

Court File No. _____

**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 SECTION 101 OF THE *COURTS OF JUSTICE
ACT*, R.S.O. 1990, C. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA,
VICTORIAN ORDER OF NURSES FOR CANADA – EASTERN REGION
AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN
REGION

Applicants

FACTUM OF THE APPLICANTS

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PART I - OVERVIEW

1. The Victorian Order Of Nurses For Canada (“**VON Canada**”) and the other entities in the VON Group (as defined below) provide home and community care services that address the health care needs of Canadians in various locations across the country on a not-for-profit charitable basis.
2. For over 100 years, the VON Group has been a part of Canada’s health care system.
3. The VON Group delivers its programs through its four regional VON Group entities (the “**Regional Entities**”):

- a) Victorian Order Of Nurses For Canada – Eastern Region (“**VON East**”);
- b) Victorian Order Of Nurses For Canada – Western Region (“**VON West**”);
- c) Victorian Order Of Nurses For Canada – Ontario Branch (“**VON Ontario**”); and
- d) Victorian Order Of Nurses For Canada Nova Scotia Branch (“**VON Nova Scotia**”)

(collectively, with VON Canada, the “**VON Group**”).

- 4. The Applicants - VON Canada, VON East and VON West - seek protection from their creditors under the *Companies’ Creditors Arrangement Act* (Canada) (the “**CCAA**”).
- 5. The Applicants also seek certain limited protections for VON Ontario and VON Nova Scotia, which carry on a core aspect of the VON Group’s business, but are not Applicants in these proceedings.
- 6. The focus of the Applicants’ efforts in these CCAA proceedings will be: (i) restructuring of overhead costs that are currently incurred at VON Canada and that are at an unsustainable level; (ii) winding down VON East and VON West, which are not financially viable; and (iii) positioning VON Ontario and VON Nova Scotia to achieve long term sustainability.

7. A successful restructuring will allow the VON Group to continue providing much needed health and community care services in its core regions to a population that is increasingly in need of the flexible health and community-based care services that the VON Group provides.
8. The proposed restructuring is essential to the long-term viability and continuation of the VON Group's services to its clients and the continuation of employment for a large majority of the employees of the VON Group who are employed by VON Ontario and VON Nova Scotia.

PART II - THE FACTS

A. Organizational Structure

9. The VON Group does not operate under a traditional vertical corporate structure. The current corporate structure is as follows:
 - a) VON Canada: The administrative and overhead related functions of the VON Group are performed by VON Canada. VON Canada also owns the intellectual property of the VON Group, which is licensed to the Regional Entities through trademark licensing agreements. VON Canada provides necessary back office support and senior management oversight for the operations undertaken by the Regional Entities.¹

¹ Affidavit of Jo-Anne Poirer sworn November 24, 2015 [the "Poirer Affidavit"] at para. 15(a), Initial Application Record, Tab 2.

- b) The affairs of VON Canada are governed by a board of directors (the "**VON Canada Board**") elected by the members of VON Canada. The members of VON Canada (analogous to shareholders of a business corporation) are the VON Canada board of directors and Community Corporations described below.²

- c) Regional Entities: VON East, VON West, VON Ontario and VON Nova Scotia are the regional operating corporations of the VON Group. The Regional Entities enter into and perform the VON Group's service agreements within specific provinces or regions. The majority of services are provided at the cost and direction of governments, government agencies, health authorities and charitable organizations across Canada. These service arrangements are the primary source of the VON Group's cash flow.³

10. VON Canada and the Regional Entities operate as an affiliated corporate group. Operationally, VON Canada is fully integrated with each of the Regional Entities. Each Regional Entity has a board of directors composed of the same individuals who comprise the VON Canada board. The members of each Regional Entity are VON Canada itself as well as the individual VON Canada directors. VON

² Poirer Affidavit at para. 12(a), Initial Application Record, Tab 2.

³ Poirer Affidavit at para. 15(b), Initial Application Record, Tab 2.

Canada's senior management team is also the senior management team of each of the Regional Entities.⁴

11. This structure is the product of a prior corporate reorganization commenced in 2000 and completed in 2006 outside of a court process (the "**2006 Reorganization**"). Prior to the commencement of the 2006 Reorganization, individual Community Corporations (of which there are approximately 30) each provided health and community care services directly to clients in their communities. However, in 2006 these operating activities were transferred to the VON Group and consolidated under the Regional Entities.⁵

B. Business

12. The VON Group maintains and provides a network of services that support the health and wellbeing of its clients outside of a formal institutional setting, allowing its clients to maintain their health and independence and providing family caregivers with much needed support.⁶
13. The VON Group has contractual arrangements for the provision of services with various government and non-government parties (such parties being "**Funders**").⁷
14. A core program of VON Ontario and VON Nova Scotia is Home Care (consisting of visiting nursing and home support). Home Care is not a material part of the

⁴ Poire Affidavit at para. 12(b), Initial Application Record, Tab 2.

⁵ Poire Affidavit at para. 13, Initial Application Record, Tab 2.

⁶ Poire Affidavit at para. 17, Initial Application Record, Tab 2.

⁷ Poire Affidavit at para. 56, Initial Application Record, Tab 2.

service offering of VON East or VON West. VON East and VON West operate at a significantly smaller scale than both VON Ontario and VON Nova Scotia.⁸

15. Community Support Services are provided by all Regional Entities, These services are deployed from over 50 sites across Canada and include: (i) adult day/respite care; (ii) foot care; (iii) active lifestyle programs for seniors; (iv) independent living skill programs for seniors; and (v) elder abuse prevention.⁹

Employees

16. The VON Group's services are delivered by unionized and non-unionized employees. The VON Group has over 4200 full time equivalent employees. Because service arrangements must often be flexible, most employees are casual or part time employees of the VON Group. In total, the VON Group has over 6000 full time, casual and part time employees.¹⁰

17. Most employees are employed by the Regional Entities as follows:

- (a) VON East: approximately 160 employees
- (b) VON West: approximately 147 employees
- (c) VON Ontario: approximately 3915 employees
- (d) VON Nova Scotia: approximately 1947 employees¹¹

⁸ Poirer Affidavit at paras. 18 and 24, Initial Application Record, Tab 2.

⁹ Poirer Affidavit at para. 19, Initial Application Record, Tab 2.

¹⁰ Poirer Affidavit at paras. 25-26, Initial Application Record, Tab 2.

¹¹ Poirer Affidavit at para. 27, Initial Application Record, Tab 2.

