Court File No. CV-24-

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF 1000195736 ONTARIO LTD., 1000193772 ONTARIO LTD. AND MORGIS CORPORATION

FACTUM OF 1000195736 ONTARIO LTD., 1000193772 ONTARIO LTD., AND MORGIS CORPORATION

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Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

Jason Wadden (LSO# 46757M)
Tel: 416.627.9815
Email: jwadden@tyrllp.com

Shimon Sherrington (LSO# 83607B)
Tel: 587.777.0367
Email: ssherrington@tyrllp.com

Lawyers for the Applicants

TO: **THE SERVICE LIST**

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PART I - OVERVIEW[1]

1. 1000195736 Ontario Ltd. (the "**736**"), 1000193772 Ontario Ltd. ("**772**") and Morgis Corp. ("**MC**") (together, the "**Eglinton Project Entities**" or the "**Debtors**") bring an application for protection under the *Companies' Creditor Arrangement Act,* R.S.C. 1985, c-36 (the "**CCAA**") for creditor protection in light of the receivership application (Court File No. CV-24-00716381-00CL) (the "**Receivership Application**") brought by the Applicant mortgagees therein (collectively, the "**Trilend Lenders**" or the "**Lenders**").

2. The Debtors are developing an important community-building, multi-use development in mid-town Toronto (the "**Eglinton Project**" or the "**Project**"). The Project is in the pre-construction, development phase. The operating costs of the existing buildings are covered by current rent revenues. However, the Debtors now seek the protection of the CCAA because the Trilend Lenders, who were to be the lenders at least until construction, pulled out of the Project. This has left the Debtors to obtain replacement financing at a time when the development financing market is experiencing extraordinary dislocation, making the refinancing process take longer than expected. The Debtors have a commitment in place that is expected to close on or before August 31, 2024, and have a number of other refinancing alternatives that they are working on that respond to the changes in the development financing market. Nonetheless, the Trilend Lenders are proceeding with their Receivership Application, necessitating the commencement of this CCAA Application.

[1] All capitalized terms which are used but not defined in this section have the meanings ascribed to them in subsequent sections of this factum.

3. The Court should grant the CCAA Application based on the following six criteria that are applied when considering competing CCAA and receivership applications:

(i) ***The relationship between debtor and creditors.*** The relationship between a debtor and its creditors, including creditor faith in the Debtor's management[2] is a relevant consideration in contested applications. In this case, the creditors did not claim loss of faith in management in their initial materials (and only made a bald claim in their reply materials) and there is no basis that allows them to credibly claim a loss of faith in the Debtors' management.

(ii) ***The likelihood of success of a CCAA.*** The feasibility of a CCAA process is an important consideration. In cases where courts have been unconvinced about the viability of the CCAA process, receiverships have been granted.[3] But in cases where viable financial commitments are on the table,[4] CCAA orders are granted. Courts have granted a CCAA application where debtor property owners demonstrated equity in several properties allowing for the mere possibility of financing.[5] In this case, there is a firm commitment on the table (the "**Commitment**") that will pay out Trilend's Mortgages,[6] as well as there being ample equity in the Project to allow for the possibility of additional lenders.[7]

(iii) ***Value maximization.*** Value maximization for creditors is a central consideration

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[2] *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, especially at paras 25 - 33.
[3] See e.g., *Dondeb Inc. (Re)*, 2012 ONSC 6087; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para 36; *Callidus v. Carcap*, 2012 ONSC 163 at para 54.
[4] *Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd.*, 2013 BCSC 2358, at paras 13, 38 – 39; *Hush Homes Inc. (Re)*, 2015 ONSC 370 at paras 24 – 31.
[5] *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para 24.
[6] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 2 at para 7.
[7] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 2 at para 2 – 10.

in insolvency proceedings.[8] Courts will prefer the process that offers the greatest possibility of recovery to creditors, while preserving debtor enterprise value as much as possible.[9] In this case, the Commitment on the table promises full payout of the Trilend Mortgages.[10] By contrast, the receivership threatens to destroy significant value created over fourteen years assembling the Project,[11] including because additional transactions will not be able to close under a receivership nor will the ongoing development work, which will substantially reduce the ultimate value of the Project.[12]

