

**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 MCEWAN ENTERPRISES INC.**

Applicant

FACTUM OF THE APPLICANT
Motion for CCAA Termination Order
(Returnable December 21, 2021)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Robert J. Chadwick LSO#: 35165K
rchadwick@goodmans.ca

Caroline Descours LSO#: 58251A
cdescours@goodmans.ca

Trish Barrett LSO#: 77904U
tbarrett@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Applicant

TABLE OF CONTENTS

PART I – INTRODUCTION	1
PART II – FACTS	4
A. Extension of the Stay Period.....	4
B. Increase to Interim Transaction Funding	4
C. Termination of the CCAA Proceedings	5
D. Default Waiver	5
E. Discharge of the Monitor	6
F. Limited Release of the Released Parties	6
G. Discharge of the Court-Ordered Charges	7
PART III – ISSUES AND THE LAW	7
A. The Extension of the Stay Period is Appropriate and Should Be Approved	7
B. The Increased Interim Transaction Funding Should Be Approved	9
C. The Termination of the CCAA Proceedings Is Appropriate and Should Be Approved.....	11
PART IV – CONCLUSION	14

**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 MCEWAN ENTERPRISES INC.**

Applicant

FACTUM OF THE APPLICANT
Motion for CCAA Termination Order
(Returnable December 21, 2021)

PART I – INTRODUCTION

1. McEwan Enterprises Inc. (“**MEI**”, the “**McEwan Group**” or the “**Company**”), one of Canada’s premier hospitality companies, is a high-end, full-service restaurant, catering, gourmet grocery and events company (the “**Business**”) based in the Greater Toronto Area.¹

2. On September 28, 2021, MEI sought and obtained an Initial Order (as amended and restated pursuant to an order of the Court dated October 7, 2021, the “**Amended and Restated Initial Order**”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) granting, among other things, a stay of proceedings (the “**Stay of Proceedings**”) in favour of the Company and appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as the monitor of the Company (the “**Monitor**”). The Stay of Proceedings currently expires on December 22, 2021.

¹ Capitalized terms not defined herein have the meanings given to them in the Affidavit of Dennis Mark McEwan sworn December 16, 2021 (the “**McEwan Affidavit**”).

3. Over the course of these CCAA proceedings, the Company has acted in good faith and with due diligence to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of the Company and its Business to provide for a right-sized, sustainable Business going forward.

4. One of the main issues in these CCAA proceedings has been a dispute between MEI and First Capital Holdings (Ontario) Corporation (“**First Capital**”), its landlord for the McEwan Yonge & Bloor location. As outlined in previous materials filed in these CCAA proceedings, the Company has engaged in discussions with First Capital with respect to a potential consensual resolution of the disputed matters between the Company and First Capital in connection with the lease agreement entered into by the Company and First Capital for the McEwan Yonge & Bloor location (as amended, the “**Yonge & Bloor Lease**”). The discussions between the Company and First Capital have continued on a confidential basis and the parties are subject to a confidentiality and non-disclosure agreement.

5. On December 16, 2021, the Company and First Capital entered into a confidential binding settlement term sheet (the “**Settlement Term Sheet**”), pursuant to which the Company and First Capital reached a mutual resolution of the issues in dispute between the parties, including the consensual termination of the Yonge & Bloor Lease and mutual release of obligations between the Company and First Capital in respect of such lease, among certain other material settlement terms (the “**First Capital Settlement**”), subject to the satisfaction of certain conditions.

6. The Company is also working with Cadillac Fairview to finalize documentation with respect to amended terms for the Cadillac Fairview Leases for the Bymark, Fabbrica TD, McEwan TD, Fabbrica Don Mills and McEwan Don Mills locations on a consensual basis.