18. VON Canada has approximately 200 employees, primarily providing internal administrative support for the Regional Entities, such as financial services, information technology, human resources administration and payroll.¹²

Pensions

19. The VON Canada Pension Plan (the “**Pension Plan**”) was established on January 1, 1958. It is a defined benefit pension plan, registered in Ontario.¹³
20. VON Canada is the sponsor and administrator of the Pension Plan.¹⁴
21. The employees of VON Canada and the Regional Entities are members of the Pension Plan.¹⁵
22. Currently, the Pension Plan is in a solvency deficit position. Based upon a valuation as at June 1, 2015, the estimated wind-up deficiency for the Pension Plan was \$17 million. Normal cost and special payments are currently forecasted to continue in the ordinary course in connection with the Pension Plan.¹⁶

¹² Poirer Affidavit at para. 29, Initial Application Record, Tab 2.

¹³ Poirer Affidavit at para. 32, Initial Application Record, Tab 2.

¹⁴ Poirer Affidavit at para. 32, Initial Application Record, Tab 2.

¹⁵ Poirer Affidavit at para. 34, Initial Application Record, Tab 2.

¹⁶ Poirer Affidavit at paras. 35-36, Initial Application Record, Tab 2.

C. Outstanding Indebtedness

23. Pursuant to a number of loan, lease and service arrangements, VON Canada incurred debts to IBM Canada Limited ("**IBM**"). The obligations owing under the IBM currently total approximately \$13,000,000.¹⁷
24. VON West has also obtained a letter of credit issued by The Bank of Nova Scotia in the amount of \$40,000 for the purposes of providing security for certain licensing obligations of VON West. This letter of credit is secured by cash collateral held by The Bank of Nova Scotia (the "**LC Cash Collateral**").¹⁸
25. All other material liabilities of the Applicants at this time are ordinary course trade obligations.
26. VON Canada currently has an operating facility with Bank of Nova Scotia pursuant to an agreement dated September 9, 2015, as amended (the "**Existing BNS Facility**"). The Existing BNS Facility is limited to \$4,000,000. As at the date of this affidavit, the Existing BNS Facility is undrawn.¹⁹

New BNS Facility

27. In connection with these proposed proceedings under the CCAA, the VON Group has requested that The Bank of Nova Scotia enter into a new demand operating facility and credit card facilities to replace the Existing BNS Facility (the "**New BNS Facility**"). Under the New BNS Facility, VON Ontario and VON Nova Scotia would be the borrowers and VON Canada would be a guarantor.

¹⁷ Poirer Affidavit at paras. 39-44, Initial Application Record, Tab 2.

¹⁸ Poirer Affidavit at para. 82, Initial Application Record, Tab 2.

¹⁹ Poirer Affidavit at para. 76, Initial Application Record, Tab 2.

The obligations under the New BNS Facility and the associated guarantees will be secured by, among other things, a general security interest over the assets of VON Canada, VON Ontario and VON Nova Scotia.²⁰

28. VON Canada will benefit from the liquidity that the New BNS Facility provides to VON Ontario and VON Nova Scotia as that liquidity will permit VON Ontario and VON Nova Scotia to continue to operate in the ordinary course and generate revenues that will ensure that VON Ontario and VON Nova Scotia can continue to pay their agreed upon share of the costs incurred by VON Canada for the benefit of the entire VON Group.²¹

D. VON GROUP FINANCIAL ISSUES

29. The financial results of the VON Group on a consolidated basis since 2012, indicate consistent liquidity issues:

- (a) Current liabilities have consistently exceeded current assets by a significant margin;
- (b) Cumulative net losses from 2012 to 2015 total \$13,624,897; and
- (c) Cash flows from operations from 2012 to 2015 were similarly negative in the amount of \$8,203,266.²²

30. While the VON Group ultimately seeks to achieve neutral financial results on an annual basis and certain temporary limited deficits can be bridged either by short term financing or by third party funding, the consistent operating deficits

²⁰ Poirer Affidavit at para. 78, Initial Application Record, Tab 2.

²¹ Poirer Affidavit at para. 79, Initial Application Record, Tab 2.

²² Poirer Affidavit at para. 85, Initial Application Record, Tab 2.

and liquidity shortfalls which the VON Group has faced in recent years are not sustainable.²³

31. The VON Group's non-core operations (VON East and VON West) account for a disproportionately high share of the VON Group's overall losses and operating cash shortfalls relative to the revenues generated from these entities.²⁴

32. The financial difficulties faced by the VON Group are clear. It faces a significant working capital shortfall and has been accumulating significant operating losses over the past number of years. Current forecasts suggest that the VON Group will face a liquidity crisis in the near future if restructuring steps are not taken.²⁵

33. The key causes of these difficulties have been:

- (a) Significant investments and long-term operating arrangements were made in the 2006 Restructuring to achieve efficiencies and higher service levels, particularly in IT infrastructure. The VON Group sought to generate a substantial return on these investments that would more than offset the costs. However these returns did not materialize. As a result, the VON Group now bears significant ongoing legacy costs of the expansive platform developed in 2006, without the revenues necessary to make this sustainable. Most of these legacy costs are incurred at VON Canada.

²³ Poirer Affidavit at para. 86, Initial Application Record, Tab 2.

²⁴ Poirer Affidavit at para. 87, Initial Application Record, Tab 2.

²⁵ Poirer Affidavit at para. 88, Initial Application Record, Tab 2.

- (b) Competition from private sector service providers has resulted in many of the VON Group's material customers soliciting proposals from other private service providers, which has both placed price pressure on the VON Group and resulted in the loss of certain material revenue streams. Significant business development investment will be needed to preserve the VON Group's remaining business in view of this pressure. That significant investment must be targeted at the core regions of Ontario and Nova Scotia.
- (c) The size of the VON East and VON West businesses are not sufficient to justify the fixed costs attributable to those businesses. VON East operates in regions where the population is not sufficient to support a larger VON East business. VON West does not face these population issues but there is insufficient funding to allow appropriate business development spending to grow this business to a sufficient size to make its operations economically viable.²⁶

E. Responses to Financial Difficulties

34. The VON Group has taken many steps to attempt to address its financial issues prior to resorting to a formal restructuring proceeding. The VON Group has monetized material assets to reduce outstanding debt, sought additional funding, restructured its IT service contracts to significantly reduce overhead costs and restructured its employment arrangements, including at the senior management level.²⁷

²⁶ Poirer Affidavit at para. 89, Initial Application Record, Tab 2.

²⁷ Poirer Affidavit at para. 90, Initial Application Record, Tab 2.

