

**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 DCL CORPORATION (the “**Applicant**”)

APPLICANT

FACTUM

May 4, 2023

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Corporation) and not in its personal or
corporate capacity

PART I - NATURE OF THE APPLICATION

1. This factum is filed in support of a motion by Alvarez & Marsal Canada Inc. (“**A&M**”), in its capacity as the monitor (in such capacity, the “**Monitor**”) of 1000156489 Ontario Inc. (f/k/a DCL Corporation) (“**DCL Canada**” or the “**Applicant**”) in its proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”).

2. On this motion, the Monitor seeks an order (the “**Expansion of Monitor’s Powers Order**”), which would provide, among other things, the following relief:

- (a) granting to the Monitor, the Expanded Powers (as defined below) and additional protections, which are necessary to allow the Monitor to conduct an orderly wind-down of the Applicant and complete the CCAA Proceedings (as defined below); and
- (b) declaring that the Applicant meets the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*¹ made pursuant to the *Wage Earner Protection Program Act*² and that the Applicant’s former employees are eligible to receive payments (“**WEPP Payments**”) made under and in accordance with the WEPP Act.

3. DCL Canada and its affiliated Chapter 11 Debtors recently underwent a sale process approved by this Court and the U.S. Bankruptcy Court (each as defined below), pursuant to which substantially all of the business and assets of the Applicant and the Chapter 11 Debtors were sold

¹ SOR/2008-222 [the [WEPP Regulation](#)].

² SC 2005, C47, s 1 [the [WEPP Act](#)].

on a going-concern basis. The Applicant now has no employees and has no operations. As consideration for the sale, among other things, the Canadian Designated Amount Portion of \$575,000 and the CCAA Cash Pool of \$750,00 (each as defined below), were funded to the Monitor on closing. It is expected that these reserve amounts will fund the orderly wind-down of the Applicant, including costs of such wind-down, and the administration of the CCAA Proceedings (and any subsequent proceedings) until completion.

4. On this motion, the Monitor seeks the powers necessary to conduct an orderly wind-down of the Applicant and to administer the CCAA Proceedings. Similar expanded powers have been granted to CCAA monitors in similar circumstances, including when management has resigned, a debtor's operations have ceased, and the debtor's business has been wound down. In addition, the Monitor is of the view that the requirements of the WEPP Regulation are met and the Applicant's former employees are entitled to receive WEPP Payments pursuant to the WEPP Act.³

PART II - SUMMARY OF FACTS

A. The CCAA Proceedings

5. DCL Canada is a subsidiary of its U.S. parent, H.I.G. Colors Inc. ("**Holdings**").⁴ Holdings is a direct wholly-owned subsidiary of the ultimate corporate parent, H.I.G. Colors Holdings, Inc. ("**HIG Colors Holdings**") and, together with Holdings and its direct and indirect subsidiaries, including the Applicant and its subsidiaries, the "**DCL Group**").⁵

³ Terms not otherwise defined herein have the meanings accorded to them in the Fifth Report of the Monitor dated May 3, 2023.

⁴ Fifth Report at para 1.3.

⁵ Fifth Report at para 1.3.

6. On December 20, 2022, the Applicant obtained an initial order from this Court under the CCAA, pursuant to which the Monitor was appointed as monitor.⁶

7. The CCAA Proceedings were commenced as part of a larger coordinated restructuring of the DCL Group.⁷ On the Petition Date, HIG Colors Holdings and certain of its U.S.-based subsidiaries (the “**Chapter 11 Debtors**”) each filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “**U.S. Bankruptcy Court**”, and such proceedings, the “**Chapter 11 Proceedings**”, and together with the CCAA Proceedings, the “**Restructuring Proceedings**”).⁸ On December 22, 2022, the U.S. Bankruptcy Court granted a number of “first day orders” in the Chapter 11 Proceedings.⁹

8. Since the date of the Fourth Report, the activities of the Monitor have included:

- (a) continuing to assist the Applicant with communications to suppliers, critical service providers, customers and other parties;
- (b) engaging in discussions with the DCL Group, as well as their respective legal counsel and financial advisor regarding the Restructuring Proceedings, including closing of the Transaction (as defined and discussed below);
- (c) engaging in discussions with Financial Service Regulatory Authority staff and the appointed administrator of the Hourly DB Plan and Salaried DB Plan regarding the Canadian Pension Plans (as defined and discussed below);

⁶ Fifth Report at para 1.1.

