporation incorporated under the *Business Corporations Act* (Ontario).[24]

21. The Applicant therefore submits that this Court has jurisdiction over this proposed CCAA proceeding.

B. The Applicant Is Entitled to an Initial Stay of Proceedings

22. In order to prevent a rapid erosion of enterprise value and to permit Vari-Form to pursue the going concern sale of its business, the Applicant requires a stay of proceedings.

23. Section 11.02(1) of the CCAA provides the Court with the power to impose a stay of proceedings if it is satisfied that circumstances exist that make the order appropriate.[25] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, a debtor company is entitled to seek the protection of the CCAA where the outcome will not be a going-concern restructuring, but instead a "liquidation" or wind-down of the debtor company's assets or business. Thus, Farley J. stated in *Lehndorff* that a restructuring under the CCAA "may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally."[26]

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[24] Tarry Affidavit, paras 25 and 31.

[25] CCAA, s 11.02(1).

[26] *Re Lehndorff General Partner Ltd*, 1993 CarswellOnt 183 (Sup Ct) at para 7.

24. The 2009 amendments did not expressly address whether the CCAA could be used generally to wind down the business of a debtor company. However, the enactment of Section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle by means of which a debtor company's business is down-sized or wound-down.

25. The cornerstone of the strategic sale restructuring is for Vari-Form to use the protections in this CCAA proceeding to pursue a comprehensive marketing and sale process for its business with the goal of maximizing creditor recoveries.[27] This is expected to preserve hundreds of jobs and allow Vari-Form's suppliers and customers to avoid delays and production issues that would be caused by an interruption in supply. The requested stay of proceedings will maintain the status quo and permit this process to proceed in an orderly manner. Because the restructuring is expected to proceed as an asset sale, it is expected to involve a wind-down of the aspects of the business that are not sold, but that is incidental to the goal of the larger restructuring and, in any event, is consistent with the principles set out above.

C. Authority to Permit Pre-Filing Payments to "Critical" Suppliers

26. During the course of this CCAA proceeding, Vari-Form intends to make payments for goods and services supplied post-filing.[28]

27. The Applicant also seeks authorization to potentially pay pre-filing amounts to certain specific categories of creditors. These include, for instance:

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[27] Tarry Affidavit, para 107.

[28] See Draft Initial Order, para 9(b).

(a) logistics and supply chain providers, including customs brokers and freight forwarders;

(b) creditors who hold or may (but for the stay) obtain possessory or statutory liens over any assets of the Applicant where the value of such asset exceeds the amount of the lien or where the asset is critical to the business; and

(c) third party suppliers deemed critical to the business.

28. Such payments will only be made with the consent of the proposed Monitor and can only be made up to a maximum aggregated amount of $2 million.[29]

29. Ample authority decided prior to the 2009 amendments to the CCAA supports the Court's general jurisdiction to permit the payment of pre-filing obligations to persons whose services are deemed "critical" to the ongoing operations of the debtor.[30]

30. Section 11.4 of the CCAA, which was enacted as part of the 2009 amendments to the CCAA, gives the Court the specific authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing to that supplier for services provided after the filing.[31] However, section 11.4 of the amended CCAA does not oust the court's inherent jurisdiction to make provision for the payment of pre-filing amounts to suppliers whose

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29 Draft Initial Order, para 8(c).

30 See for example *Re Smurfit-Stone Container Canada Inc*, 2009 CarswellOnt 391 (Sup Ct) at para 21.

31 CCAA, s 11.4.

services are viewed as critical to the post-filing operations of the debtor, even where the debtor does not propose to secure payment of post-filing supplies with a critical supplier charge.[32]

31. As noted by Pepall J. in *Canwest Global*, the 2009 amendments, including under section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.[33] The Supreme Court of Canada has also affirmed in *Century Services* that: "[t]he general language of the *CCAA* should not be read as being restricted by the availability of more specific orders."[34]

32. Case law under both section 11.4 of the CCAA and under the inherent jurisdiction of the CCAA to authorize payment of pre-filing amounts demonstrates that a supplier is viewed as "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services and/or difficult to secure an alternate supplier.[35]

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[32] *Re Canwest Publishing Inc./Publications Canwest Inc*, 2010 ONSC 222 at para 50; *Re Performance Sports Group Ltd*, 2016 ONSC 6800 at para 24.

