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COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE COMPANIES'  
CREDITORS ARRANGEMENT ACT, RSC 1985,  
c C-36, as amended

AND IN THE MATTER OF CYXTERA  
TECHNOLOGIES, INC., CYXTERA CANADA,  
LLC, CYXTERA COMMUNICATIONS  
CANADA, ULC and CYXTERA CANADA TRS,  
ULC

APPLICANTS

CYXTERA TECHNOLOGIES, INC., CYXTERA  
CANADA, LLC, CYXTERA  
COMMUNICATIONS CANADA, ULC and  
CYXTERA CANADA TRS, ULC

DOCUMENT

**BRIEF OF LAW OF THE FOREIGN  
REPRESENTATIVE**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF PARTY  
FILING THIS DOCUMENT

Gowling WLG (Canada) LLP  
421 7 Ave SW Suite 1600  
Calgary, AB T2P 4K9  
Telephone: (403) 298-1946  
Email: tom.cumming@gowlingwlg.com /  
sam.gabor@gowlingwlg.com /  
stephen.kroeger@gowlingwlg.com  
File No.: A170537  
**Attn: Tom Cumming/Sam Gabor/Stephen  
Kroeger**

## I. Introduction

1. On June 4, 2023 Cyxtera Technologies, Inc. (“**CTI**”), Cyxtera Communications Canada, ULC (“**Communications ULC**”), Cyxtera Canada, LLC (“**Cyxtera LLC**”) and Cyxtera Canada TRS, ULC (“**TRS ULC**”, which together with Communications ULC, “**Cyxtera Canada**”, and together with Cyxtera LLC, the “**Debtors**”) and several other of their affiliates (collectively the “**Chapter 11 Debtors**”) each commenced cases (the “**Chapter 11 Cases**”) under Chapter 11 of Title 11 of the United States Code (the “**US Bankruptcy Code**”) in the United States Bankruptcy Court for the District of New Jersey (the “**US Bankruptcy Court**”).
2. CTI is a United States corporation incorporated pursuant to the laws of the State of Delaware with its head office in Coral Gables, Florida and its registered office in Wilmington, Delaware. CTI is the ultimate parent corporation of a group of companies operating under the tradename “Cyxtera” that are incorporated in the United States, Canada, United Kingdom, Germany, Australia, Japan, the Netherlands, Hong Kong, Singapore and the Cayman Islands, including the Debtors (collectively the “**Cyxtera**”).
3. Pursuant to first day motions filed by the Chapter 11 Debtors in the Chapter 11 Cases (“**First Day Motions**”), on June 6, 2023 the US Bankruptcy Court issued certain procedural and substantive orders (collectively, the “**First Day Orders**”), including an order designating CTI as foreign representative (the “**Foreign Representative**”), an interim cash management order, an interim debtor-in-possession financing order and an interim share transfer order. Certain First Day Orders were interim but would become final orders on or before subsequent hearings before the US Bankruptcy Court.
4. Pursuant to an originating application by the Foreign Representative on behalf of the Debtors applied to this Honourable Court under Part IV of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA**”, these proceedings under Part IV, the “**Recognition Proceedings**”), on June 9, 2023 this Honourable Court granted an Initial Recognition Order – Foreign Main Proceedings (the “**Initial Recognition Order**”) and a Supplemental Order – Foreign Main Proceeding, recognizing the First Day Orders including the interim cash management order, interim debtor-in-possession financing

order and interim share transfer order, and granting a super-priority first ranking charge over the assets of the Debtors in Canada in favour of the debtor-in-possession lenders to the Chapter 11 Debtors.