(iv) ***The effects on stakeholders.*** One of the fundamental policy objectives of the CCAA is "avoiding the social and economic losses resulting from liquidation of an insolvent company."[13] In addition to the years-long investment and efforts made by the Morgis Group's direct stakeholders, including the service providers and contractors who are owed money,[14] the Project has numerous community stakeholders based on its promise to revitalize an underdeveloped part of the City[15] and based on the Project's significant charitable component: Five percent of the Project's units will be highly subsidized homes for women and children.[16]

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[8] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paras 40 and 42.
[9] *Re Skydome Corp,*1998 CarswellOnt 5914 (Ont Sup Ct J (Gen Div) [Comm List]) at paras 12 – 18.
[10] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 4 at para 2 – 4.
[11] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 29.
[12] As fully explained in the Morgis Confidential Affidavit affirmed May 9, 2024, schedule 1.
[13] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 70.
[14] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para35.
[15] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 26.
[16] A partnership has been entered into with the Red Door charity to provide these homes, building on an existing partnership: Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 25.

(v) ***The behaviour of the parties.*** The behaviour of both the debtor[17] and creditors[18] is relevant to the determination of whether a CCAA application should be granted. The CCAA requires that a debtor act with good faith and due diligence.[19] That requirement is met here. The Debtors have been in constant communication with Trilend, both before and after Trilend decided to pull its financing commitment.[20] The Debtors are doing everything possible to payout Trilend's Mortgages at the earliest opportunity[21] while still funding and advancing the Project through the zoning and approval process.[22] By contrast, Trilend pulled its commitment after repeatedly indicating a long-term financial partnership.[23] This favours the CCAA process.

(vi) ***Prejudice to the secured creditors under a CCAA.*** Courts will consider prejudice to creditors in determining whether a CCAA or receiver is preferable.[24] There is no practical prejudice to the Lenders in proceeding with a CCAA

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[17] Positive behaviour militates in favour of granting a CCAA application over a receivership: *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 81 at para 57. Dishonesty on the part of the debtor favours the granting of a receivership: *SLMSoft Inc., Re,* 2003 CarswellOnt 4402, where there was evidence that the debtor entered into self-dealing transactions to the detriment of creditors; *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.,* [2024] (Ont SCJ [Commercial List]), Court File No CV-23-00710361-00CL concerning a previous finding of fund misappropriation in another court Action; *Retail Funding Inc. v. Cotton Ginny Inc.,* 2008 CarswellOnt 4808 at paras 71 – 72, where the debtor violated forbearance agreements through unauthorized distribution of funds.

[18] See e.g., *Royal Bank v. Chongsim Investments Ltd*., 1997 CanLII 12112 (ON SC).

[19] CCAA section 11.02(3b).

[20] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 48; Morgis Confidential Affidavit affirmed May 9, 2024, schedule 1 at para 4; Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 60.

[21] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 58 - 60.

[22] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 67; as more fully set out in Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 3 at paras 2 – 5.

[23] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 52 – 53.

[24] *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 at para 71 – 75. A secondary factor is whether the CCAA process will eat into creditor recovery: *Shire International Real Estate Investments Ltd. (Re)*, 2010 ABQB 84 at para 9. The equity in the Project means this is not a material concern in this case.

process. The complexity of the Project and current market conditions mean that the Lenders can only expect to receive proceeds from the Receivership Application roughly along the same timeline as under the proposed CCAA process, and much later than if the Commitment closes.[25] If the Commitment does not close, the Debtors will return after that three month period for the approval of a sale and investment solicitation process ("**SISP**") to have a sale process run concurrently with on-going refinancing efforts. All of the appraisals show that the property is worth far more than the amounts owing to the Lenders, and there is no real risk of that value eroding such that the Lenders' secured position would be in jeopardy. Further, as described below, the Debtors are not seeking DIP financing to prime the Lenders, and the Administration Charge being sought is less than the Receivers' Borrowing Charges sought by the Lenders. Accordingly, they will not suffer prejudice from a CCAA process.