[33] *Re Canwest Global Communications Corp*, 2009 CarswellOnt 6184 (Sup Ct) at para 24 [*Canwest Global*].

[34] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70.

[35] See, for example *Re Priszm Income Fund*, 2011 ONSC 2061. In *Priszm*, the suppliers who were declared to be "critical" to the debtor's operations were suppliers of food and other consumables that were necessary to the continued operation of the debtors' restaurant business, as well as utility service providers, suppliers of waste disposal services, providers of appliance repair and information technology services. Similarly, in *Canwest Global* at para 43, this Court recognized certain suppliers as critical to the debtor companies' operations for the purposes of paying pre-filing amounts, including television programming suppliers, newsprint suppliers, as well as the American Express Corporate Card Program and Central Billed Accounts that enabled the debtors' employees to perform their job functions. See also *Re Cinram International Inc*, 2012 ONSC 3767 at paras 67-68.

D. DIP Financing and Charges

1. Nature of DIP Facility

33. Vari-Form requires interim financing to provide an immediate source of cash funding and to provide stability and fund operations for a limited period of time under CCAA protection while pursuing the going concern sale of its business on an expedited basis.[36]

34. Subject to certain terms and conditions, including the granting of the proposed Initial Order, 11032569 Canada Inc. (the "**Initial DIP Lender**") – which is an affiliate of FCA and is also the Stalking Horse Bidder – has agreed to provide a debtor-in-possession delayed-draw term loan credit facility (the "**DIP Facility**") in an aggregate principal amount of up to $22,794,000.[37]

35. The DIP Facility is crucial, as it will provide Vari-Form with the necessary liquidity to operate during these proceedings and permit it to pursue the going concern sale of its business on an expedited basis.[38]

36. The DIP Facility includes the following commercial terms, among others:[39]

(a) **Use of Proceeds:** The proceeds shall be used solely in accordance with, and subject to, the DIP Budget.

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[36] Tarry Affidavit, para 112.

[37] Tarry Affidavit, para 112.

[38] Tarry Affidavit, para 118.

[39] Tarry Affidavit, para 115.

(b) **Interest:** All amounts owing under the DIP Loan Agreement bear interest at 5% per annum. Upon a Default or Event of Default, all amounts owing shall bear interest at the Default Rate of 7% per annum.

(c) **Conditions Precedent to the Effectiveness of the DIP Loan Agreement:** The conditions precedent include: (i) The ABL Agent and the Term Loan Agent shall have consented to the terms of the DIP Facility Agreement and the DIP Lenders' Charge; (ii) Vari-Form shall have entered into the Stalking Horse APA; and (iii) the Court shall have issued the Initial Order approving the DIP Loan Agreement and granting the DIP Lenders' Charge.

(d) **Conditions Precedent to all Advances:** The DIP Lenders' agreement to make Advances is subject to the satisfaction or waiver of certain conditions precedent including: (i) the Initial Order shall not have been amended or vacated without the consent of the Majority DIP Lenders; (ii) there shall be no Encumbrances on Collateral ranking in priority to or *pari passu* with the DIP Lenders' Charge other than those permitted.

(e) **DIP Lenders' Charge:** All DIP Obligations of the Borrower, including all principal, interest and other amounts owing in respect of fees and expenses of the DIP Lenders and the Agent, shall be secured by a Court-ordered DIP Lenders' Charge on the Collateral in favor of the Agent for the benefit of the DIP Lenders and the Agent. That charge shall rank ahead of any and all Encumbrances on the Collateral other than the Priority Charges, ABL Security and Term Loan Security, to the extent provided in the proposed Initial Order.