5. The following is a summary of certain Orders granted by the US Bankruptcy Court and recognized by this Honourable Court subsequent to June 6, 2023:

- (a) following the Chapter 11 Debtors filing certificates of no objection, on or before June 29, 2023 the US Bankruptcy Court granted certain second day orders, including a bidding procedures order and a second interim cash management order (“**Second Day Orders**”) for these orders, and on July 12, 2023, this Honourable Court granted an Order under Part IV of the CCAA recognizing and giving effect in Canada to the Second Day Orders;
- (b) following the Chapter 11 Debtors filing certificates of no objection, on or before July 19, 2023 the US Bankruptcy Court granted certain third day orders, including a claims bar date order and a third interim cash management order (“**Third Day Orders**”), and on July 31, 2023, this Honourable Court granted an Order under Part IV of the CCAA recognizing and giving effect in Canada to the Third Day Orders;
- (c) following the Chapter 11 Debtors filing a certificate of no objection, on August 16, 2023, the US Bankruptcy Court granted a fourth interim cash management order (“**Fourth Interim Cash Management Order**”) and on September 6, 2023, this Honourable Court granted an Order recognizing and giving effect in Canada to the Fourth Interim Cash Management Order; and
- (d) on September 29, 2023, the US Bankruptcy Court granted the Fifth Interim Cash Management Order, the DS Order, the Lease Order and the Exclusive Filing Order (each as defined below) pursuant to certificates of no objection (other than with respect to the DS Order, which the U.S. Trustee initially objected to, but which objection has since been resolved).

6. This Bench Brief is submitted on behalf of CTI as the Foreign Representative in support of an application, among other things, for the following Orders:

- (a) an Order (the “**Recognition Order**”) recognizing and giving effect in Canada to the following orders of the US Bankruptcy Court pursuant to Part IV of the CCAA:
  - (i) the fifth interim order of the US Bankruptcy Court (A) authorizing the Chapter 11 Debtors to (1) continue using the cash management system, (2) honor certain prepetition obligations related thereto, (3) maintain existing Chapter 11 Debtor bank accounts, business forms, and books and records, and (4) continue intercompany transactions; and (B) granting related relief (the “**Fifth Interim Cash Management Order**”);
  - (ii) an order approving (A) the adequacy of the disclosure statement, (B) the solicitation procedures, (C) the forms of ballots and notices in connection herewith, and (D) certain dates with respect thereto (the “**DS Order**”);
  - (iii) an order (A) pursuant to section 365(D)(4) of the US Bankruptcy Code extending Debtors’ time to assume or reject unexpired leases of non-residential real property, and (B) granting related relief (the “**Lease Order**”); and
  - (iv) an order (A) extending the Debtors’ exclusive periods to file a Chapter 11 Plan and solicit acceptances thereof pursuant to Section 1121 of the Bankruptcy Code, and (B) granting related relief (the “**Exclusive Filing Order**”, and together with the Fifth Interim Cash Management Order, the DS Order and the Lease Order, the “**US Orders**”);
- (b) an Order (the “**Cash Transfer Order**”) authorizing Communications ULC to:
  - (i) transfer from its accounts maintained at the branch of Bank of America located in Toronto, Ontario (the “**Canadian Accounts**”) to an account

maintained by Communications ULC with Bank of America in the United States of America that is compliant with the Uniform Depository Agreement with the United States Trustee for the District of New Jersey (the “**U.S. Trustee**”, and such account, the “**New Account**”) that amount in the Canadian Accounts that is in excess of USD\$750,000 plus the outstanding amount of the Debtors’ Canadian restructuring costs in the aggregate (including all reasonable fees and disbursements of Gowling WLG (Canada) LLP (“**Gowling**”), counsel to the Foreign Representative and the Debtors, Alvarez & Marsal Canada Inc. in its capacity as information officer (the “**Information Officer**”) and McMillan LLP (“**McMillan**”), counsel to the Information Officer (the “**Restructuring Costs**”, and the amount in the Canadian Accounts from time to time in excess of USD\$750,000 plus the Restructuring Costs being the “**Excess Amount**”); and

- (ii) thereafter, transfer on at least a weekly basis from the Canadian Accounts to the New Account the aggregate of the Excess Amount in the Canadian Accounts,

provided that:

- (1) the balances in the Canadian Accounts shall at all times be sufficient to meet Communication ULC’s reasonable business needs, including but not limited to, funding the Debtors’ operations and Restructuring Costs in Canada; and
- (2) on notice to the Information Officer, the Chapter 11 Debtors, with the consent of the U.S. Trustee, may increase or decrease the allowed total aggregate balance maintained in the Canadian Accounts due to their reasonable business needs, including but not limited to funding the Chapter 11 Debtors’ operations and the Restructuring Costs in Canada;