35. The above initiatives have had a material positive effect on the financial circumstances of the VON Group but, as its financial results and projections indicate, none have been sufficient to resolve the financial issues faced by the VON Group.²⁸

F. Current Restructuring Goals

36. Currently, the VON Group operations suffer as a result of excessive overhead cost and efforts to maintain a national network. The VON Group can have a sustainable future only if it modifies the scope of its operations and focuses efforts on its core businesses and regions. The Applicants' restructuring process will seek to achieve this.²⁹

VON East and VON West

37. The financial results of VON West and VON East have led the VON Group to conclude that these operations are not viable at their current limited scale and, further, the scale of these operations cannot reasonably be increased to a sufficient degree to make them viable. The VON Group has concluded that VON East and VON West cannot be a part of the VON Group's business strategy going forward and must be wound down in an orderly manner.³⁰

VON Ontario and VON Nova Scotia

38. VON Ontario and VON Nova Scotia are the core operating entities of the VON Group. During the 2012 to 2015 period, revenues at VON Ontario and VON

²⁸ Poirer Affidavit at para. 91, Initial Application Record, Tab 2.

²⁹ Poirer Affidavit at para. 92, Initial Application Record, Tab 2.

³⁰ Poirer Affidavit at paras. 93-95, Initial Application Record, Tab 2.

Nova Scotia have averaged \$100,397,549 and \$92,089,613, respectively. If overhead costs are properly managed and operations are restructured, it is believed that VON Ontario and VON Nova Scotia should be sustainable and the recent losses faced by these entities can be reduced or eliminated in the future.³¹

39. Business will operate as usual at VON Ontario and VON Nova Scotia during the Applicants' CCAA proceedings.³²

VON Canada

40. The functions performed by VON Canada are essential to the continuing operation and service delivery of VON Ontario and VON Nova Scotia. VON Canada will seek to restructure its management services delivery model in order to have a more efficient and cost effective operating structure.³³

G. CCAA Protection Is Needed

41. These CCAA proceedings are necessary to provide the Applicants with a stable environment within which to undertake the extensive operational restructuring efforts that are part of the VON Group's plan for long term viability.
42. Without the relief sought in the proposed Initial Order, the VON Group would be exposed to significant and immediate claims resulting from the steps that will be taken in connection with the proposed restructuring. The VON Group would not have sufficient liquidity to satisfy these claims.

³¹ Poirer Affidavit at para. 98, Initial Application Record, Tab 2.

³² Poirer Affidavit at para. 99, Initial Application Record, Tab 2.

³³ Poirer Affidavit at para. 100, Initial Application Record, Tab 2.

43. Additionally, the proposed restructuring may result in enforcement steps by pre-filing creditors absent a stay of proceedings in favour of the Applicants and may also trigger detrimental steps by Funders of VON Ontario and VON Nova Scotia. Such steps would be highly damaging to the VON Group's business.

H. The Initial Order

i. Stay Of Proceedings In Favour Of Non-Applicant Affiliates

44. VON Ontario and VON Nova Scotia are not proposed to be Applicants in these proceedings. VON Ontario and VON Nova Scotia are intended to carry on business substantially in the ordinary course during these proceedings. It is believed that this is the best approach to maintain the business of these core entities at this time. Further, because there is not currently an intention to engage in any material restructuring at VON Ontario and VON Nova Scotia, these parties do not need access to the full statutory mechanisms available under the CCAA.³⁴

45. A limited stay is sought in favour of VON Ontario and VON Nova Scotia to protect against the unlikely event that Funders of VON Ontario and VON Nova Scotia may seek to take steps against VON Ontario and VON Nova Scotia which may result from, among other things, these proceedings and the declarations of insolvency made by members of the VON Group.³⁵

46. The Applicants are dependent upon VON Ontario and VON Nova Scotia due to the significant revenues generated by those entities that ultimately provide

³⁴ Poirer Affidavit at para. 79, Initial Application Record, Tab 2.

³⁵ Poirer Affidavit at para. 114, Initial Application Record, Tab 2.

funding to VON Canada and its various overhead functions. Any proceedings or the exercise of rights or remedies against these entities would be detrimental to the Applicants restructuring efforts and would undermine a process that would otherwise benefit the VON Group's stakeholders as a whole. The Initial Order contains provisions enjoining the exercise of certain rights and remedies by Funders against VON Ontario and VON Nova Scotia.³⁶

ii. Charges

47. The Applicants seek a charge on their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**") in the maximum amount of \$250,000 to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by the Monitor, counsel to the Monitor, the Chief Restructuring Officer, the Applicants' counsel and counsel to the boards of directors of the Applicants (the "**Administration Charge**").³⁷
48. The proposed Initial Order contemplates the establishment of a charge on the Applicants' Property in the amount of \$750,000 (the "**Directors' Charge**") to protect the directors and officers against obligations and liabilities they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings, except to the extent that the obligation or liability was incurred as a result of the directors' or officers' gross negligence or wilful misconduct. The benefit of the Directors' Charge will only be available to the extent that a liability

³⁶ Poirer Affidavit at para. 110, Initial Application Record, Tab 2.

³⁷ Poirer Affidavit at para. 117, Initial Application Record, Tab 2.

is not covered by existing directors' and officers' insurance. While directors' and officers' insurance is in place, the directors and officers of the Applicants cannot be certain that the insurance providers will provide coverage or that coverage limits will not be exhausted.³⁸

49. The directors and officers of the Applicants have indicated that due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Directors' Charge. The Applicants require the continued participation of its directors and officers.³⁹

50. The Applicants have reviewed the proposed quantum of the Directors' Charge and the Administration Charge with the Proposed Monitor and believe the Directors' Charge and the Administration Charge are reasonable in the circumstances.⁴⁰

51. It is proposed that March Advisory Services Inc. as chief restructuring officer of VON Canada (the "CRO") would have the benefit of the Directors' Charge to secure any indemnity obligations the Applicants may have to the CRO in connection with that role.

52. The proposed ranking of the court-ordered charges is as follows:

a) first, the Administration Charge; and

³⁸ Poirer Affidavit at para. 123-125, Initial Application Record, Tab 2.

³⁹ Poirer Affidavit at para. 120, Initial Application Record, Tab 2.

⁴⁰ Poirer Affidavit at para. 118, Initial Application Record, Tab 2.

b) second, the Directors' Charge.⁴¹

53. The Applicants will provide notice to any secured creditors who are likely to be affected by the court-ordered charges following the grant of the proposed Initial Order.⁴²

iii. Payment of Pre-filing Obligations

54. The proposed Initial Order authorizes payment of the following amounts, whether incurred in the pre-filing or post-filing period:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses, and volunteer and director expense reimbursements, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges;

(c) the fees and disbursements of the monitor, counsel to the monitor, the CRO, the Applicants' counsel and counsel to the boards of directors of the Applicants; and

(d) liabilities for charges incurred on credit cards issued to the Applicants.⁴³

⁴¹ Poirer Affidavit at para. 132, Initial Application Record, Tab 2.

⁴² Poirer Affidavit at para. 133, Initial Application Record, Tab 2.