(f) **Repayment and Maturity Date:** All amounts owing to the DIP Lenders under the DIP Facility shall be due and payable on the earliest of any of the following: (i) 90 days after the Filing Date; (ii) termination of the CCAA Proceeding; and (iii) an Event of Default in respect of which the DIP Lenders have elected to accelerate the DIP Obligations and after the expiration of such cure periods and required notice.

(g) **Indemnity:** Subject to certain conditions, the Borrower shall indemnify and hold harmless the DIP Lenders and the Agent from and against, among other things, any liabilities or expenses in any way related to the DIP Facility.

(h) **Events of Default:** Events of Default include, among others: (i) the CCAA Proceeding is terminated or a bankruptcy order is made against the Borrower; (ii) the stay imposed by the CCAA proceeding is terminated or amended in a manner prejudicial to the DIP Lenders; and (iii) failure to pay any amounts when due and owing under the DIP Loan Agreement. The remedies for an event of default include, among others, acceleration of all amounts outstanding under the DIP Facility so that they are due and payable upon one day's prior written notice.

(i) **Priority Payables:** Notwithstanding anything in the DIP Loan Agreement to the contrary, pursuant to section 37 of the DIP Loan Agreement, in the event a Default or Event of Default has occurred and is continuing following consummation of the Sale pursuant to the Stalking Horse APA and prior to the occurrence of the Maturity Date, the DIP Lenders agree to make Advances in accordance with their commitments for the payment when due of Priority Payables included in the DIP Budget.

37. Vari-Form asked other parties, including each of the ABL Lender and the Term Loan Lenders, whether they would provide additional financing to support Vari-Form. Both declined.[40]

38. Vari-Form believes that the DIP Facility is being offered on more favourable terms than any other potentially available third-party financing and that no third party would be prepared to provide non-priming financing on acceptable terms in these circumstances. Vari-Form believes that the DIP Facility is in the best interests of Vari-Form and its stakeholders.[41]

39. The entire amount of the DIP Facility is to be secured by a security interest on the property, assets and undertaking of Vari-Form. As noted above, the amount actually borrowed by Vari-Form is proposed to be secured by, among other things, a Court-ordered DIP Lenders' Charge on Vari-Form's property.[42] The DIP Lenders' Charge shall not prime the Priority Charges, ABL Security or Term Loan Security.[43]

2. Jurisdiction to Approve DIP Financing and Related Charge

40. Section 11.2 of the CCAA gives the Court the statutory authority and discretion to grant a DIP financing charge:

> **11.2(1)** ***Interim Financing*** – On application by a debtor company 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 company'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 company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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40 Tarry Affidavit, para 117.

41 Tarry Affidavit, paras 117-118.

42 The proposed priorities of the various charges is set out at paragraph 146 of the Tarry Affidavit.

43 Tarry Affidavit, para 116.

> **11.2(2)** ***Priority – Secured Creditors*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

41. Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> **11.2(4)** ***Factors to be considered*** – In deciding whether to make an order, the court is to consider, among other things:
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

42. The following factors also support the approval of the DIP Facility and the granting of the DIP Lenders' Charge, many of which satisfy the considerations enumerated in section 11.2(4) above:

(a) In compliance with section 11.2(1) of the CCAA, the DIP Lenders' Charge will not secure any pre-filing obligations.

(b) The ability to make draws from the DIP Facility will stabilize the business.

(c) Based on the Applicant's cash flow requirements, the DIP Facility will provide the Borrower with the stability and liquidity necessary to continue operations in the

CCAA proceedings while it pursues the going concern sale of its business on an expedited basis.