⁷ Fifth Report at para 1.4.

⁸ Fifth Report at para 1.4.

⁹ Fifth Report at para 1.4.

- (d) responding to inquiries from stakeholders;
- (e) monitoring receipts, disbursements, purchase commitments and the intercompany account between the Applicant and DCL US, including the review of payments made through to the closing of the Transaction; and
- (f) with the assistance of its legal counsel, preparing the proposed Expansion of Monitor's Powers Order and the Fifth Report.¹⁰

B. The Transaction

9. The DCL Group conducted sales processes with the final phase commencing when the Applicant and the Chapter 11 Debtors (collectively, the “**Sellers**”) entered into an asset purchase agreement with Pigments Holdings, Inc. (including any permitted assignees, “**Pigments**”) dated as of December 22, 2022 (as amended, the “**Stalking Horse APA**”).¹¹

10. The Stalking Horse APA acted as the “stalking horse bid” in connection with the sales process conducted in the Restructuring Proceedings.¹² No better or higher offers than the Stalking Horse APA were received by the Bid Deadline and the Stalking Horse APA was declared the successful bid.¹³ On March 29, 2023, this Court issued an order approving the transactions contemplated by the Second Amended and Restated Sale Agreement (which was an amendment and restatement of the Stalking Horse APA) (the “**Transaction**”).¹⁴

11. The Transaction included the sale of substantially all the business and assets of the Applicant (the “**Canadian Purchased Assets**”). The Sellers and Pigments commenced the steps

¹⁰ Fifth Report at para 5.1.

¹¹ Fifth Report at para 1.6.

¹² Fifth Report at para 1.7.

¹³ Fifth Report at para 1.7.

¹⁴ Fifth Report at para 1.8.

necessary to close the Transaction on April 14, 2023; however, not all wire transfers necessary for the Transaction to close were received until April 17, 2023. On such date, the Monitor delivered the Monitor's Certificate to the Sellers and Pigments and upon delivery to Pigments, all rights, title and interest in and to the Canadian Purchased Assets vested in and to Pigments. Pursuant to the proposed Expansion of Monitor's Powers Order, the Monitor seeks to give effect to the intention of the Sellers and Pigments and the terms of the Effective Time Agreement, by seeking to amend the date and time set forth in the Monitor's Certificate to 11:59 p.m. (Toronto time) on April 14, 2023.

12. At the closing of the Transaction, all employment relationships between the Applicant and its former employees ceased (one member of the board of directors has remained to assist the Monitor with the wind-down of the Applicant).¹⁵ Some of the Applicant's former employees commenced employment with Pigments following the closing of the Transaction.¹⁶ The Applicant now has no employees and no operations.¹⁷

(a) The Canadian Designated Amount Portion and the CCAA Cash Pool

13. The Transaction provided, among other things, that Pigments would deliver two amounts to the Monitor on behalf of the Applicant: (i) \$575,000 allocated to fund an orderly wind-down of the Applicant and administer the CCAA Proceedings and any subsequent proceedings until completion (the "**Canadian Designated Amount Portion**"); and (ii) \$750,000 to be held for the benefit of the Applicant's estate, including any costs of administration of the CCAA proceedings

¹⁵ Fifth Report at para 4.2.

¹⁶ Fifth Report at para 4.12.

¹⁷ Fifth Report at para 4.12.

(the “**CCAA Cash Pool**”).¹⁸ Any excess amounts remaining from the Canadian Designated Amount Portion will be transferred to the CCAA Cash Pool.¹⁹

14. The Monitor is of the view that the Canadian Designated Amount Portion provides sufficient liquidity through to the end of the Stay Period to administer the wind-down of the Applicant.²⁰ It is intended that a further motion will be brought before this Court during the Stay Period to commence a claims process to administer the CCAA Cash Pool.²¹

(b) The Pension Plans

15. The Applicant is the sponsor of the following registered pension plans: (i) the Salaried DC Plan; (ii) the Hourly DC Plan; (iii) the Hourly DB Plan; (iv) the Salaried DB; and (v) the Monteith Plan (the “**Canadian Pension Plans**”).²²

16. The Canadian Pension Plans were not assumed by Pigments as part of the Transaction.²³

17. The Chief Executive Officer of the Financial Services Regulatory Authority appointed Actuarial Services Inc. as the administrator of the Hourly DB Plan and the Salaried DB Plan, and appointed Canada Life as the administrator of the Hourly DC Plan and the Salaried DC Plan.²⁴ If surplus assets remain after the liabilities of the Hourly DB Plan and the Salaried DB Plan are settled, the Monitor seeks the authority pursuant to the Expansion of Monitor’s Powers Order to

¹⁸ Fifth Report at para 3.1.