⁴³ Poirer Affidavit at para. 116, Initial Application Record, Tab 2.

iv. Approval of Key Employee Retention Plan

55. The Applicants will seek approval of a Key Employee Retention Plan for certain critical employees as part of the proposed Initial Order. The Applicants depend upon the continued employment of these highly skilled and experienced employees who: (i) perform roles that are critical to accomplishing the Applicants' restructuring goals; and (ii) likely cannot be suitably replaced at a reasonable cost.⁴⁴

v. Engagement of Chief Restructuring Officer

56. The Applicants will seek approval of the engagement letter (the "**CRO Engagement Letter**") to be entered into with the CRO. The CRO will provide the services of Roxanne Anderson, who has worked extensively with VON Canada to date in its pre-CCAA restructuring efforts and has extensive knowledge of the options reviewed and available to VON Canada. Ms. Anderson's background knowledge is particularly helpful in the ongoing review of strategic alternatives for VON Canada.⁴⁵ The CRO will not take on any role in respect of VON East or VON West.

vi. Proposed Monitor

57. Collins Barrow Toronto Limited (the "**Proposed Monitor**") has consented to act as the Court-appointed Monitor of the Applicants, subject to Court approval.⁴⁶

⁴⁴ Poirer Affidavit at para. 129, Initial Application Record, Tab 2.

⁴⁵ Poirer Affidavit at para. 134-35, Initial Application Record, Tab 2.

⁴⁶ Poirer Affidavit at para. 137, Initial Application Record, Tab 2.

58. Collins Barrow Toronto Limited is a trustee within the meaning of section 2 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and is not subject to any of the restrictions on who may be appointed as monitor set out in section 11.7(2) of the CCAA.⁴⁷

vii. Concurrent Receivership Proceeding

59. The Applicants seek, in conjunction with the Initial Order, an Order appointing Collins Barrow Toronto Limited as Receiver of certain of the assets, properties and undertakings of VON Canada, VON East and VON West pursuant to Section 101 of the *Courts of Justice Act* (Ontario) (the “**Receivership Order**”).⁴⁸

60. The Receivership Order is requested in respect of the following assets:

- a) VON Canada’s right, title and interest in its goodwill and intellectual property;
- b) VON East’s right, title and interest in its goodwill and intellectual property; and
- c) VON West’s right, title and interest in its goodwill and intellectual property,

(collectively, the “**Receivership Assets**”).⁴⁹

⁴⁷ Poirer Affidavit at para. 138, Initial Application Record, Tab 2.

⁴⁸ Poirer Affidavit at para. 140, Initial Application Record, Tab 2.

⁴⁹ Poirer Affidavit at para. 141, Initial Application Record, Tab 2.

61. VON East and VON West will be the subject of an orderly wind-down following the granting of the Initial Order. The Receivership Assets of VON East and VON West represent substantially all of the assets of VON East and VON West other than accounts receivable and inventory.⁵⁰
62. VON Canada will be the subject of substantial restructuring and downsizing. Again, the Receivership Assets represent substantially all of the assets of VON Canada other than accounts receivable and inventory.⁵¹
63. In aggregate, more than 300 employees are expected to be terminated by the Applicants as part of this process. These employees will be paid their wages up to the date of their termination. However, the Applicants do not have sufficient liquidity to pay these employees amounts in respect of termination or severance pay at this time.⁵²
64. Individuals whose employment is terminated may be eligible to receive certain payments under the Wage Earner Protection Program on account of vacation pay and severance and termination pay that remain unpaid to them after their employer commences a bankruptcy or a receivership.⁵³
65. The Applicants have considered whether a bankruptcy of any of the Applicants would be possible at this time and have concluded that a bankruptcy of the Applicants would not be a practical option. Therefore, a bankruptcy could not

⁵⁰ Poirer Affidavit at para. 142, Initial Application Record, Tab 2.

⁵¹ Poirer Affidavit at para. 143, Initial Application Record, Tab 2.

⁵² Poirer Affidavit at para. 144, Initial Application Record, Tab 2.

⁵³ Poirer Affidavit at para. 145, Initial Application Record, Tab 2.

be engaged to trigger access to the Wage Earner Protection Program for terminated employees of the Applicants.⁵⁴

66. The appointment of a receiver over the Receivership Assets would allow the orderly wind down of VON East and VON West to continue, would not interfere with the administrative functions that VON Canada must continue to perform, and would allow terminated employees to seek access to the Wage Earner Protection Program.⁵⁵
67. The Applicants are of the view that it would be just and convenient to appoint the Receiver in this case. This relief would permit the more than 300 terminated employees to seek to access the Wage Earner Protection Program and receive funds from that program on account of unpaid vacation pay, termination and severance pay up to the maximum amount permitted by statute. This is particularly important in the current case given the number of employees that will be terminated and whose termination and severance pay cannot be fully satisfied by the Applicants. The Applicants are unaware of any stakeholders that would be prejudiced by the Receivership Order.⁵⁶
68. The Receivership Order contemplates a cash retainer to be held by the Receiver in the amount of \$15,000 to cover the costs of the Receiver and counsel in connection with this role. It is also proposed that any amounts payable to the Receiver or its counsel should have the benefit of a court

⁵⁴ Poirer Affidavit at para. 146, Initial Application Record, Tab 2.

⁵⁵ Poirer Affidavit at para. 147, Initial Application Record, Tab 2.

⁵⁶ Poirer Affidavit at para. 148, Initial Application Record, Tab 2.

ordered charge ranking behind the Directors' Charge and the Administration Charge described above.

PART III - ISSUES AND THE LAW

The Applicants

69. The Applicants are companies to which the CCAA applies.
70. The Applicants are continued under the *Canada Not-for-profit Corporations Act*.
71. The Applicants are each insolvent. They each face a looming liquidity crisis⁵⁷ and are at risk of exhausting remaining cash in the short term. The Applicants are each unable to meet their obligations that have become due and the aggregate value of their 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 them to pay all of their obligations due and accruing due.⁵⁸
72. The Applicants are affiliated companies who face claims well in excess of \$5,000,000 as contemplated in Section 3 of the CCAA.⁵⁹ While the corporate structure of the Applicants does not conform exactly to the parent and subsidiary structure that would be applicable in the for profit context, each of VON East and VON West is under the control of VON Canada. Specifically:

⁵⁷ *Stelco Inc. (Re)*, [2004] O.J. No. 1257 (S.C.J.) at para. 40, Book of Authorities of the Applicant, Tab 1.

⁵⁸ *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [BIA], s. 2, "Insolvent Person."

⁵⁹ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 [CCAA], s. 3.