4. For these reasons, the Debtors respectfully request that the proposed Initial Order be granted.

PART II - SUMMARY OF FACTS

A. The Eglinton Project Entities.

5. Each of the Eglinton Project Entities are corporations incorporated under the *Business Corporations Act* (Ontario). They are part of the broader Morgis group of companies (the "**Morgis Group**"). The Morgis Group has successfully developed over 400 construction and real estate development projects in the residential, commercial,

[25] Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 2 at para 7.

and industrial sectors across the Greater Toronto Area in the last 40 years.[26] Morgis Group is currently managing 23 multi-family properties with over 870 residential units, 35 commercial properties with over 200 commercial units, and 31 industrial multi-unit locations which house over 290 individual businesses.[27]

6. The Project site currently has commercial buildings occupied by mom-and-pop shop type businesses. The rental revenues are modest but fund maintenance and operations costs of the properties.[28] It has been the Morgis Group, using funds generated from its other businesses, that have funded the development work for the Project (this will continue to during the CCAA). The Debtors are only insolvent as they cannot repay the Mortgages (defined below) which are due and owing.

7. The Eglinton Project Entities do not directly employ any employees. Rather, the Morgis Group uses its team of employees (36 direct employees), service providers and contractors (including approximately 50 consulting firms for professional services) to carry out work for the Eglinton Project.[29]

B. The Eglinton Project and the Trilend Mortgages.

8. The Project is a land assembly and development project in the heart of Toronto at the intersection of Eglinton Avenue West and Avenue Road. The Morgis Group has worked over the last fourteen years planning for the Project and assembling properties for the purposes of this Project.[30] The Project is now in the advanced stages of planning

[26] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 7 – 8.
[27] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 7 – 8.
[28] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 37.
[29] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 35.
[30] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 9.

and zoning approval,[31] reflecting the significant work which has been undertaken to date by the Morgis Group. This planning and zoning work has continued notwithstanding the Trilend Lenders' decision to withdraw from the Project, and has continued to be funded by the Morgis Group.[32]

9. The individual parcels of land that are subject to the Mortgages are held by the Eglinton Project Entities as follows: (a) 736 is the registered owner and mortgagor of 368, 370, 372, 374, 376 and 378 Eglinton Avenue West; (b) 772 is the registered owner and mortgagor of 366 Eglinton Avenue West; and (c) MC is the registered owner and mortgagor of 346, 350 and 352-356 Eglinton Avenue West.[33]

10. The "**Mortgages**" are: (a) a $15,500,000 mortgage dated April 6, 2021; (b) a $33,000,000 mortgage dated April 6, 2022; and (c) a $4,500,000 mortgage dated March 1, 2023. The parties to each of the Mortgages one or more of the Eglinton Project Entities as borrowers on one hand, and the Trilend Lenders, as lender, on the other hand.[34] The collective amount owed by the Eglinton Project Entities under the Mortgages held by Trilend is $53,000,000 plus interest.[35]

11. The importance of the Eglinton Project transcends the Debtors and the Morgis Group and extends to a range of present and future stakeholders. This Project is vital to the city and the revitalization of this community, providing much needed purpose-built rental homes amidst the ongoing housing crisis and community gathering spaces along

[31] As fully set out in Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 3 at paras 2 – 5.
[32] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 67.
[33] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 36.
[34] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 39.
[35] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 39.

a chronically underdeveloped stretch of Eglinton Avenue.[36] The Project also furthers federal and local government priorities to densify the area around the Crosstown Eglinton LRT line, which itself is a $12 billion transit project.[37] The Project has the support of the City of Toronto and its current incarnation reflects the City's design requests to ensure that historic elements of this area are preserved.[38]

12. Central to the Project is a significant charitable component. Five percent of the units have been committed as highly subsidized housing for women and children in need through the Red Door Family Shelter charity. These homes will mean that families which would live in a shelter will instead live in high quality housing.[39]

C. The Involvement of the Trilend Lenders and the Pullout of Financing

13. The involvement of the Trilend Lenders in the Project dates back to April 2021. Trilend Inc. ("**Trilend**"), acting on behalf of the Trilend Lenders, agreed to arrange and provide financing for the Eglinton Project. The Trilend Lenders' commitment was envisioned to be a long-term one from the outset of the relationship: it was expected to continue through to the Eglinton Project's readiness for construction, if not completion.[40] Trilend was specifically chosen over other prospective lenders based on the representation that it would be a long-term partner in the Project.[41]

[36] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 9.
[37] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 26.
[38] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 9.
[39] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 25.
[40] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 46 – 47.
[41] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 47.