- (c) an Order (the “**Fee Order**”) approving the fees of Gowling, the Information Officer and McMillan (collectively, the “**Professionals**”).
7. The Foreign Representative’s application is supported by the Affidavit of Eric Koza sworn June 6, 2023 (the “**Koza Affidavit #1**”), the Affidavit of Eric Koza sworn June 30, 2023 (the “**Koza Affidavit #2**”), the Affidavit of Eric Koza sworn July 27, 2023 (the “**Koza Affidavit #3**”), the Affidavit of Eric Koza sworn September 1, 2023 (the “**Koza Affidavit #4**”) and the Affidavit of Eric Koza sworn October 5, 2023 (the “**Koza Affidavit #5**”) and with the Koza Affidavit #1, the Koza Affidavit #2, the Koza Affidavit #3 and the Koza Affidavit #4, the “**Koza Affidavits**”). The facts in support of this application are more particularly set out in the Koza Affidavits.
8. Capitalized terms not defined herein have the meanings given to them in the Koza Affidavit #5. All references to monetary amounts referenced herein are in United States dollars, unless otherwise stated.

## **II. LAW AND ARGUMENT**

9. The primary issues to be determined on this application are as follows:
- (a) whether this Honourable Court should grant the Recognition Order;
  - (b) whether this Honourable should grant the Cash Transfer Order; and
  - (c) whether this Honourable Court should grant the Fee Order.

### **Part IV of the CCAA**

10. Part IV of the CCAA establishes the applicable process for addressing the administration of cross-border insolvencies to promote cooperation and coordination with foreign courts.
- CCAA, Part IV [Tab 1]
11. The foundational principles are comity and cooperation between courts of various jurisdictions. Section 44 of the CCAA states that the purpose of Part IV is to provide mechanisms for dealing with cross border insolvencies in order to (a) promote

cooperation in such insolvencies between the courts and competent authorities of Canada and the courts and competent authorities of foreign jurisdictions, (b) promote the fair and efficient administration of such insolvencies in order to protect the interests of creditors, other interested persons and the debtor company, (c) protect and maximize the value of the debtor company's property, and (d) permit the rescue of financially troubled businesses so as to protect investment and preserve employment.

CCAA, s. 44 [Tab 1]

12. Canadian courts have recognized that they should accord respect to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless the foreign legislation is in substance so different from Canada's legislation, or the legal process generating a foreign order diverging so radically from Canada's process, that it ought not be recognized.

*Babcock & Wilcox Canada Ltd., Re*, 2000 CanLII 22482 (ON SC), at para 21(b) [Tab 2]

13. Canadian courts recognize that comity and cooperation between courts under Part IV promotes the "fair and efficient administration of cross-border insolvencies" and the "protection and maximization of the value of the debtors' property", and avoids multiplicity of proceedings, inconsistent judgments and general uncertainty. With international insolvencies, coordination is particularly critical to ensure the equal and fair treatment of creditors regardless of their location.

*MtGox Co., Ltd (Re)*, 2014 ONSC 5811, at paras 10-12 [Tab 3]; *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238, at paras 41 & 42 [Tab 4]

### **Recognition of the US Orders is Appropriate**

14. Under section 49 of the CCAA, the court has the authority on application by a foreign representative to grant any order that it considers appropriate if it is satisfied that the order is necessary for the protection of a debtor's property or the interests of a creditor or creditors. Such orders include the recognition of orders made by a United States court supervising a Chapter 11 case under the US Bankruptcy Code.

CCAA, sections 52 and 61 [Tab 1]

15. Section 52 of the CCAA provides that if an order recognizing a foreign proceeding is made, the court shall cooperate to the maximum extent possible with the foreign representative and the foreign court involved in the foreign proceeding. In exercising this authority, the Canadian court will apply any Canadian legal or equitable rules governing the recognition of foreign insolvency orders, such assistance cannot be inconsistent with the provisions of the CCAA, and the Canadian court retains its authority to refuse to do something that would be contrary to public policy.