7. In light of the current circumstances, and the overall settlement and resolution of outstanding creditor matters, this factum is filed in support of a motion by the Company for an Order (the “**CCAA Termination Order**”), among other things:

- (a) extending the Stay Period (as defined in the Amended and Restated Initial Order) to the earlier of the CCAA Termination Time (as defined below) and January 14, 2022;
- (b) increasing the Interim Transaction Funding (as defined in the Stay Extension and Interim Transaction Funding Approval Order granted by this Court dated November 1, 2021 (the “**November 1 Order**”), as amended by the Stay Extension and Interim Transaction Funding Approval Order granted by this Court dated November 26, 2021 (the “**November 26 Order**”)) to a maximum amount of \$2.0 million;
- (c) terminating the CCAA proceedings, releasing the Court-ordered charges granted in these CCAA proceedings, in each case effective as of the CCAA Termination Time; and
- (d) discharging and releasing the Monitor effective as of the CCAA Termination Time, and granting certain releases in favour of the Released Parties (as defined below).

8. No relief is being sought with respect to the Settlement Term Sheet or the First Capital Settlement under the CCAA Termination Order.

9. For the reasons set out herein, the Company respectfully submits that the terms of the CCAA Termination Order are consistent with the remedial purpose of the CCAA, that the relief

requested is in the best interests of the McEwan Group and its respective stakeholders and that it fair, reasonable and appropriate in the circumstances for the Court to grant the CCAA Termination Order.

PART II – FACTS

10. The facts underlying this motion are described in detail in the McEwan Affidavit.

A. EXTENSION OF THE STAY PERIOD

11. The Stay Period granted under the Amended and Restated Initial Order, as extended by further orders of this Court, currently expires on December 22, 2021. Pursuant to the CCAA Termination Order, the Company is seeking an extension of the Stay Period to the earlier of the CCAA Termination Time and January 14, 2022.

McEwan Affidavit at para. 22; Motion Record, Tab 3.

B. INCREASE TO INTERIM TRANSACTION FUNDING

12. Pursuant to the November 1 Order, the Company received approval of Interim Transaction Funding of up to a maximum amount of \$600,000 to finance the Company's working capital requirements, other general corporate purposes and capital expenditures, and the costs of these CCAA proceedings. Pursuant to the November 26 Order, the maximum amount of Interim Transaction Funding was increased to a maximum of \$1.4 million.

McEwan Affidavit at para. 26; Motion Record, Tab 3.

13. Pursuant to the proposed CCAA Termination Order, the Interim Transaction Funding would be increased up to a maximum amount of \$2.0 million to provide the Company with sufficient funding through the proposed extension of the Stay Period. The increased Interim

Transaction Funding would be secured pursuant to the Interim Transaction Funding Lender's Charge (as defined in the November 1 Order).

McEwan Affidavit at paras. 27-28; Motion Record, Tab 3.

C. TERMINATION OF THE CCAA PROCEEDINGS

14. The proposed CCAA Termination Order provides that these CCAA proceedings will be terminated upon the service by the Monitor of a certificate (the “**Monitor’s Certificate**”) on the service list in these proceedings (the “**CCAA Termination Time**”), certifying that the Monitor has received the written consent of each of the Company, First Capital, Royal Bank of Canada (the Company’s secured lender), Cadillac Fairview (a secured creditor of the Company and landlord), the Purchaser (the provider of the Interim Transaction Funding, secured by the Interim Transaction Funding Lender’s Charge), Mark McEwan (a beneficiary of the stay of proceedings in these proceedings and the Directors’ Charge (as defined in the Amended and Restated Initial Order)), and the Monitor (collectively, the “**Required Consent Parties**”).

McEwan Affidavit at para. 15; Motion Record, Tab 3.

D. DEFAULT WAIVER

15. The proposed CCAA Termination Order provides that, from and after the CCAA Termination Time, all persons shall be deemed to have waived any and all defaults and events of default of the Company under any contracts, leases, licenses or other agreements to which the Company is a party committed by the Company, or caused by the Company, as a result of the insolvency of the McEwan Group, the commencement or continuation of these CCAA proceedings by the Company, by any of the provisions in the CCAA Termination Order and/or any other Orders of this Court in these CCAA proceedings, and any and all notices of default or any step or

proceeding taken or commenced in connection with these CCAA proceedings will be deemed to have been rescinded and of no further force or effect (the “**Default Waiver**”).

CCAA Termination Order at para. 12; Motion Record, Tab 2.