14. The first two years of the relationship between the parties went smoothly. Morgis Group provided regular updates on status and plans for the project[42] and Trilend maintained it would be a long-term partner, including through providing the additional $33,000,000 and $4,500,000 mortgages.[43] In March 2023, at the time that the $4,500,000 Mortgage was entered into, the maturity of all of the Mortgages was set at a common maturity date of September 1, 2023, with the understanding being that on maturity the Mortgages would be consolidated into one facility,[44] a plan which dovetailed with the progression of other parts of the Project.[45]

15. The Trilend Lenders' long-term commitment to the Project abruptly changed in June 2023, when Trilend advised of their intention to exit the Project.[46] This occurred after numerous representations up until May 2023 that ongoing funding continued to be solid.[47]

16. Trilend's withdrawal came at an extremely challenging time in the real estate credit market space, which is suffering from an extraordinary dislocation as a result of the knock-on effects of the COVID-19 pandemic.[48] The once in a multi-generational slowdown made it impossible for the Eglinton Project Entities to secure alternative financing to payout the Mortgages on a short timeframe being demanded by Trilend.[49]

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[42] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 48; Morgis Confidential Affidavit affirmed May 9, 2024, schedule 1 at para 4.
[43] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 50.
[44] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 51.
[45] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 1 at paras 4 – 8.
[46] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 54.
[47] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 52 – 53.
[48] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 19.
[49] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 60.

17. Notwithstanding the significant market challenges, Morgis Group worked tirelessly to find alternative sources of financing upon Trilend's pullout in June 2023.[50] In 2023, Morgis Group secured seemingly firm expressions of interest from two prospective lenders: Marshall Zehr and Provizia Capital. To facilitate the expected forthcoming Marshall Zehr and Provizia Capital financing, Morgis Group secured extensions from Trilend through extension agreements which provided additional security to Trilend.[51] Trilend's suggestion that Trilend was provided with no consideration for the extension agreements,[52] is simply not accurate.[53] Unfortunately, the Marshall Zehr and Provizia Capital prospective commitments eventually collapsed in the late part of 2023 and early 2024.[54]

18. Since the collapse of the Marshall Zehr and Provizia Capital commitments, Morgis Group reoriented the Eglinton Project based on feedback from prospective lenders in light of current market conditions to a phased approach and sought partnerships with lenders who can more easily advance smaller portions of funds, which collectively will be sufficient to pay out the Mortgages.[55] This reorientation has been fruitful, as the Debtors now have a commitment from an international lender as well as a number of other additional prospective refinancing options.[56]

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[50] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 58 - 60.
[51] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 61 – 64.
[52] Affidavit of Donald Ierfino sworn May 16, 2024, at para 11.
[53] Morgis Confidential Affidavit affirmed May 22, 2024, at para 10. Additional charges were provided on Morgis Group controlled properties on Lawrence Avenue to secure the extension agreements.
[54] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 65. The financing from Marshall Zehr and Provizia Capital collapsed due to market conditions and other factors fully explained in the Morgis Confidential Affidavit affirmed May 9, 2024, schedule 2 at paras 2 – 4.
[55] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 65.
[56] As fully described in the Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 2.

19. Throughout this time Morgis Group has kept Trilend apprised of the status of its efforts to obtain refinancing through weekly updates and in-person meetings.[57] Trilend's initial application materials do not allege any loss of faith in management of the Debtors.[58] Nor can there be any credible allegation of a loss of faith in management,[59] based on Morgis Group's level of transparency both before[60] and after[61] Trilend indicated its exit from the Project and its work progressing refinancing. (It was only after the Debtors' affidavit noted that the Lenders did not raise a loss of faith in management that the Lenders made a bald allegation that they have lost faith in management.)