- a) All membership interests in VON East and VON West through which the directors of VON East and VON West are elected are held either by VON Canada or the directors of VON Canada.
- b) The directors of VON Canada hold their membership interests in VON East and VON West only because they hold their positions as directors of VON Canada. The directors of VON Canada hold their membership interests in VON East and VON West to ensure that VON Canada, VON East and VON West are under common control. In substance, the directors of VON Canada hold their membership interests in VON East and VON West for the benefit of the VON Group.
- c) The board of directors of VON Canada, VON East and VON West have an identical composition.

73. The Applicants have complied with the obligations of section 10(2) of the CCAA, which sets out documentation required in connection with an initial application. This initial application is accompanied by (a) a statement indicating, on a weekly basis, the projected cash flow of the Applicants; (b) a report containing the prescribed representations of the Applicants regarding the preparation of the cash-flow statement; and (c) copies of all financial statements, audited or unaudited, prepared during the year before the Application.
74. The Applicants' proposed form of Initial Order seeks certain relief that is specifically designed to suit its particular circumstances. Given the broad and

remedial purpose of the CCAA, this Court has the jurisdiction to grant such relief as is reasonable and necessary in order to achieve a successful restructuring.⁶⁰ The Applicants submit that the proposed form of Initial Order raises the following questions for the Court's consideration:

- a) Should this Court extend the stay of proceedings in the limited manner requested to VON Ontario and VON Nova Scotia?
- b) Should this Court grant the Administration Charge and the Directors' Charge over the Property of the Applicants?
- c) Should this Court approve the CRO Engagement Letter (as defined below) and seal the terms of the Engagement Letters?
- d) Should the Applicants be authorized to comply with their pre-filing obligations to the extent provided in the Initial Order?
- e) Should this Court approve the Key Employee Retention Plan?
- f) Should this Court approve the Modified Cash Management System?

75. The Applicants submit that the request for the Receivership Order raises the following question:

⁶⁰ *Winnipeg Motor Express Inc. (Re)*, 2008 MBQB 297 at paras. 41 and 44, Book of Authorities of the Applicant, Tab 2; *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at paras. 5 and 21 [*Lehndorff General*], Book of Authorities of the Applicant, Tab 3.

- a) Is it just or convenient to grant the Receivership Order pursuant to Section 101 of the *Courts of Justice Act* (Ontario)?

A. The Stay of Proceedings Against Non-Applicants Is Appropriate

76. In order for an insolvent company to restructure, there must be a means of holding its creditors and contractual counterparties at bay. The powers vested in the Court under the CCAA that allow the Court to order a stay that temporarily enjoins creditors and contractual counterparties from making claims or taking steps against the debtor company advances this objective.⁶¹ This stay maintains the status quo and prevents any creditor or contractual counterparty from obtaining an advantage over other creditors.⁶²
77. The VON Group operates in a fully integrated manner and depends upon VON Ontario and VON Nova Scotia for their value generating capacity. Absent a stay of proceedings not only in favour of the Applicants but also the proposed limited stay in favour of VON Ontario and VON Nova Scotia, enforcement steps by the Funders to VON Ontario and VON Nova Scotia may be sought by the Funders under their contracts. This would create material concern about a number of the VON Group's most material revenue streams during this process and would create significant questions about the going concern viability of the VON Group as a whole. This would not be in the best interests of the Applicants' stakeholders.

⁶¹ *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at para. 10, Book of Authorities of the Applicant, Tab 4.

⁶² *Woodward's Ltd. (Re)* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 12 [Woodwards], Book of Authorities of the Applicant, Tab 5.

78. The Court has jurisdiction to extend the stay of proceedings in favour of VON Ontario and VON Nova Scotia, notwithstanding the fact that they are not Applicants in these proceedings, because it is just and convenient to do so.⁶³ Courts have exercised such jurisdiction where, as in the current case⁶⁴:

- a) it is important to the reorganization process;
- b) the operations of the Applicants and the third party non-applicants are intertwined and the third parties are not “debtor companies”, as defined in the CCAA;
- c) irreparable harm may accrue if the stay is not granted.

79. The extended stay of proceedings in this case is limited to those steps that the Funders may otherwise take against VON Ontario and VON Nova Scotia due to the Applicants being parties to this proceeding (including the receivership), having made an Application to this Court pursuant to the CCAA including any declarations of insolvency contained therein in respect of the Applicants or VON Ontario’s or VON Nova Scotia, or taking any steps in furtherance thereof, or complying with the terms of any Order granted in these CCAA proceedings. VON Ontario and VON Nova Scotia’s obligations to comply with the substantive service deliveries under their contracts with the Funders are

⁶³ *Lehndorff General* at para. 21, Book of Authorities of the Applicant, Tab 3.

⁶⁴ *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 153 at paras. 33-34, Book of Authorities of the Applicant, Tab 6. See also *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500, Book of Authorities of the Applicant, Tab 7; *Woodwards*, Book of Authorities of the Applicant, Tab 5; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) at paras. 27-30 [*Canwest Global*], Book of Authorities of the Applicant, Tab 8; *Jaguar Mining Inc. (Re)* (2013), 12 C.B.R. (6th) 290 at paras. 27 and 37, Book of Authorities of the Applicant, Tab 9; and *4519922 Canada Inc. (Re)* (2015), 22 C.B.R. (6th) 44 at paras. 36-38, Book of Authorities of the Applicant, Tab 10.

unaffected by this proposed stay. No party will be prejudiced by the proposed stay.

80. If detrimental steps were taken by Funders against VON Ontario or VON Nova Scotia in connection with this proceeding, the VON Group could face irreparable harm as a result of the loss of value currently generated by VON Ontario and VON Nova Scotia.

81. The requested stay of proceedings will provide a structured environment for the Applicants and their stakeholders to seek to restructure. The Applicants submit that the requested stay is appropriate in the circumstances.

B. The Court-Ordered Charges Are Appropriate

82. The Court has statutory authority to grant the proposed Administration Charge and the Directors' Charge.⁶⁵

i. Administration Charge

83. In order to protect the fees and expenses of the Monitor, counsel to the Monitor, the Chief Restructuring Officer, the Applicants' counsel and counsel to the boards of directors of the Applicants, the Applicants seek the Administration Charge in favour of these professionals to secure payments of their reasonable fees and disbursements incurred both prior to filing and after in the amount of \$250,000.

⁶⁵ CCAA, ss. 11.51 and 11.52.