(d) The proposed Monitor supports the Applicant's request for an order authorizing them to enter into the DIP Agreements and granting the DIP Lenders' Charge.[44]

3. Payments to Pre-Filing Lenders

43. Vari-Form is a party to a Loan Agreement (the "**ABL Agreement**"), dated as of February 2, 2018, as amended, by and among Vari-Form and Post Meridiem Plastics Inc. ("**Post Meridiem**") as Canadian Borrowers, Bank of America, N.A. as Agent and the other lender party thereto (the "**ABL Lender**"). As amended, the ABL provides for $6.75 million in revolving credit to the Canadian Borrowers. As of January 3, 2019, the outstanding principal balance on the revolving credit line to the Canadian Borrowers was approximately $5.3 million plus a $500,000 letter of credit.[45]

44. Vari-Form's obligations under the ABL Agreement are secured by first- and second-priority liens on substantially all of its assets, subject to the terms of the Intercreditor Agreement between the ABL Lender and the Term Loan Lender.[46]

45. Vari-Form proposes to use funds from the first draw under the DIP Facility to repay all of Vari-Form's outstanding Canadian Obligations owing to the ABL Lender under the Canadian ABL Facility. Under the terms of the ABL Agreement, Vari-Form is liable for all Canadian Obligations, including the amounts borrowed by Post Meridiem, and all of these Canadian Obligations will

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[44] Monitor's Pre-Filing Report.

[45] Tarry Affidavit, paras 67 and 69.

[46] Tarry Affidavit, para 68.

need to be paid to obtain a release of the ABL Lender's security. As of January 3, 2019, the Canadian Obligations total approximately $5.3 million plus a $500,000 letter of credit. The DIP Loan Agreement provides that, subject to the DIP Budget, Vari-Form may use proceeds of the DIP Facility to pay the "ABL Repayment Amount" (as well as related costs, fees and expenses incurred in connection therewith) of approximately $4.5 million. Vari-Form anticipates that the remainder of the Canadian Obligations will be paid by Post Meridiem in January 2019 from proceeds received in the anticipated sale of the Post Meridiem.[47]

46. As long as the DIP Facility in question does not secure pre-filing amounts, CCAA Courts have permitted DIP facilities to contain provisions similar to these. CCAA courts have thereby given a narrow interpretation to the restriction in section 11.2(1) of the CCAA (which precludes a DIP charge from securing pre-filing indebtedness).

47. In *White Birch*, for example, the Superior Court of Quebec approved a DIP loan where $50 million of the $140 million loan was to be immediately deducted and applied to the full payment and discharge of a pre-filing asset based revolving credit facility. The court concluded that under this arrangement, the DIP charge was not securing any pre-filing indebtedness.[48]

48. A similar conclusion was reached in *Toys "R" Us*, where Myers J. stated:

> The applicant asks for the approval of a debtor in possession (DIP) lending facility to repay its pre-filing ABL indebtedness and to fund its cash flow needs as it bulks up its inventory for holiday sales and then throughout its restructuring. Section 11.2 of the CCAA provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in CCAA cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal

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47 Tarry Affidavit, para 114.

48 *Arrangement relatif à White Birch Paper Holding Company*, 2010 QCCS 764 at para 70.

> opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.[49]

49. Consistent with the findings in *White Birch* and *Toys "R" Us*, the DIP Lenders' Charge here would not be securing any pre-filing indebtedness, as all the loans that will be secured are fresh advances by the DIP Lender. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid. The DIP funds are replacing existing secured collateral. As the DIP Lender is not an existing lender, it is not using the DIP loan as a way to improve its security position. DIP security will not be priming Apollo and other higher ranking creditors. The take out of the ABL Lender will simplify the CCAA proceedings and minimize related costs, so there would be a benefit to the estate and stakeholders if the relief is granted.

50. In this case, the DIP Facility and the DIP Lenders' Charge are entirely consistent with section 11.2(1) of the CCAA and are consistent with the CCAA's primary objective as they will help facilitate the restructuring of Vari-Form. The DIP Lenders' Charge will not secure any pre-filing obligations and will only secure post-filing advances under the DIP Facility.