20. While the Debtors do not dispute that they are in arrears on Mortgages,[62] the reality is that when Trilend became involved in the Project it was based on the mutual expectation that it would be a long-term financing partner.[63] Based on this mutual understanding, it was always likely that if Trilend were to exit before construction, then the only way that it would be repaid would be via a refinancing as it was clear that the rents from the mom-and-pop shops occupying the current premises would never be sufficient to repay the Mortgages.[64] The timing of that refinancing was a risk all parties took on.

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[57] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 70.
[58] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 70.
[59] While Trilend's reply materials contain a bald statement that the Trilend Lenders "have lost all confidence in Mr. Morgis and the Respondents" (Affidavit of Donald Ierfino sworn May 16, 2024, at para 11) there continues to be no evidence for this assertion.
[60] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 48; Morgis Confidential Affidavit affirmed May 9, 2024, schedule 1 at para 4.
[61] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 60.
[62] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 16.
[63] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 16.
[64] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 14.

PART III - SUMMARY OF ISSUES

21. The issues in the CCAA Application are: (a) should the CCAA be granted instead of the Receivership Application; and (b) whether to approve the sealing request.

PART IV - LAW AND ARGUMENT

A. The Eglinton Project Entities are "debtor companies" under the CCAA

22. Section 9(1) of the CCAA provides that debtor companies may apply for protection under the CCAA in the province where their head offices or chief place of business in Canada are situated.[65] Each of the Eglinton Project Entities is a "debtor company" as that term is defined in the CCAA.[66] They meet the definition of an "insolvent person" as set out in the *Bankruptcy and Insolvency Act* ("**BIA**").[67] A company that satisfies these criteria is considered insolvent for the purposes of the CCAA.[68]

23. The Eglinton Project Entities are insolvent as they are unable to meet their financial obligations (being $53,000,000 under Mortgages, plus interest) as they have become due. The total indebtedness of the Eglinton Project Entities is well over $5 million, the threshold required for affiliated companies under section 3(1) of the CCAA[69].

B. A Stay of Proceedings Should be Granted

24. Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days, provided that a stay is appropriate, and that the applicant is acting with due diligence

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[65] CCAA at section 9(1).
[66] CCAA at section 2(1).
[67] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, at section 2.
[68] *McEwan Enterprises Inc.*, 2021 ONSC 6453, para 26.
[69] CCAA at section 3(1).

and in good faith.[70] The Court may extend the stay to the directors and officers of the debtor company.[71]

25. The Eglinton Project Entities are seeking an initial stay of 10 days (the "**Initial Stay Period**") until the Comeback Hearing, on a date to be scheduled by the Court. The Initial Stay Period is necessary to provide the Eglinton Project Entities with the breathing room to organize their affairs, consult with stakeholders and creditors without the threat of enforcement, and to continue moving forward their viable restructuring plan to pay out the Trilend Mortgages, based on the Commitment which has been obtained.[72]

26. The Eglinton Project Entities require a stay of proceedings to protect the status quo.[73] The Trilend Lenders are seeking to enforce their security through receivership and liquidation of the Eglinton Project. A sale of the land is unlikely to maximize realization of proceeds for the stakeholders of Eglinton Project Entities or Morgis Group, justifying a stay.[74]

27. Relief under the CCAA will also permit the Debtors the time to continue working to ensure that the refinancing moves smoothly ahead, while also continuing to develop other alternative value-maximizing strategies for the Eglinton Project Entities and Morgis Group's stakeholders.

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[70] CCAA at section 11.02(1).
[71] CCAA at section 11.03.
[72] Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 2 at para 6.
[73] As explained by Chief Justice Morawetz in *Lydian International Limited (Re),* 2019 ONSC 7473 at para 26, the status quo should be maintained whenever possible until the Comeback Hearing.
[74] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 5.

C. The Stay Should Be Extended Over Non-Applicants

28. The stay of proceedings should be extended over Chris Morgis, who is the sole director and officer of the Eglinton Project Entities,[75] and has given personal guarantees for each of the Mortgages.[76] Mr. Morgis should be given the protections necessary as a director and officer to be able to continue forward with the CCAA.