¹⁹ Fifth Report at Appendix A, para 6.14.

²⁰ Fifth Report at para 4.9.

²¹ Fifth Report at para 4.9.

²² Fifth Report at para 3.10.

²³ Fifth Report at para 3.11.

²⁴ Fifth Report at para 3.12.

apply for such assets to be allocated in accordance with each plan's governing documents or as may otherwise be agreed with the applicable plan members or as ordered by the Court.²⁵

C. The Expansion of Monitor's Powers Order

18. Now that the Transaction has closed, it is necessary to conduct an orderly wind-down of the Applicant.

19. The Monitor seeks the Expansion of Monitor's Powers Order to provide the Monitor with the powers necessary to, effectively and efficiently, administer the Applicant's estate following the closing of the Transaction and to complete the CCAA Proceedings (or any subsequent proceeding) and any related wind-down activities.²⁶

20. The Expansion of Monitor's Powers Order authorizes and empowers the Monitor to, among other things:

- (a) for and on behalf of the Applicant, to:
 - (i) perform, or cause the Applicant to perform duties as the Monitor considers necessary or desirable in order to facilitate any action necessary to affect a winding-up, dissolution or liquidation of the Applicant;
 - (ii) take control of the existing bank accounts of the Applicant, including transferring any funds received into these bank accounts²⁷, subject to the terms of the Transition Services Agreement; and

²⁵ Fifth Report at para 3.13.

²⁶ Fifth Report at para 4.1.

²⁷ Following the closing of the Transaction, amounts were deposited into the Applicant's bank accounts in respect of the collection of accounts receivable and other amounts that constituted purchased assets under the Second

- (iii) exercise any shareholder, partnership, joint venture or other right or power, contractual or otherwise, which the Applicant may have, including in connection with the Transition Services Agreement;
- (b) receive, collect and take control of all property and assets of the Applicant;
- (c) have access to all books and records that are the property of the Applicant in the Applicant's possession or control as of the closing date of the Transaction;
- (d) provide instructions to counsel to the Applicant on behalf of the Applicant in connection with the wind-down or post-closing matters related to the Transaction;
- (e) have the authority to sign agreements and other documents on behalf of the Applicant and take corporate actions regarding governance of the Applicant without requiring any further action or approval by any person;
- (f) develop, facilitate and oversee a claims procedure for the identification and quantification of certain claims against the Applicant and the current and former directors and officers of the Applicant;
- (g) on behalf of the Applicant or on its own behalf, engage or continue to engage assistants or advisors to carry out the terms of any Order in the CCAA Proceedings;
- (h) on behalf of the Applicant or on its own behalf, instruct and engage with any person regarding the Applicant's registered and non-registered pension, savings or retirement plans, and to the extent of any surplus assets held in connection with any

of the Applicant's defined benefit pension plans, to apply for such assets to be allocated in accordance with each such plan's governing documents or as may otherwise be agreed with the applicable plan members or as ordered by the Court;

- (i) pay from the Canadian Designated Amount Portion and the CCAA Cash Pool, the fees, costs and expenses secured by the Administration Charge and/or incurred by the Monitor and the Applicant in connection with post-closing matters related to the Transaction, the wind-down of the Applicant, and the administration of the CCAA Proceedings (and any subsequent proceedings) until completion; and
- (j) take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.²⁸

In each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Applicant, and without interference from any person (collectively, the "**Expanded Powers**").²⁹

21. Pursuant to the Expansion of Monitor's Powers Order, the Monitor shall also be authorized to file an assignment in bankruptcy for and on behalf of and the Applicant (in which case A&M shall be authorized and empowered, but not obliged, to serve as trustee-in-bankruptcy of any such bankruptcy).

22. The Applicant has no employees, no executives, and no operations. The sole remaining person connected with the business of the Applicant is one director, who has remained with the Applicant solely to assist the Monitor with the wind-down of the Applicant.³⁰ In this context, the

²⁸ Fifth Report at para 4.3.

²⁹ Fifth Report at para 4.3.

³⁰ Fifth Report at para 4.2.