CCAA, sections 52 and 61 [Tab 1]

16. Hence, once the Canadian court gives an order recognizing a foreign proceeding Court, it is mandated to cooperate, to the maximum extent possible, with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.

CCAA, sections 49 and 50 [Tab 1]; *Purdue Pharma L.P., Re*, 2019 ONSC 7042 at para 22 [Tab 5]

17. A Canadian court, in determining whether to recognize a foreign order made in foreign proceedings, will consider factors such as the following:

- (a) the principles of comity and the need to encourage cooperation between courts of various jurisdictions;
- (b) the need to accord respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws of Canada or diverges radically from the processes in Canada;
- (c) whether stakeholders are and will be treated equitably and to the extent reasonably possible equally regardless of the jurisdiction in which they reside;
- (d) the importance of promoting plans that allow the enterprises to reorganize globally, especially where there is an established transnational interdependence within the enterprises, and of permitting one jurisdiction, to the extent reasonably practical, to take “charge” of the principal administration of the enterprise’s reorganization, where this approach facilitates a potential reorganization and

respects the claims of stakeholders in all jurisdictions without detracting from the net benefits that may be available from alternative approaches;

- (e) the appropriate level of court involvement depends to a significant degree upon the court's nexus to the enterprise;
- (f) where one jurisdiction will have an ancillary role, the court in the ancillary jurisdiction should on an ongoing basis be provided with information and be kept apprised of developments regarding the reorganizational efforts in the foreign principal jurisdiction, and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and
- (g) all affected stakeholders should receive effective notice as is reasonably practicable in the circumstances.

*Babcock & Wilcox Canada Ltd., Re*, 2000 CanLII 22482 at para 21 [**Tab 2**]

18. Given that the central governing principle of Part IV of the CCAA is comity, Canadian courts should recognize and enforce the judicial acts of a foreign jurisdiction provided that the foreign jurisdiction has assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

*Hollander Sleep Products, LLC et al., Re*, 2019 ONSC 3238 at para 41 [**Tab 4**]

19. It is therefore respectfully submitted that this Honourable Court should allow the US Bankruptcy Court to exercise principal control over the Chapter 11 Cases, given that it has the closest connection to the proceeding and the CCAA promotes such cooperation to the maximum extent possible.
20. The Foreign Representative seeks a recognition order in respect of the Fifth Interim Cash Management Order which was granted by the US Bankruptcy Court through a certificate of no objection filed September 20, 2023 (meaning that no objection was received by any interested party prior to the applicable deadline established by the US Bankruptcy Court), the Lease Order and the Exclusive Filing Order (also granted pursuant to certificates of no objection filed September 15, 2023), and the DS Order.

Koza Affidavit #5, paras 30, 45, 47

21. Initially, the U.S. Trustee objected to the DS Order on the basis that, among other things, the joint plan of reorganization filed by the Chapter 11 Debtors (the “**Plan**”) and the disclosure statement filed in support of the DS Order did not convey sufficient information to allow a hypothetical reasonable investor to make an informed judgment about the Plan. However, a revised disclosure statement (the “**Disclosure Statement**”) was filed on September 24, 2023 which resolved the U.S. Trustee’s objection.

Koza Affidavit #5, paras 40, 41

22. Recognition of the US Orders is consistent with Part IV of the CCAA and the principles of comity, is not contrary to public policy and are orders commonly granted in Canadian restructuring proceedings.
23. Recognition of the US Orders is also important to ensuring the equal treatment of Canadian stakeholders and the coordination of the Chapter 11 Cases and the Recognition Proceedings, and to ensuring that Canadian trade creditors, suppliers and stakeholders receive the benefit of the US Orders. The reasons for this include the following:

- (a) the Debtors have no business or activity, or senior management structures, or access to debt or equity financing, or administrative structures, that is or could be independent of or separate from the other Chapter 11 Debtors, and therefore the restructuring or other resolution of the Debtors cannot be independent on any practical level of the restructuring or other resolution of the other Chapter 11 Debtors;