29. It is well recognized that courts have the broad jurisdiction under section 11 and 11.02(1) and 11.03 of the CCAA and the court's inherent jurisdiction to grant a stay of proceedings over directors and third parties that are not themselves applicants in a CCAA proceeding.[77] This includes individuals who are third parties.[78] In *McEwan Enterprises Inc.,* the court extended the stay of proceedings over the principal of the applicant on the basis that any enforcement proceedings against the principal would cause significant disruption to the applicant and have a detrimental effect on restructuring efforts.[79] The same considerations apply here: extending the stay to Mr. Morgis is necessary to ensure that he can dedicate is efforts to close the refinancing Commitment at this critical juncture.

D. The Court Should Grant the Administration Charge in the Initial Order

30. Section 11 of the CCAA provides that an order granted on an initial application must be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial 10-day stay

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[75] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 1.
[76] Affidavit of Donald Ierfino sworn April 19, 2024, at paras 21, 24 and 28.
[77] *McEwan Enterprises Inc.*, 2021 ONSC 6453, at para 42; *Re: Tamerlane Ventures Inc. and Pine Point Holding Corp.*, 2013 ONSC 5461, at para 21.
[78] *McEwan Enterprises Inc.*, 2021 ONSC 6453 at paras 19 and 45.
[79] *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para 44.

period.[80] The Eglinton Project Entities request a first priority charge in favour of the monitor, counsel to the monitor, counsel to the Company, and such other professional advisors that may be reasonably necessary (the "**Administration Charge**"). The quantum of the Administration Charge sought is $250,000 for the Stay Period.[81] This amount is half of the Receivers' Borrowing Charge that is being sought by the Lenders in the Receivership Application.

31. Courts have considered the following non-exhaustive factors in determining whether an administrative charge is appropriate: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; (vi) and the position of the monitor.[82]

32. The proposed Administration Charge is necessary and reasonable. The Eglinton Project Entities lack restructuring expertise and need the involvement of restructuring professionals to implement the restructuring process, for the benefit of the Project, the Eglinton Project Entities, their creditors and stakeholders. An administration charge is considered fair and reasonable where its quantum is not disproportionate to the complexity of the business and restructuring.[83] The amount of the Administration Charge is reasonable and proportionate considering the nature of the Project.

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[80] CCAA at section 11.
[81] CCAA at section 11.52 requires that notice be given to the secured creditors and that the charge is limited to an amount that the court considers appropriate, criteria which are met.
[82] *Canwest Publishing Inc.,* 2010 ONSC 222 at para 54.
[83] *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para 40.

33. Considering the level of equity in the Project, Trilend's commitment amount under the Mortgages is secured[84] and not prejudiced by the Administration Charge.

E. DIP Financing Should Be Considered at the Comeback Hearing

34. If the Initial Order is granted, the Eglinton Project Entities will return with a detailed debtor-in-possession financing ("**DIP**") proposal for the Court's consideration at the Comeback Hearing. The DIP proposal will provide for security subordinate to Trilend's position, meaning Trilend will not be prejudiced by the DIP financing.

F. The CCAA Process is Preferable to the Receivership Process

35. The CCAA process is the preferable procedure compared to the proposed receivership. As Justice Penny explained in *Hush Homes Inc. (Re)*, the determination regarding which of a receivership or CCAA is preferable is "highly discretionary in nature, requiring the court to consider and balance the competing interests of the various economic stakeholders … [and is] very circumstance-oriented".[85] There are numerous cases in the real property space where courts have considered the competing merits of a CCAA process and a receivership process, and decisions have gone both ways.[86] There are six factors that courts have applied time and again in contested applications. In this case, the six factors support the CCAA application.