84. In order to grant the Administration Charge, the Court must conclude that (i) notice has been given to the secured creditors likely to be affected by the charge; (ii) the amount is appropriate; and (iii) the charges should extend to all of the proposed beneficiaries.⁶⁶
85. Due to the confidential nature of this Application and the operational issues that would arise as a result of prior disclosure of these proceedings to all secured creditors, all known secured creditors have not been provided with notice of this application at the current time. The sole potential secured creditor of the Applicants who has been provided with notice of this Application is Bank of Nova Scotia. For this reason, the proposed Initial Order provides that the Administration Charge shall, at this time, rank subordinate the security interests of all other secured creditors of the Applicants with the exception of Bank of Nova Scotia. The Applicants will seek an order providing for the subordination of all other security interests to the Administration Charge in the near future following notice to all potentially affected secured creditors.
86. The amount of the Administration Charge requested is up to \$250,000. The Proposed Monitor has reviewed the Administration Charge. It is required and reasonable in the circumstances in order to allow the proposed restructuring to move forward in respect of the Applicants.
87. The amount of the Administration Charge is very limited in the circumstances when considering the professional services involved in this restructuring and

⁶⁶ *Canwest Global* at para. 38, Book of Authorities of the Applicant, Tab 8.

the size and complexity of the restructuring. There is no unwarranted duplication of roles.⁶⁷

88. The beneficiaries of the Administration Charge are (a) the Monitor and its counsel; (b) counsel to the Applicants; (c) the Chief Restructuring Officer; and (d) counsel to the board of directors. The Applicants and the proposed Monitor believe that the above-noted professionals have played and will continue to play a necessary and integral role in the restructuring activities of the Applicants.
89. The professionals who are the proposed beneficiaries of the Administration Charge have requested the benefit of such a charge in order to continue to participate in these proceedings.

ii. Directors' Charge

90. In order to secure certain indemnities granted by the Applicants to their directors and officers and the CRO for obligations that may be incurred by those directors or officers or the CRO, in their capacities as such, after the commencement of the CCAA proceedings, the Applicants seek the Directors' Charge in favour of the directors and officers and the CRO in the amount of CDN\$750,000.
91. The Directors' Charge will provide the directors and officers of the Applicants with additional protections and safeguards against liabilities that they may incur while they continue in their roles during the restructuring process.

⁶⁷ *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 at para. 54 [*Canwest Publishing*], Book of Authorities of the Applicant, Tab 11.

Retaining these directors and officers will provide stability to the Applicants and will enable these experienced directors and officers to remain engaged.

92. In order to grant the Directors' Charge, the Court must be satisfied that (i) notice has been given to the secured creditors likely to be affected by the charge; (ii) the amount is appropriate; (iii) the Applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and (iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.⁶⁸
93. As mentioned above, all known secured creditors have not been provided with notice of this application at the current time. The sole potential secured creditor of the Applicants who has been provided with notice of this Application is Bank of Nova Scotia. For this reason, the Applicants propose that the priority of the Directors Charge be handled in the same manner as the Administration Charge.
94. The amount of the charge was estimated taking into consideration the existing directors' and officers' insurance that is available and the potential liabilities which may attach including certain employee related obligations. The Directors' Charge only relates to matters arising after the commencement of these CCAA proceedings. In establishing the quantum of the Directors' Charge the Applicants considered their outstanding payroll obligations at any particular point in time in a pay cycle as well as outstanding vacation pay and anticipated

⁶⁸ CCAA, s. 11.51.

liabilities for remittances to government authorities. The Proposed Monitor has reviewed and has raised no concerns about the Directors' Charge. The Directors' Charge is needed in the circumstances of these proceedings in order to preserve the going concern operations of the business. On that basis, it is respectfully submitted that this Court should be satisfied that the amount of the Directors' Charge is appropriate.⁶⁹

95. While the Applicants do maintain insurance for their directors and officers, the Applicants cannot be certain that such insurance will be sufficient for all purposes. The proposed Initial Order provides for protection of the Directors' Charge to be engaged only in the event that such directors' and officers' insurance is not adequate. This Court has taken this approach with Directors' Charges in similar circumstances in the recent past.⁷⁰

96. The benefit of this charge has also been provided to the CRO in connection with indemnity obligations analogous to those that the Applicants have to their appointed and elected officers and directors. While these indemnity obligations could also be the subject of the Administration Charge, the Applicants believe that it is more appropriate in the circumstances to secure those obligations under the Directors' Charge as such indemnity obligations would be analogous to the indemnities in favour of the Applicants' elected and appointed directors and officers for which the Directors' Charge has been created

⁶⁹ *Canwest Global*, at paras. 47 and 48, Book of Authorities of the Applicant, Tab 8.

⁷⁰ *Prizm Income Fund (Re)*, 2011 ONSC 2061 at para. 45, Book of Authorities of the Applicant, Tab 12.

97. The Directors' Charge contemplated by the Initial Order expressly excludes claims that arise as a result of a director's or officer's gross negligence or wilful misconduct.

C. Chief Restructuring Officer and Sealing Order

98. In order to assist in the implementation of this CCAA process, the Applicants seek the approval and authorization of the Court of the retention of the CRO by VON Canada, and approval of the terms of the CRO Engagement Letter.

99. Section 11 of the CCAA provides the Court with authority, subject to the restrictions contained in the CCAA, to make any order that it considers appropriate in the circumstances. Courts have in the past used this authority to approve agreements that the debtor company has entered into, including advisory agreements.⁷¹

100. The approval of the engagement of the CRO is appropriate in the circumstances as the CRO continues to be critically important to VON Canada's continued restructuring efforts, having worked extensively with VON Canada to date in its pre-CCAA restructuring efforts and having extensive knowledge of the options reviewed and available VON Canada. The Chief Restructuring Officer's background knowledge is necessary to the ongoing review of strategic alternatives for VON Canada. The Chief Restructuring Officer has played, and will continue to play, a central role in advancing the restructuring.

⁷¹ *Sino-Forest Corp. (Re)*, 2012 ONSC 2063 at paras. 44–47, Book of Authorities of the Applicant, Tab 13; *Northstar Aerospace, Inc. (Re)* (June 14, 2012), Toronto CV-12-9761-00CL (Ont. S.C.J.) at para. 11, Book of Authorities of the Applicant, Tab 14; *8440522 Canada Inc. (Re)* (2013), 8 C.B.R. (6th) 86 (Ont. S.C.J.) at para. 47, Book of Authorities of the Applicant, Tab 15.

101. The Applicant seeks to have the terms of the CRO Engagement Letter sealed. In *Sierra Club of Canada v. Canada (Minister of Finance)*⁷², the Supreme Court of Canada held that sealing orders should be granted when:

- a) an order is needed to prevent serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and
- b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

102. The information subject to the sealing request is commercially sensitive information which if disclosed would have a detrimental impact on the Chief Restructuring Officer's ability to negotiate compensation on any future engagements.⁷³ The Proposed Monitor has reviewed the amount of the fees payable to the proposed Chief Restructuring Officer and has not raised any concerns in connection therewith. The sealing order will not prejudice stakeholders and is therefore appropriate.