Monitor is of the view that the Expansion of Monitor's Powers Order is necessary to empower the Monitor to undertake an orderly wind-down of the Applicant.³¹

PART III -THE ISSUES AND THE LAW

23. The issues on this application are whether:

- (a) This Court should grant the Expansion of Monitors' Powers Order; and
- (b) This Court should declare that the Applicant meets the criteria prescribed by section 3.2 of the WEPP Regulation such that the Applicant's former employees are eligible to receive payments under and in accordance with the WEPP Act.

(a) Expansion of Monitors' Powers Order Should Be Granted

24. As outlined above, the Monitor seeks an order expanding the powers of the Monitor to, among other things, grant the Monitor the powers necessary to wind down, dissolve, and/or bankrupt the Applicant and administer the Canadian Designated Amount Portion and the CCAA Cash Pool. This relief is necessary to enable and facilitate an orderly wind-down of the Applicant, which has no operations and no employees.

25. This Court is authorized to grant the Expansion of Monitor's Powers Order pursuant to its broad discretion under section 11 of the CCAA to "make any order that is appropriate in the circumstances". Courts have frequently made orders expanding the powers of the Monitor in circumstances where the debtor company has no remaining management,³² or in order to conclude

³¹ Fifth Report at para 4.1.

³² See for example *Nortel Networks Corporation et al (Re)*, [2017 ONSC 673](#) at [paras 6-7](#); *Arrangement relatif à 9323-7055 Québec Inc (Aquadis International)*, [2020 QCCA 659](#) at [para 19](#); *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#) at [para 9](#); *League Assets Corp (Re)*, [2016 BCSC 2262](#) at [para 73](#).

the CCAA proceedings by effecting an orderly wind-down of the debtor's remaining operations.³³

Both circumstances are present in this case.

26. The Monitor submits that the Expansion of Monitor's Powers Order is necessary to effect an efficient and orderly wind-down of the Applicant's remaining business and affairs and administer the CCAA Proceedings (and any subsequent proceedings) to completion, in keeping with the objectives of insolvency proceedings. Accordingly, it is appropriate in the circumstances to grant the Expansion of Monitor's Powers Order.

(b) Applicant's Employees are Eligible for WEPP Payments

27. The WEPP Act enacts the Wage Earner Protection Program, pursuant to which eligible former employees may be entitled to payments in respect of outstanding eligible wages, including termination and severance pay (as defined above, WEPP Payments) if certain criteria are met.³⁴ Subsection 5(1) of the WEPP Act provides that an individual is eligible to receive WEPP Payments if, among other things: (i) the individual's employment is ended for a reason prescribed by regulation; (ii) the individual is owed eligible wages by a former employer; (iii) the former employer is subject to proceedings under the CCAA; and (iv) a court determines under subsection 5(5) of the WEPP Act that the criteria prescribed by regulation are met.

28. Section 5(5) of the WEPPA provides that in CCAA proceedings, a court must determine if prescribed criteria are met before former employees are entitled to WEPP Payments. These criteria are outlined in section 3.2 of the WEPP Regulation, which provides that the Court "may determine

³³ See for example: *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946 at paras 40-41 and 73; *Quest University (Re), Order Made After Application – Expansion of Monitor's Powers and Stay Extension*, Vancouver Registry, No. S-200586, dated December 17, 2020 at para 4; *Harte Gold (Re)*, 2022 ONSC 653 at paras 91-93; *Just Energy Group Inc. (Re), Order Made After Application – Monitor's Enhanced Powers & Other Relief*, Ontario Registry, Court File No. CV-21-00658423-00CL, dated November 3, 2022 at para 3.

³⁴ WEPP Act, s. 5(1)(iv).

whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations”. If the Court so determines, the former employee is entitled to WEPP Payments.

29. Section 3.2 of the WEPP Regulation establishes the criteria for WEPP Payments in respect of former employers in CCAA proceedings. Section 3.2 of the WEPP Regulation provides that the Court “may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations”.

30. Prior to recent amendments to the WEPP Regulations, WEPP Payments were only available where an employer had entered into bankruptcy or become subject to a receivership. This led to delays in accessing WEPP Payments when an employer engaged in a liquidating CCAA before filing for bankruptcy or receivership. The WEPP Regulations have now been amended specifically to enable earlier WEPP Payments when an employer engages in liquidating restructuring proceedings, including liquidating CCAA proceedings, provided the criteria set out in section 3.2 of the WEPP Regulations are met (essentially, the termination of all employees and a wind-down of operations).³⁵

31. Given the above, in order to assist eligible former employees of the Applicant in accessing payments in respect of eligible wages under the WEPP Act in a timely manner, the Monitor seeks a declaration that, pursuant to subsections 5(1)(b)(iv) and 5(5) of WEPP Act, the Applicant meets the criteria prescribed by section 3.2 of the WEPP Regulations and its former employees are eligible to receive payments under and in accordance with WEPPA.