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[84] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 4 at para 2 – 4.
[85] *Hush Homes Inc. (Re)*, 2015 ONSC 370 at para 20.
[86] Examples of decisions where the Court has found that a CCAA process is preferable include: *Re 2607380 Ontario Inc,* [2020] (Ont SCJ [Commercial List]), Court File No CV-20-00636875-00CL; *Hush Homes Inc. (Re)*, 2015 ONSC 370; *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775; *Re Lehndorff General Partners Ltd.*, 1993 CarswellOnt 183 (Gen. Div.). Examples of decisions where the Court found a receivership process preferable include: *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327; *Dondeb Inc. (Re)*, 2012 ONSC 6087; *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953. In *Shire International Real Estate Investments Ltd. (Re)*, 2010 ABQB

i. The Relationship Between Morgis Group and Trilend

36. Courts will consider the relationship between a creditor and a debtor, including considerations such as whether a creditor has a basis to allege a loss of faith in management,[87] and if the relationship between the parties has broken down to the point that leaving debtor management in place under a CCAA would be untenable.[88]

37. These factors are not present in this case. Trilend's initial application materials did not alleged a lack of faith in management[89] and the evidentiary record shows that Morgis Group has acted diligently and transparently, both in its dealings with Trilend[90] and with respect to the preservation of value of the Eglinton Project.[91] The late and bald assertion contained in Trilend's reply materials regarding a loss of confidence is based on a statement that is not only factually misleading[92] but not born out at all in the evidentiary record. Further, there is no evidence before the Court to suggest there has

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84 an initial CCAA order was granted, but at the comeback hearing the CCAA stay extension was denied and the proceeding was converted into a receivership, based on the risk that continuing with the CCAA proceedings would put secured creditors at risk (see especially, para 9). *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.,* [2024] (Ont SCJ [Commercial List]), Court File No CV-23-00710361-00CL was a recent case where a receivership was granted, but the factual record showed no evidence of prospective financing, and the debtors had misappropriated funds in another court Action.

87 *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, especially at paras 25 - 33.

88 *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 at para 73; *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 at para 21.

89 Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 70. Trilend's reply materials do allege a loss of confidence: Affidavit of Donald Ierfino sworn May 16, 2024, at para 11. There is no basis for this bald assertion based on Morgis Group's conduct.

90 Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 48; Morgis Confidential Affidavit affirmed May 9, 2024, schedule 1 at para 4; Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 60.

91 Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 67; as more fully set out in Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 3 at paras 2 – 5.

92 The lack of confidence is based on refusal to "remit any of the monthly interest payments due since September 1, 2023" (Affidavit of Donald Ierfino sworn May 16, 2024, at para 11). This ignores the extension agreements the parties entered into which pushed out the Mortgages to February 1, 2024 based on capitalized interest and additional collateral being provided to the Trilend Lenders (the charge on the Lawrence Avenue properties), as described as paras 61 – 64 of the Morgis Non-Confidential Affidavit affirmed May 9, 2024 and para 10 of the Morgis Confidential Affidavit affirmed May 22, 2024.

been relationship breakdown of a kind that leaving the Eglinton Project Entities in place under a CCAA process would lead to unmanageable friction between the parties.[93]

38. Trilend's opposition to the CCAA is of no moment. Creditor opposition in other cases has not resulted in courts rejecting a CCAA process. In *Pacific Shores Resort & Spa Ltd. (Re),* Justice Fitzpatrick observed that "a recalcitrant creditor should not necessarily prevent the granting of an order under the CCAA",[94] because creditors will ultimately "not act against their commercial interests"[95] Similarly, in *Canadian Airlines Corp. (Re),* Justice Paperny rejected creditors' assertions that a CCAA plan was doomed to fail[96] based on a determination that their opposition was overblown.[97] As the Commitment will pay out the Mortgages on similar timeline to a receivership,[98] Trilend's commercial interests are at the very worst in the same practical position based on the CCAA process being implemented: opposition to the CCAA should not be given weight.

ii. The CCAA Process is Likely to Succeed with the Mortgages Repaid

39. A consideration of the viability of a CCAA process as opposed to a receivership is an important consideration. Receiverships have been granted in cases where a CCAA process likely to fail based on a lack of prospective financing,[99] or because debtors have not presented a developed CCAA proposal.[100] This is not that kind of case. The Commitment is sufficient to pay out the Mortgages.[101] In *Inducon Development Corp., Re*, Justice Farley set out the now well-established maxim that

[93] Morgis Confidential Affidavit affirmed May 22, 2024, at para 4.
[94] *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para 41.
[95] *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para 44.
[96] *Canadian Airlines Corp. (Re),* 2000 CanLII 28202 (AB KB), at para 22.
[97] *Canadian Airlines Corp. (Re),* 2000 CanLII 28202 (AB KB), at paras 24 – 25.
[98] Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 2 at para 7.