E. DISCHARGE OF THE MONITOR

16. The proposed CCAA Termination Order provides that A&M will be discharged as Monitor effective as of the CCAA Termination Time and shall have no further duties, obligations or responsibilities as Monitor, provided that, notwithstanding its discharge as Monitor, A&M shall have the authority from and after the CCAA Termination Time to complete or address any matters in its role as Monitor that are ancillary or incidental to these CCAA proceedings, as may be required or appropriate.

McEwan Affidavit at para. 16; Motion Record, Tab 3.

F. LIMITED RELEASE OF THE RELEASED PARTIES

17. The proposed CCAA Termination Order provides that upon the CCAA Termination Time, the Monitor, its counsel, and each of their respective affiliates and officers, directors, partners, employees and agents (collectively, the “**Released Parties**” and each a “**Released Party**”) be released and discharged of all present and future claims and obligations based on any act, omission, transaction, dealing or other occurrence taking place prior to the CCAA Termination Time in any way relating to, arising out of, or in respect of, these CCAA proceedings or with respect to their respective conduct in these CCAA proceedings (collectively, the “**Released Claims**”). The Released Claims do not include any claim or liability arising out of any gross negligence or wilful misconduct on the part of the applicable Released Party.

McEwan Affidavit at para. 20; Motion Record, Tab 3.

G. DISCHARGE OF THE COURT-ORDERED CHARGES

18. The proposed CCAA Termination Order provides for the termination, release and discharge of the Court-ordered charges granted in these CCAA proceedings, including the Administration Charge (as defined in the Amended and Restated Initial Order), the Directors' Charge and the Interim Transaction Funding Lender's Charge effective as of the CCAA Termination Time.

McEwan Affidavit at para. 16; Motion Record, Tab 3.

PART III – ISSUES AND THE LAW

19. The issues to be considered on this motion are whether the Court should: (a) grant the requested extension to the Stay Period; (b) approve the increase to the Interim Transaction Funding; and (c) authorize the termination of the CCAA proceedings and the discharge of the Monitor and grant the related relief pursuant to the CCAA Termination Order.

A. THE EXTENSION OF THE STAY PERIOD IS APPROPRIATE AND SHOULD BE APPROVED

(i) *The Test for an Extension of the Stay Period*

20. Section 11.02(2) of the CCAA provides the Court discretion to make an order extending the stay of proceedings granted in an initial order. Specifically, Section 11.02(2) states:

11.02(2) *Stays, etc. — other than initial application* – A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(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.

[CCAA](#), Section [11.02\(2\)](#).

21. In order to make an order pursuant to Section 11.02(2), the Court must be satisfied that: (i) circumstances exist that make the order appropriate; and (ii) the applicant has acted, and is acting, in good faith and with due diligence.

[CCAA](#), Section [11.02\(3\)](#).

(ii) *It is Appropriate to Extend the Stay Period*

22. The Company submits that an extension of the Stay Period to the earlier of the CCAA Termination Time or January 14, 2022 is appropriate in the circumstances given, among other things:

- (a) the Company has acted, and continues to act, in good faith and with due diligence in respect of all matters relating to these proceedings, including to, among other things, carry out the terms of the Amended and Restated Initial Order and advance these CCAA proceedings;
- (b) the extension of the Stay Period to the CCAA Termination Time or January 14, 2022 is necessary in order to maintain continued stability for the Company while it works diligently and in good faith to further advance its efforts with its landlords on a consensual basis, satisfy the conditions to the First Capital Settlement, and complete matters to be in a position to terminate these CCAA proceedings;
- (c) the proposed extension of the Stay Period will provide additional breathing room in the event that the relevant conditions to the First Capital Settlement and the

consents to terminate these CCAA proceedings from the Required Consent Parties take additional time to finalize;

- (d) the Company's updated cash flow forecast indicates that, taking into account the increased Interim Transaction Funding, the Company is expected to have sufficient funding to operate the Business during the proposed extension of the Stay Period;
- (e) no creditor or stakeholder will be prejudiced as a result of the extension of the Stay Period; and
- (f) the Monitor is supportive of the requested extension of the Stay Period.

McEwan Affidavit, at paras. 22-25; Motion Record, Tab 3.

Fourth Report of the Monitor dated December 17, 2021, at s. 8.2.

23. Accordingly, the Company submits that it is appropriate for this Court to approve the requested extension of the Stay Period.