³⁵ See Canada Gazette, Part II, Volume 155, Number 18, SOR/2021-196.

32. At this time, after the closing of the Transaction, the employment relationship between the Applicant and all of its employees has ended.³⁶ The proposed WEPP Act declaration would ensure that the Applicant's former employees, who did not commence employment with Pigments, are able to access benefits under the WEPP Act at the earliest opportunity.

33. The Monitor submits that the requested declaration is appropriate and consistent with the recent amendments made to the WEPP Regulations. Similar relief has been granted in the CCAA proceedings of *Bed Bath & Beyond*,³⁷ *FIGR Brands*,³⁸ and *Inscape*.³⁹

34. If such declaration is made, the Monitor intends to work with the Applicant's former management to identify all employees that may be eligible for payments under the WEPP Act (the maximum amount of which for 2023 is CAD\$8,278.83) and assist eligible individuals in making submissions to Service Canada at the appropriate time.⁴⁰

PART IV - NATURE OF THE ORDER SOUGHT

35. For the reasons set out above, the Monitor requests that this Court grant the proposed Expansion of Monitor's Powers Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of May, 2023:

Martino Calvaruso

OSLER, HOSKIN & HARCOURT LLP
per Martino Calvaruso

³⁶ Fifth Report at para 4.12.

³⁷ [BBB Canada Ltd \(Re\), Amended and Restated Initial Order](#), Ontario Registry, Court File No CV-23-00694493-00CL, dated February 21, 2023 at para 23.

³⁸ [FIGR Brands, Inc. \(Re\), Wage Earner Protection Program Act Order](#), Ontario Registry, Court File No. CV-21-00655373-00CL, dated February 2, 2022 at para 4.

³⁹ [Inscape Corporation \(Re\), Amended and Restated Initial Order](#), Ontario Registry, Court File No. CV-23-00692784-00CL, dated January 20, 2023 at para. 41.

⁴⁰ Fifth Report at para 4.13.

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TO: THE ATTACHED SERVICE LIST

**SCHEDULE “A”
LIST OF AUTHORITIES**

Cases

1. [Arrangement relatif à Bloom Lake General, 2021 QCCS 2946](#)
2. [Arrangement relatif à 9323-7055 Québec Inc \(Aquadis International\), 2020 QCCA 659](#)
3. [BBB Canada Ltd \(Re\), Amended and Restated Initial Order, Ontario Registry, Court File No CV-23-00694493-00CL, dated February 21, 2023](#)
4. [FIGR Brands, Inc. \(Re\), Wage Earner Protection Program Act Order, Ontario Registry, Court File No. CV-21-00655373-00CL, dated February 2, 2022](#)
5. [Harte Gold \(Re\), 2022 ONSC 653](#)
6. [Inscap Corporation \(Re\), Amended and Restated Initial Order, Ontario Registry, Court File No. CV-23-00692784- 00CL dated January 20, 2023](#)
7. [Just Energy Group Inc. \(Re\), Order Made After Application – Monitor’s Enhanced Powers & Other Relief, Ontario Registry, Court File No. CV-21-00658423-00CL, dated November 3, 2022](#)
8. [League Assets Corp \(Re\), 2016 BCSC 2262](#)
9. [Mountain Equipment Co-Operative \(Re\), 2020 BCSC 2037](#)
10. [Nortel Networks Corporation et al \(Re\), 2017 ONSC 673](#)
11. [Quest University \(Re\), Order Made After Application – Expansion of Monitor’s Powers and Stay Extension, Vancouver Registry, No. S-200586, dated December 17, 2020](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies’ Creditors Arrangement Act, R.S.C., 1985, c. C-36

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[Wage Earner Protection Program Act, S.C. 2005, c.47](#)

5 (1) An individual is eligible to receive a payment if

(a) the individual’s employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies’ Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

[...]

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies’ Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

[Wage Earner Protection Program Regulations, SOR/2008-222](#)

3.2. For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

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

Court File No: CV-22-00691990-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DCL
CORPORATION

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

FACTUM

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