E. Sales Process

1. This Court has the Jurisdiction to Approve the Stalking Horse APA and Bidding Procedures

51. This Court has the jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets prior to the development of a plan of compromise and arrangement.[50] This

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[49] *Re Toys "R" Us (Canada) Ltd*, 2017 ONSC 5571 at para 10.

[50] *Re Nortel Networks Corp*, 2009 CarswellOnt 4467 (Sup Ct) at para 48 [*Nortel*].

Court in *Nortel* identified a number of factors that should be considered when authorizing a sales process:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole economic community?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?[51]

52. In addition, a court may also indirectly consider the factors provided in section 36(3) of the CCAA, which will apply when an applicant seeks approval for a sale after the sales process has concluded.[52] These considerations are as follows:

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances.

(b) Whether the Monitor approved the process leading to the proposed sale or disposition.

(c) Whether the Monitor filed with the Court a report stating that in its 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.

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[51] *Nortel* at para 49. *Re Brainhunter Inc*, 2009 CarswellOnt 8207 (Sup Ct) at paras 15-17 [*Brainhunter*] confirmed that the *Nortel* factors remain applicable even after the 2009 amendments to the CCAA.

[52] *Brainhunter* at para 17.

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

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

2. Overview of the Proposed Stalking Horse APA and Bidding Procedures

53. Vari-Form has worked with the Monitor and the Financial Advisor to design a set of Bidding Procedures to govern the proposed sale of all or substantially all of Vari-Form's assets, pursuant to one or more bids.[53] As described below, Vari-Form is seeking the Court's approval to execute the Stalking Horse APA, which will sets a minimum floor price in respect of the Stalking Horse Assets. Vari-Form is seeking to obtain competing bids and, if Qualified Bids are received, will hold an auction process to seek to maximize the value from the sale of its assets. The details of the Bidding Procedures are further summarized in the Tarry Affidavit.[54]

54. The Stalking Horse APA is an asset purchase agreement by and among Vari-Form, 11032569 Canada Inc. (the "**Buyer**"), the Term Loan Lenders[55] and Fiat Chrysler Automobiles N.V.[56] In addition to setting a minimum floor price in respect of the Stalking Horse Assets, executing the Stalking Horse APA will permit Vari-Form's assets to be rapidly sold to the Stalking Horse Bidder if no other Qualified Bids are received.[57]

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53 Tarry Affidavit, para 135.

54 Tarry Affidavit, paras 136-138.

55 Solely with respect to "Additional Liabilities" as specified in section 2.11 of the Stalking Horse APA.

56 Solely with respect to the Guaranty and related representations and warranties in section 7.13 of the Stalking Horse APA.

57 Tarry Affidavit, para 132.

55. The Stalking Horse APA provides, among other things:[58]

(a) **Purchase Price and Deposit:** The aggregate consideration, exclusive of all applicable Transfer Taxes will be (i) the cash Purchase Price of $50 million, plus (ii) the Buyer's assumption of certain liabilities, plus (iii) a credit in the full amount of the aggregate liabilities under the DIP Financing, which shall be determined on the basis of the maximum amount of the DIP Financing having been advanced.

Within three days from the Execution Date, Buyer shall deposit $5 million with the Monitor and treated in accordance with the terms of the Stalking Horse APA.

(b) **Guarantee of Buyer Parent:** Fiat Chrysler Automobiles N.V. guarantees the full payment and performance of Buyer's payment obligations (including the Buyer Termination Fee if applicable) when due in accordance with, and subject to, the terms and conditions of the Stalking Horse APA.

(c) **Transferred Assets:** Subject to certain conditions, the Buyer agrees to purchase Vari-Form's assets except the Excluded Assets. Excluded Assets include certain contracts that Vari-Form intends to disclaim, Retained Actions, and, subject to certain exceptions, intercompany accounts receivable and other rights to payment from Vari-Form's Affiliates.