B. THE INCREASED INTERIM TRANSACTION FUNDING SHOULD BE APPROVED

24. The Company is seeking an increase to the Interim Transaction Funding from the existing approved amount of \$1.4 million up to a maximum amount of \$2.0 million to provide the Company with sufficient funding through the proposed extension of the Stay Period.

McEwan Affidavit at paras. 26- 27; Motion Record, Tab 3.

25. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to approve interim financing and to grant an interim financing charge securing such financing. Section 11.2(4) contains the factors a court is to consider in deciding whether to grant such a

charge. Such factors are not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant an interim financing charge.

CCAA, Sections 11.2(1) and 11.2(4).

9354-9186 Quebec Inc v Callidus Capital Corp, 2020 SCC 10 at paras. 84-88, 90-91.

Carillion Canada Holdings Inc., Re, 2018 ONSC 1051 at para. 3.

26. The following factors support the approval of the increase to the Interim Transaction Funding:

- (a) Company's updated cash flow forecast indicates the Company will need additional liquidity to continue to operate during these CCAA proceedings through the proposed Stay Period;
- (b) the Interim Transaction Funding continues to be provided without any fees or interest;
- (c) the Interim Transaction Funding Lender's Charge will continue to rank behind in priority to the security granted in favour of RBC and the Administration Charge and the Directors' Charge, and will not secure any pre-filing obligations;
- (d) there will be no material prejudice to any of the Company's creditors as a result of an increase to the Interim Transaction Funding ; and
- (e) the Monitor is supportive of the increase to the Interim Transaction Funding.

McEwan Affidavit at paras. 26-29; Motion Record, Tab 3.

Fourth Report of the Monitor dated December 17, 2021, at s. 7.0 and 11.1.

C. **THE TERMINATION OF THE CCAA PROCEEDINGS IS APPROPRIATE AND SHOULD BE APPROVED**

(i) *Termination of the CCAA Proceedings and Discharge of the Monitor is Appropriate*

27. It is well established that the Court may grant an Order terminating proceedings under the CCAA and discharging the Monitor appointed in the proceedings absent a plan of arrangement, compromises of claims, or restructuring.

[*Ted Leroy Trucking \[Century Services\] Ltd., Re*](#), 2010 SCC 60 at para. [14](#).

[*JTI-MacDonald Corp., Re*](#), 2010 ONSC 4212 at paras. [14](#), [18-19](#).

[*Toys “R” Us \(Canada\) Ltd., Re*](#), 2016 ONSC 2744 at paras. 9, 10, 31.

28. At this time, the Company has reached the First Capital Settlement with First Capital in connection with the Yonge & Bloor Lease, and is working with Cadillac Fairview to finalize documentation with respect to amended terms for the Cadillac Fairview Leases on a consensual basis. Accordingly, having consensually resolved the key matters with its landlords, subject to certain remaining conditions precedent and finalizing definitive documentation, the Company believes it is appropriate and in the best interest of the McEwan Group to seek the CCAA Termination Order terminating these CCAA proceedings.

McEwan Affidavit at paras. 14-15; Motion Record, Tab 3.

29. The consensual resolution of the Company’s lease obligations is a significant positive development for the Company in these CCAA proceedings, as well as for its many stakeholders. The arrangements with its landlords will result in, among other things, the Company exiting its most challenged, burdensome and unsustainable locations, being Fabbri Don Mills and McEwan Yonge & Bloor, and proceeding with a right-sized Business going forward.

McEwan Affidavit at para. 17; Motion Record, Tab 3.

30. No creditors or stakeholders will be prejudiced by the termination of these CCAA proceedings. During the course of these CCAA proceedings, the Company has been paying pre- and post-filing amounts owed to its trade creditors in accordance with the terms of the Amended and Restated Initial Order, and the Company will continue to satisfy all of its obligations in the ordinary course following the termination of these CCAA proceedings.

McEwan Affidavit at para. 18; Motion Record, Tab 3.