Koza Affidavit #2, para 36

- (b) the Debtors’ centre of main interest is in the United States and therefore potential transactions restructuring or selling the Debtors or their assets will be within the overall Chapter 11 Cases, subject to obtaining any necessary recognition orders by this Honourable Court in these Recognition Proceedings and to satisfying this Honourable Court that such relief is appropriate;

- (c) if the US Orders are not recognized and given effect in Canada by this Honourable Court, the Debtors would have to incur significant professional costs to seek Orders from this Honourable Court providing similar or even identical relief to that contained in the US Orders, without any benefit to the creditors and stakeholders in the Chapter 11 Cases and Recognition Proceedings;
  - (d) the recognition and giving effect in Canada of the US Orders ensures the consistency of relief provided by the US Bankruptcy Court in the Chapter 11 Cases and this Honourable Court in the Recognition Proceedings, ensures that creditors and other interested parties in both the United States and Canada are treated fairly because they receive substantively similar treatment in both proceedings, and enhances the chances of the Debtors and other Chapter 11 Debtors being successfully rescued; and
  - (e) the US Orders are intended to protect and maximize the value of the properties, business and estates of the Debtors and other Chapter 11 Debtors' property in both the United States and Canada.
24. On the basis of the foregoing factors, CTI requests that this Honourable Court recognize the US Orders.

**Approval of the Cash Transfer Order is Appropriate**

25. Pursuant to the Initial Recognition Order, the Debtors are prevented, except with leave of the Court, from disposing, outside of the ordinary course of business, any of their property in Canada that relates to the business of the Debtors, and any of their other property in Canada.

Initial Recognition Order – Foreign Main Proceedings granted June 9, 2023, para 5

26. The Cash Transfer Order, which is required pursuant to an agreement between Cyxtera and the U.S. Trustee, authorizes the immediate transfer from the Canadian Accounts to the New Account, and the transfer at least once per week thereafter, of the amounts in the

Canadian Accounts from time to time in excess of USD\$750,000 plus the Restructuring Costs (the “**Remaining Balance**”), provided that:

- (a) the Remaining Balance shall at all times be sufficient to pay the Chapter 11 Debtors’ Restructuring Costs in Canada; and
- (b) the Chapter 11 Debtors, with the consent of the U.S. Trustee, may increase or decrease the allowed total aggregate balance of the Remaining Balance due to their reasonable business needs, including but not limited to funding the Chapter 11 Debtors operations and Restructuring Costs in Canada.

Koza Affidavit #5, para 35

27. It is of critical importance to CTI, the Debtors and other Chapter 11 Debtors, and to the continued coordination of the Chapter 11 Cases and these Recognition Proceedings, that in addition to the Fifth Interim Cash Management Order being recognized and given effect in Canada by this Honourable Court, and that this Honourable Court grant the Cash Transfer Order:

- (a) if these Orders are not granted, the U.S. Trustee has advised Cyxtera that it will not support a waiver of section 345 of the US Bankruptcy Code, which requires the Debtors to only have bank accounts that are fully insured by a governmental insurer in the United States, and will not support the entry of a final cash management order.;
- (b) the U.S. Trustee has also indicated they will not continue to support Cyxtera obtaining any further interim cash management orders absent a change in circumstance such as the proposed transactions contemplated by paragraph 9 of the Fifth Interim Cash Management Order;
- (c) it is not practical for the Debtors to create an independent cash management system in Canada, as they are thoroughly integrated into the financial, management and administrative structures of Cyxtera and have no independent or

separate financial, management and administrative structure in Canada to support an independent cash management system;

- (d) since the Debtors are also debtors in the Chapter 11 Cases, they must comply with section 345 of the US Bankruptcy Code and the U.S. Trustee Guidelines absent a waiver from the U.S. Trustee, which I am informed by K&E will not be available; and
- (e) if this Honourable Court does not recognize the Fifth Interim Cash Management Order and grant the Cash Transfer Order, this would jeopardize the ability of the other Chapter 11 Debtors to maintain their current cash management system, which is critical to Cyxtera successfully restructuring its business.