The Seller is selling the Transferred Assets on an "as is, where is" basis.

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[58] Tarry Affidavit, para 133.

(d) **Assumed Liabilities:** Subject to the Stalking Horse APA, the Buyer agrees to assume certain liabilities including liabilities under the Pension Plan and cure costs that the Buyer is required to pay with respect to certain contracts.

(e) **Assignment of Contracts:** Seller and Buyer shall use commercially reasonable efforts to obtain all necessary consents required to permit the assignment to the Buyer. If a consent is not forthcoming, as part of the Sale Motion, Vari-Form will seek an order under Section 11.3 of the CCAA to cause the assignment to the Buyer.

(f) **Competing Transactions:** If an Auction is conducted, and the Buyer is not the prevailing party at the conclusion of such Auction but is the next highest bidder at the Auction, Buyer shall be required to serve as the Back-up Bidder.

(g) **Conditions Precedent:** The Parties' obligations to consummate the Transaction are subject to the fulfillment or waiver of various conditions precedent including that the CCAA Court shall have entered the Sale Order, which shall vest the Transferred Assets in the Buyer free and clear of all Liens other than Permitted Encumbrances.

(h) **Termination**: The Stalking Horse APA may be terminated in a variety of circumstances, including (i) if the Sale Order has not been entered by March 24, 2019 or the Closing has not occurred within 14 days following the Sale Order becoming a Final Order; or (ii) if the CCAA proceeding is terminated or a trustee in bankruptcy is appointed and refuses to proceed with the transactions contemplated by the Stalking Horse APA.

(i) **Seller Termination Fee:** In the event that the Stalking Horse APA is terminated upon the consummation of a Competing Transaction, or other specified grounds, Vari-Form shall pay to the Buyer the Seller Termination Fee of $1.5 million, which is proposed to be secured by a court-ordered Seller Termination Fee Charge on the proceeds of a Competing Transaction.

(j) **Buyer Termination Fee:** In the event that the Stalking Horse APA is terminated by the Seller under various specified grounds, the Buyer shall pay the Seller the Buyer Termination Fee of $50 million (i.e., less the amount of the Deposit).

56. The proposed Bidding Procedures also provide that, in the event that the Stalking Horse Bid is not the Successful Bid (or in the event the Stalking Horse Bidder is the Back-up Bidder but does not become the Successful Bidder), the Stalking Horse APA shall be terminated pursuant to its terms, and the Expense Reimbursement of $1.5 million shall be paid to the Stalking Horse Bidder from the proceeds received upon closing of the Successful Bid or the Back-Up Bid.[59]

3. The Stalking Horse APA and Bidding Procedures Should Be Approved

57. The Nortel criteria, when considered in light of the relevant section 36(3) factors, support approving the Stalking Horse APA and Bidding Procedures:

(a) The sales process is a broad and flexible process that will permit the Applicant to explore and fully canvass the market. It will allow the Applicant to review a number of restructuring options within a single comparative framework.

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[59] Tarry Affidavit, para 134.

(b) The process contemplated is fair and reasonable. The Financial Advisor will conduct the process on behalf of the company, bringing to bear its independence and considerable expertise. The Financial Advisor is of the view that the timeframes set out are reasonable in the circumstances. The process will be conducted under the supervision of the Monitor.

(c) The Monitor has been involved in the development of the sales process and supports the Applicant's request to approve and implement the sales process.

58. The objective of this process is to complete the sale by April 2019 to maximize creditor recoveries. Vari-Form recognizes that this is a compressed timeline, but believes that it is necessary to maintain stable business operations while it pursues an expediated sale and to minimize the losses that are being incurred in the business. Given the liquidity constraints and the need to maintain customer confidence, the proposed sale process must be completed within an expedited timeframe.