31. The Company believes that given the progress it has made with its landlords and the resolutions achieved to date to right-size the Business, it no longer requires the benefit of the protections under the CCAA and can proceed to implement its lease amending arrangements with Cadillac Fairview and the First Capital Settlement with First Capital on a commercial basis outside of these CCAA proceedings. Terminating these CCAA proceedings will allow the Company to end the ongoing professional fees and costs associated with these proceedings, and to focus all of its time and efforts on operating the Business for the benefit of MEI's stakeholders.

McEwan Affidavit at paras. 19; Motion Record, Tab 3.

Fourth Report of the Monitor dated December 17, 2021, at ss. 4.3.

(ii) *The Default Waiver Is Appropriate*

32. The Court has jurisdiction under its general power and section 11.02(2) of the CCAA to grant permanent injunctive relief surviving the restructuring of a debtor company in respect of events of default or breaches relating or occurring prior to a restructuring. In the absence of such relief, insolvency defaults could be asserted on the debtor's emergence from creditor protection, with the effect being that the CCAA proceedings would not have provided any protection for the continuing prospects of the debtor company's business.

[CCAA](#), Section [11.02\(2\)\(c\)](#).

[Playdium Entertainment Corp., Re](#), (2001), 31 C.B.R. (4th) 309 (Ont. Sup. Ct. J. [Commercial List]) at para. 32.

33. This Court has previously approved injunctive relief prohibiting the exercise of rights or remedies as a result of non-monetary defaults arising in connection with the completion of a transaction or settlement in the absence of a plan of compromise or arrangement, and has found such relief to be consistent with the goals of the CCAA.

[Carillion Canada Holdings Inc. et al., Re](#) (1 March 2018), Toronto, Ont. Sup. Ct. [Commercial List] CV-18-590812-00CL (Assignment Approval Order) at para. 3.

[Comark Holdings Inc., Re](#), (13 July 2020), Toronto, Ont. Sup. Ct. [Commercial List] CV-20-00642013-00CL (Approval and Vesting and CCAA Termination Order) at para. 14.

[Toys “R” Us \(Canada\) Ltd., Re](#), (9 May 2018), Toronto, Ont. Sup. Ct. [Commercial List] CV-17-00582960-00CL (CCAA Discharge Order) at para. 12 [*Toys Discharge Order*].

34. The Company submits the requested Default Waiver is necessary and appropriate relief in the circumstances for the McEwan Group to successfully complete and exit these CCAA proceedings with the necessary protections for the Business for the benefit of all stakeholders. The requested Default Waiver is limited in scope to defaults relating to these CCAA proceedings and the CCAA Termination Order, will not impose any new or different obligations on affected counterparties, and is necessary to ensure that the positive results that are to flow from the emergence of the Company from creditor protection (if authorized by this Court) are not jeopardized or subject to collateral attack following the CCAA Termination Time.

(iii) The Limited Releases of the Released Parties Are Appropriate

35. The Released Parties have made substantial contributions to the Company’s restructuring efforts and these CCAA proceedings. The Company seeks the release of the limited Released Claims so as to achieve certainty and finality for the Released Parties, and believes the proposed releases are appropriate in the circumstances.

McEwan Affidavit at paras. 20-21; Motion Record, Tab 3.

36. Such limited releases in favour of the Monitor, counsel to the Monitor, and each of their respective affiliates and officers, directors, partners, employees and agents, are appropriate and Courts have exercised their discretion to grant similar relief in a number of cases.

See [*Toys Discharge Order*](#), *supra* at para. 12; [*2123125 Ontario Inc., Re*](#), (25 January 2017), Toronto, Ont. Sup. Ct. [Commercial List] CV-16-11358-00CL (CCAA Discharge and Termination Order) at para. 12; [*Aralez Pharmaceuticals Inc. et al., Re*](#), (7 December 2018), Toronto, Ont. Sup. Ct. [Commercial List] CV-18-603054-00CL (Aralez Canada CCAA Termination Order) at para 16; and [*2607380 Ontario Inc., Re*](#), (18 March 2021), Toronto, Ont. Sup. Ct. [Commercial List] CV-20-00636875-00CL (CCAA Termination Order) at para. 7.

PART IV – CONCLUSION

37. These CCAA proceedings have allowed the Company to work to solve its key financial issues with the benefit of a stay of proceedings under the CCAA. These CCAA proceedings provided the Company with breathing room while it engaged with its key stakeholders and worked to advance consensual arrangements with such parties.