D. Performance of Pre-Filing Obligations

103. The payment of the proposed pre-filing amounts on account of certain obligations to employees, professionals, volunteers, directors, assistants and credit card issuers are justifiable in the circumstances.

⁷² 2002 SCC 41, at para. 53, Book of Authorities of the Applicant, Tab 16.

⁷³ *Canwest Publishing* at para. 65, Book of Authorities of the Applicant, Tab 11.

104. The continued service of the Applicants' continuing employees, professionals and assistants will be essential in the post-filing period to move forward with the Applicants' restructuring efforts. There is a significant risk that these parties will not continue to provide services if not paid for pre-filing obligations.
105. The continued access to the company's credit cards, which have been issued by Bank of Nova Scotia is important from an administrative perspective. Bank of Nova Scotia has agreed to the continued use of these credit cards in the post-filing period, but amounts incurred in the pre-filing period must be paid. These amounts represent ordinary course expenditures of the Applicants.

E. The Key Employee Retention Plan Should Be Approved

106. The Applicants seek approval of a Key Employee Retention Plan in the amount of up to \$240,000 payable to key employees during 2016.
107. The Applicants' employees all have skills that are transferrable to other organizations and even other industries. Therefore, in the circumstances, there is a strong possibility that certain critical employees would consider other employment options without the benefit of retention compensation.⁷⁴ Given the specialized nature of the Applicants' industry, the experience and knowledge of these critical individuals is highly valuable.⁷⁵ The applicable employees' all have

⁷⁴ *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 at para. 14 [*Grant*], Book of Authorities of the Applicant, Tab 17.

⁷⁵ *Grant* at para. 11, Book of Authorities of the Applicant, Tab 17.

extensive history and knowledge of the Applicants.⁷⁶ The Applicants are unlikely to be able to adequately replace any of their critical employees at this time.⁷⁷

108. The Key Employee Retention Plan was approved by the board of directors of the Applicants. The Court should not unnecessarily second guess the business decisions of the board of directors.⁷⁸

109. The Applicants request that Key Employee Retention Plan be sealed at this time. These agreements contain sensitive personal compensation information about identifiable individuals. Disclosure of this information could cause harm to the beneficiaries of the Key Employee Retention Plan and would be contrary to the reasonable expectation of these employees that their personal employment information would remain confidential. Sealing orders have been made in similar circumstances by this Court in the past and should be made in this case as well.⁷⁹

F. The Modified Cash Management System Should Be Approved

110. The Modified Cash Management System effectively segregates the cash management of the non-Applicant entities at VON Ontario and VON Nova Scotia from the existing cash consolidation arrangement and maintains an effective cash management arrangement for the Applicants to collectively fund their operations going forward.

111. This approach is appropriate in the circumstances because:

⁷⁶ *Grant* at para. 12, Book of Authorities of the Applicant, Tab 17.

⁷⁷ *Timminco Ltd. (Re)* 2012 ONSC 506 at para. 75 [*Timminco KERP*], Book of Authorities of the Applicant, Tab 18.

⁷⁸ *Timminco KERP* at para. 73, Book of Authorities of the Applicant, Tab 18.

⁷⁹ *Timminco KERP* at para. 78, Book of Authorities of the Applicant, Tab 18.

(a) VON Ontario's and VON Nova Scotia's assets are preserved in a segregated pool;

(b) VON East and VON West are able to receive much needed limited funding from cash on hand at VON Canada to permit the orderly wind down of their operations. VON East and VON West are forecasted to be cash flow negative in the future.

(c) VON Canada's stakeholders are not materially prejudiced as any cash currently on hand at VON Canada was not generated by VON Canada, which has no revenue generating operations, but is instead the product of an existing cash pooling arrangement amongst all VON Group entities. Further, to the extent there is any limited prejudice to VON Canada this is justifiable as it represents the continuation of an ordinary course arrangement between VON East and VON West and it is in the public interest that VON East and VON West be wound down in an orderly manner and that critical programs are not abruptly cut off at this time.

G. The Receivership Order Should Be Granted

112. The *Wage Earner Protection Program Act (Canada)* ("WEPPA") was established to make payments to individuals in respect of wages (as defined in WEPPA) owed to them by employers who are bankrupt or subject to a receivership. The amounts that may be paid under WEPPA to an individual are the amount of eligible wages owing to the individual up to the maximum of four times maximum weekly insurable earnings under the *Employment Standards Act*. Wages for the purposes of WEPPA include, among other things, severance pay and

termination pay that relate to employment that ended during the six months prior to the day on which proceedings are commenced under the CCAA and vacation pay accrued during that same period.⁸⁰

113. In aggregate, over 300 employees are expected to be terminated at the commencement of this proceeding. These employees will be paid their ordinary course salary and wages up to the date of their termination. However, the Applicants do not have sufficient liquidity to pay these employees amounts in respect of termination or severance pay or accrued vacation pay at this time. These amounts will be substantial.
114. The terminated employees would not be able to access protection under WEPPA in the current circumstances unless a receiver is appointed over VON Canada, VON East and VON West. A bankruptcy cannot be undertaken in the circumstances in connection with VON East and VON West as this would likely compromise the wind down of key services at those entities. VON East and VON West must remain under the operational control of existing management in order to ensure that the wind down can be properly undertaken.
115. A “receiver” under WEPPA includes a receiver within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act* (Canada) and for the purposes of WEPPA, an employer is subject to receivership if any property of the employer is in the possession or control of a receiver.⁸¹ A receiver over goodwill and intellectual property of the Applicants would qualify as a Receiver under Section

⁸⁰ *Wage Earner Protection Program Act*, S.C. 2005, c. 47 [WEPPA], ss. 2, 5 and 7.

⁸¹ WEPPA, s. 2.

243(2) of the *Bankruptcy and Insolvency Act* (Canada).⁸² A receiver under Section 243(2) of the *Bankruptcy and Insolvency Act* (Canada) includes a receiver appointed under the *Courts of Justice Act* (Ontario) if appointed to take control over all or substantially all of the debtor's accounts receivable, inventory or other property. In this case the proposed receiver would take control over substantially all of the Applicants' property other than accounts receivable and inventory subject to the terms of the proposed receivership order.

116. A company may apply to appoint a receiver over itself and its affiliates under Section 101 of the *Courts of Justice Act* (Ontario) and the Court can grant an Order approving the appointment of the Receiver if it is just or convenient to do so.⁸³

117. In assessing whether it is just or convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed than not after consideration of all of the circumstances of the case.⁸⁴

118. This Court has found that it was both just and convenient to appoint a receiver under section 101 of the *Courts of Justice Act* (Ontario) over certain property of a CCAA debtor within a concurrent CCAA proceeding where the purpose of the receivership was to clarify the position of employees with respect to WEPPA.⁸⁵ In *Cinram (Re)*, Regional Senior Justice Morawetz approved the appointment of

⁸² *BIA*, s. 243(2).