59. Although this is an expediated process, a similar timeline has been approved by courts in *Nortel*[60] and *NewPage Port Hawkesbury*.[61]

60. Finally, note that the Stalking Horse APA includes a credit bidding component, allowing the Buyer to bid the full amount of the DIP Facility as additional purchase consideration. Credit bidding in CCAA proceedings has generally been accepted by Canadian courts.[62] Importantly, in

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60 *Nortel* at paras 18-19 and 55-56.

61 *Re NewPage Port Hawkesbury Corp* (September 9, 2011), NS Sup Ct, Hfx No 355063 (Approval of Settlement and Transition Agreement and Sales Process) at para 3.

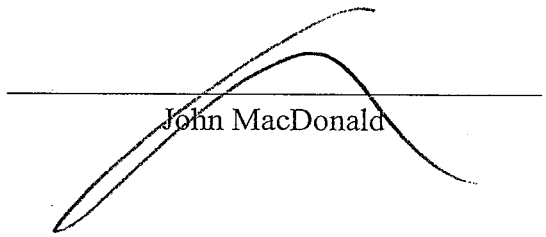
62 See *Re White Birch Paper Holding Co*, 2010 QCCS 4915; *Re TBS Acquireco Inc*, 2013 ONSC 4663.

these instances all claims with priority over the DIP Facility will be fully addressed. Therefore, credit bidding will not be used as a method to improve the position of the DIP Facility.

PART IV - NATURE OF THE ORDER SOUGHT

61. The Applicants therefore request an Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



TAB A

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Arrangement relatif à White Birch Paper Holding Company,* 2010 QCCS 764
2. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
3. *Re Brainhunter Inc,* 2009 CarswellOnt 8207 (Sup Ct)
4. *Re Canwest Global Communications Corp,* 2009 CarswellOnt 6184 (Sup Ct)
5. *Re Canwest Publishing Inc/Publications Canwest Inc*, 2010 ONSC 222
6. *Re Cinram International Inc*, 2012 ONSC 3767
7. *Re Lehndorff General Partner*, 1993 CarswellOnt 183 (Sup Ct)
8. *Re NewPage Port Hawkesbury Corp (September 9, 2011),* NS Sup Ct, Hfx No 355063 (Approval of Settlement and Transition Agreement and Sales Process)
9. *Re Nortel Networks Corp*, 2009 CarswellOnt 4467 (Sup Ct)
10. *Re Performance Sports Group Ltd*, 2016 ONSC 6800
11. *Re Priszm Income Fund*, 2011 ONSC 2061
12. *Re Smurfit-Stone Container Canada Inc*, 2009 CarswellOnt 391 (Sup Ct)
13. *Re Stelco Inc*, 2004 CarswellOnt 1211 (Sup Ct)
14. *Re Target Canada Co*, 2015 ONSC 303
15. *Re TBS Acquireco Inc*, 2013 ONSC 4663
16. *Re Toys "R" Us (Canada) Ltd*, 2017 ONSC 557
17. *Re White Birch Paper Holding Co*, 2010 QCCS 4915

TAB B

Schedule "B"

BANKRUPTCY AND INSOLVENCY ACT

R.S.C. 1985, c. B-3, as amended

2. [...]

"insolvent person"

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(*a*) who is for any reason unable to meet his obligations as they generally become due,

(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

2. (1) [...]

"debtor company"

"debtor company" means any company that

(*a*) is bankrupt or insolvent,

(*b*) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(*c*) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(*d*) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

[...]

Application

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

[...]

Jurisdiction of court to receive applications

9. (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

Interim financing

11.2 (1) On application by a debtor company 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 company'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 company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

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

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

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[...]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

[...]

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act 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.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) 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 monitor approved the process leading to the proposed sale or disposition;

(*c*) whether the monitor 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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(*a*) a director or officer of the company;

(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and

(*c*) a person who is related to a person described in paragraph (*a*) or (*b*).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(*a*) and (6)(*a*) if the court had sanctioned the compromise or arrangement.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VARI-FORM INC.

Applicant

Court File No. CV-19-612116-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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