38. Having reached the First Capital Settlement with First Capital, the only opposing creditor in these proceedings, and having otherwise substantially advanced its lease arrangements in respect of five McEwan Locations with Cadillac Fairview, the Company has addressed on a consensual basis with the applicable landlords the challenges relating to the McEwan Group’s unsustainable lease obligations that caused it to need to seek CCAA relief.

39. The consensual resolution of the Company’s lease obligations is a significant positive development in these CCAA proceedings.

40. Based on its arrangements with First Capital and Cadillac Fairview, the Company will have comprehensively addressed the material and unsustainable obligations that had been straining the Business. While the COVID-19 pandemic continues to create a challenging environment for the McEwan Group and the restaurant industry as a whole, with the continued support of the

Company's existing shareholders, the McEwan Group will be exiting these CCAA proceedings on solid financial footing with a positive path forward for the benefit of our many stakeholders.

41. For the reasons set out herein, the Company respectfully requests that this Court grant the requested relief pursuant to the CCAA Termination Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 17, 2021

Goodmans LLP

Goodmans LLP

SCHEDULE A
LIST OF AUTHORITIES

1. [9354-9186 Quebec Inc v Callidus Capital Corp](#), 2020 SCC 10
2. [Carillion Canada Holdings Inc., Re](#), 2018 ONSC 1051
3. [Ted Leroy Trucking \[Century Services\] Ltd., Re](#), 2010 SCC 60
4. [JTI-MacDonald Corp., Re](#), 2010 ONSC 4212
5. [Toys “R” Us \(Canada\) Ltd., Re](#), 2016 ONSC 2744
6. [Playdium Entertainment Corp., Re](#), (2001), 31 C.B.R. (4th) 309 (Ont. Sup. Ct. .J. [Commercial List])
7. [Carillion Canada Holdings Inc. et al., Re](#), (1 March 2018), Toronto, Ont. Sup. Ct. [Commercial List] CV-18-590812-00CL (Assignment Approval Order)
8. [Comark Holdings Inc., Re](#), (13 July 2020), Toronto, Ont. Sup. Ct. [Commercial List] CV-20-00642013-00CL (Approval and Vesting and CCAA Termination Order)
9. [Toys “R” Us \(Canada\) Ltd., Re](#), (9 May 2018), Toronto, Ont. Sup. Ct. [Commercial List] CV-17-00582960-00CL (CCAA Discharge Order)
10. [2123125 Ontario Inc., Re](#), (25 January 2017), Toronto, Ont. Sup. Ct. [Commercial List] CV-16-11358-00CL (CCAA Discharge and Termination Order)
11. [Aralez Pharmaceuticals Inc. et al., Re](#), (7 December 2018), Toronto, Ont. Sup. Ct. [Commercial List] CV-18-603054-00CL (Aralez Canada CCAA Termination Order)
12. [2607380 Ontario Inc., Re](#), (18 March 2021), Toronto, Ont. Sup. Ct. [Commercial List] CV-20-00636875-00CL (CCAA Termination Order)

**SCHEDULE B
STATUTORY REFERENCES**

**COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c C-36, as amended**

[s. 11](#)

General power of court – Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up 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 an order that it considers appropriate in the circumstances.

[s. 11.02 \(2\)](#)

Stays, etc. — other than initial application – A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (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.

[s. 11.02 \(3\)](#)

Burden of proof on application – The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[s. 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.

[s. 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.

[s. 11.2 \(3\)](#)

Priority – other orders – 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.

[s. 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.

[s. 11.2 \(5\)](#)

Additional factor – initial application – When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

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

Court File No.: CV-21-00669445-00CL

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN
ENTERPRISES INC.**

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(Returnable December 21, 2021)**

Goodmans LLP

Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Robert J. Chadwick LSO#: 35165K
rchadwick@goodmans.ca

Caroline Descours LSO#: 58251A
cdescours@goodmans.ca

Trish Barrett LSO#: 77904U
tbarrett@goodmans.ca

Tel: (416) 979-2211

Fax: (416) 979-1234

Lawyers for the Applicant