⁸³ *Tool-Plus Systems Inc. (Re)*, 2008 CarswellOnt 6257 (Ont. S.C.J.) at para 3, Book of Authorities of the Applicant, Tab 19.

⁸⁴ *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONSC 1911 (Ont. S.C.J.) at para. 22, Book of Authorities of the Applicant, Tab 20.

⁸⁵ *Cinram (Re)*, (October 19, 2012), Toronto CV-12-9767-00CL, Book of Authorities of the Applicant, Tab 21.

a receiver over certain limited property of a CCAA debtor company for the same purposes that the receivership is being sought in this case.

119. In the current circumstances, no stakeholder would be prejudiced by the proposed Receivership Order. By contrast, there would be significant prejudice to the terminated employees if they were not able to access protection under WEPPA at this time. The amounts that will remain unpaid to employees upon termination on account of vacation pay, termination pay and severance pay will be significant.

120. It is respectfully submitted that it is both just and convenient in the circumstances of this particular case to appoint a receiver under Section 101 of the *Courts of Justice Act* (Canada) over the specified property of Applicants.

PART IV - NATURE OF THE ORDER SOUGHT

121. If the requested relief is not granted, the most likely scenario is an eventual cessation of business of the VON Group. This result will have an immediate adverse impact on the VON Group's stakeholders and the communities that depend upon the core service offerings of the VON Group, particularly in the core regions of Ontario and Nova Scotia. The Applicants therefore request an Order substantially in the form of the draft Initial Order and Receivership Order filed with the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of November,
2015.

Norton Rose Fulbright Canada LLP

Norton Rose Fulbright Canada LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

- 1 *Stelco Inc. (Re)*, [2004] O.J. No. 1257 (S.C.J.).
- 2 *Winnipeg Motor Express Inc. (Re)*, 2008 MBQB 297.
- 3 *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.).
- 4 *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).
- 5 *Woodward's Ltd. (Re)* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).
- 6 *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 153.
- 7 *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500.
- 8 *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.).
- 9 *Jaguar Mining Inc. (Re)* (2013), 12 C.B.R. (6th) 290.
- 10 *4519922 Canada Inc. (Re)* (2015), 22 C.B.R. (6th) 44.
- 11 *Canwest Publishing Inc. (Re)*, 2010 ONSC 222.
- 12 *Priszm Income Fund (Re)*, 2011 ONSC 2061.
- 13 *Sino-Forest Corp. (Re)*, 2012 ONSC 2063.
- 14 *Northstar Aerospace, Inc. (Re)* (June 14, 2012), Toronto CV-12-9761-00CL (Ont. S.C.J.).
- 15 *8440522 Canada Inc. (Re)* (2013), 8 C.B.R. (6th) 86 (Ont. S.C.J.).
- 16 *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41.
- 17 *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128.
- 18 *Timminco Ltd. (Re)* 2012 ONSC 506.
- 19 *Tool-Plas Systems Inc. (Re)*, 2008 CarswellOnt 6257 (Ont. S.C.J.).
- 20 *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONSC 1911 (Ont. S.C.J.).
- 21 *Cinram (Re)*, (October 19, 2012), Toronto CV-12-9767-00CL.

**SCHEDULE “B”
RELEVANT STATUTES**

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

Definitions

2. In this Act,

“insolvent person”

« personne insolvable »

“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;

Definition of “receiver”

243. (2) Subject to subsections (3) and (4), in this Part, “receiver” means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Companies' Creditors Arrangement Act, R.S.C. 1985, CHAPTER C-36

Definitions

2. (1) In this Act,

“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;

“equity claim” means a claim that is in respect of an equity interest, including a claim for, among others,

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

“equity interest” means

- (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419.

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.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

Documents that must accompany initial application

10. (2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (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 that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Restrictions on who may be monitor

11.7 (2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Quebec that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

1997, c. 12, s. 124; 2005, c. 47, s. 129.

Wage Earner Protection Program Act, S.C. 2005, c. 47

Definitions

2. (1) The following definitions apply in this Act.

“eligible wages”

« salaire admissible »

“eligible wages” means

(a) wages other than severance pay and termination pay that were earned during the longer of the following periods:

(i) the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer, and

(ii) the period beginning on the day that is six months before the day on which a proposal under Division I of Part III of the Bankruptcy and Insolvency Act is filed by or in respect of the employer or the day on which proceedings under the Companies' Creditors Arrangement Act are commenced and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer; and

(b) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (a).

“wages”

« salaire »

“wages” includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.

Employers subject to a receivership

(2) For the purposes of this Act, an employer is subject to a receivership when any property of the employer is under the possession or control of a receiver.

Meaning of “receiver”

(3) In this Act, “receiver” means a receiver within the meaning of subsection 243(2) of the Bankruptcy and Insolvency Act.

Words and expressions

(4) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the Bankruptcy and Insolvency Act.

Related persons

(5) Despite subsection 4(5) of the Bankruptcy and Insolvency Act,

(a) for the purposes of paragraph 6(d), an individual is considered to deal at arm's length with a related person if the Minister is satisfied that, having regard to the circumstances — including the terms and conditions of the individual's employment with the former employer, their remuneration and the duration, nature and importance of the work performed for the former employer — it is reasonable to conclude that the individual would have entered into a substantially similar contract of employment with the former employer if they had been dealing with each other at arm's length; and

(b) for the purposes of subsection 21(4), individuals who are related to each other are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length while so related.

2005, c. 47, s. 1 "2"; 2007, c. 36, s. 83; 2009, c. 2, s. 342; 2011, c. 24, s. 163; 2012, c. 19, s. 697(E).

Conditions of eligibility

5. An individual is eligible to receive a payment if

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

(b) the former employer is bankrupt or subject to a receivership; and

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

(d) [Repealed, 2009, c. 2, s. 343]

2005, c. 47, s. 1 "5"; 2007, c. 36, s. 84; 2009, c. 2, s. 343.

Amount of payment

7. (1) The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of the greater of the following amounts, less any amount prescribed by regulation:

(a) \$3,000; and

(b) an amount equal to four times the maximum weekly insurable earnings under the Employment Insurance Act.

Bankruptcy and receivership

(2) If the former employer is both bankrupt and subject to a receivership, the amount that may be paid is the greater of the amount determined in respect of the bankruptcy and the amount determined in respect of the receivership.

2005, c. 47, s. 1 "7"; 2007, c. 36, s. 86; 2009, c. 2, s. 345.

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
VICTORIAN ORDER OF NURSES FOR CANADA

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

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