Koza Affidavit #5, para 38

- 28. An important consideration is that creditors in Canada with claims against any Chapter 11 Debtor, including any Debtor, are in no way foreclosed from pursuing their claims in the Chapter 11 Cases. There has been no attempt by any interested party in the Chapter 11 Cases to erect a “firewall” at the United States – Canada border, preventing Canadian creditors and stakeholders from participating in the Chapter 11 Cases, or being treated any different than creditors in the United States. Hence, no Canadian creditor will be prejudiced by the granting of the Cash Transfer Order, rather they benefit from the Cash Transfer Order, which accords with Canadian public policy and the purposes of the CCAA.
- 29. Accordingly, for the foregoing reasons, and the principles of comity, cooperation and efficiency enumerated in paragraphs 14 to 18 of this Brief, the Cash Management Order should be granted.

### **Approval of the Accounts of the Professionals**

#### *Jurisdiction*

- 30. The jurisdiction of this Court to pass the accounts of the Professionals is confirmed in the Supplemental Order, which directs as follows:

“The Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, are hereby referred to a judge of the Commercial List of the Court of Kings Bench of Alberta, and the accounts of the Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, shall not be subject to approval in the Foreign Proceeding.”

Supplemental Order, para 17

*Fair and Reasonable Test*

31. The overarching test for assessing the fees and disbursements of the Monitor and its counsel in a CCAA proceeding is whether they are “fair and reasonable” in all of the circumstances, and are appropriate.

*Nortel Networks Corp. (Re)*, 2017 ONSC 673, paras 14-15 [**Tab 6**]

32. The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional’s services may not be instructive when looked at in isolation. In complex cases, detailed assessments are not practical and do not aid in determining the overall value of the services provided. Rather, as indicated by the Ontario Court of Appeal, the focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took.

*Nortel Networks Corp. (Re)*, 2017 ONSC 673, paras 15 and 21 [**Tab 6**]

33. To aid in the determination of whether a court-appointed officer’s fees are fair and reasonable, courts have recognized certain factors as a useful guideline. These factors, which are not intended to be exhaustive, include the following:
  - (a) the nature, extent and value of the assets being handled;
  - (b) the complications and difficulties encountered;
  - (c) the degree of assistance provided by the company, its officers or its employees;
  - (d) the time spent;

- (e) the Monitor's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results achieved; and
- (i) the cost of comparable services when performed in a prudent and economical manner.

*Nortel Networks Corp. (Re)*, 2017 ONSC 673, para 14 [**Tab 6**]

34. Applying the foregoing factors to these proceedings, the Foreign Representative submits that the accounts of the Professionals are fair and reasonable in the circumstances and should be approved as, among other things:

- (a) since their fees in the Recognition Proceedings were approved by this Honourable Court on July 12, 2023, August 1, 2023 and on September 6, 2023, the Professionals have continued to work diligently in respect of all matters concerning these CCAA Proceedings including, without limitation, communicating with creditors of the Debtors, researching legal issues affecting the Debtors, drafting application materials for recognition of orders granted in the US Bankruptcy Court, attending and making submissions at court for recognition of said orders and continuing to work with the US counsel and the restructuring advisor to the Chapter 11 Debtors respecting all matters in these CCAA Proceedings particularly including providing guidance respecting Canadian law to aid the ongoing sales process;
- (b) the Professionals are experienced restructuring professionals who have played an integral part in these CCAA proceedings and who have at all times demonstrated diligence and thoroughness; and
- (c) the accounts of the Professionals have been reviewed by Cyxtera's Chief Restructuring Officer who has confirmed that they are fair and reasonable.

35. Accordingly, for the reasons set out above, it is submitted that when considering the applicable factors in the context of these proceedings, the remuneration of the Professionals is fair and reasonable in the circumstances and should be approved.

### **III. CONCLUSION AND RELIEF SOUGHT**

36. CTI and the Debtors seek the granting of the Recognition Order, the Cash Transfer Order and the Fee Order under the CCAA substantially in the form as attached to the Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6<sup>th</sup> day of October, 2023.

**GOWLING WLG (CANADA) LLP**

**Per:**

A handwritten signature in blue ink, appearing to be 'S. H.', is written over a horizontal line.