CCAA applicants should come to court with a "germ of a plan".[102] The Eglinton Project Entities are well ahead of this minimum requirement.[103]

40. CCAA applications have been granted in cases similar to this one where a financial commitment was before the court,[104] because, as explained by Penny J in *Hush Homes Inc. (Re),* where a debtor company has a realistic proposal to deal with its assets and requires creditor protection to do so "and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA."[105] Indeed, courts have favoured a CCAA application over a receivership application in situations where refinancing was far less progressed or certain than the present case. In *Pacific Shores Resort & Spa Ltd. (Re),* Justice Fitzpatrick allowed the CCAA process to play out based on a debtor showing that there was equity in properties meaning there was a realistic possibility of financing.[106] The Commitment and other financing means that the Debtor is well advanced of this stage.

41. CCAA protection is available notwithstanding that the Project is currently in the development phase rather than a fully fledged operating business. In *Douglas Channel*

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[99] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para 36; *Callidus v. Carcap*, 2012 ONSC 163 at para 54.
[100] See e.g., *Dondeb Inc. (Re)*, 2012 ONSC 6087; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, at paras 69 – 71.
[101] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 2 at para 7.
[102] *Inducon Development Corp., Re*, 1991 CarswellOnt 219 at para 14. Justice Farley's statement that CCAA applicants require a germ of a plan has been widely adopted in subsequent cases, see e.g., *Callidus v. Carcap*, 2012 ONSC 163 at paras 58 – 60; *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 at para 14.
[103] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 2 at paras 2 – 10.
[104] *Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd.*, 2013 BCSC 2358, at paras 13, 38 – 39; *Hush Homes Inc. (Re)*, 2015 ONSC 370 at paras 51 – 53;
[105] *Hush Homes Inc. (Re)*, 2015 ONSC 370 at paras 51 – 53, citing *Re Lehndorff General Partners Ltd.*, 1993 CarswellOnt 183 (Gen. Div.) at para 6.
[106] *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para 24.

LNG Assets Partnership v. DCEP Gas Management Ltd., Justice Masuhara granted a CCAA stay and dismissed the receivership application with respect to a planned liquified natural gas facility which was in the preliminary development stages on the basis that "[w]hile there is presently no real operating business at this point, there is clearly a development business which has been operating and into which significant efforts have been invested."[107] The Project is at a sufficiently advanced stage such that similar public interest in the continuation of this Project exists, including based on the community interests engaged such as addressing a critical need for housing.

42. That the Project is a real estate development is not a reason in and of itself to reject the CCAA Application. In *Hush Homes Inc. (Re),* Penny J explained that "there is no 'generic' prohibition against a land development business being subject to a CCAA process."[108] In similar circumstances to this one, Penny J rejected the argument that a receivership should be granted based on an alleged lack of stakeholders and that the project was "raw land"; he found that the CCAA proposal would not have the secured party "sit on its hands for two to three years with its capital tied up" but rather provided for near-term refinancing sufficient to pay the creditor out,[109] making it the superior path forward. The same considerations identified in *Hush Homes Inc. (Re)* apply here: the Commitment provides for a near term payout, making a CCAA process preferable.[110]

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[107] *Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd.*, 2013 BCSC 2358 at paras 34 - 35. At the time of the hearing the project was bare land (para 7).
[108] *Hush Homes Inc. (Re)*, 2015 ONSC 370 at para 23.
[109] *Hush Homes Inc. (Re)*, 2015 ONSC 370 at paras 24 – 31.
[110] Morgis Confidential Affidavit affirmed May 22, 2024, at paras 7 – 8.

iii. The CCAA Process Allows for Value Maximization

43. Courts will prefer a process that maximizes creditor recovery[111] while also preserving as much of the enterprise value of the debtor as possible.[112] The corollary of value maximization is the minimization of costs which impede creditor recovery.[113]

44. In this case, the CCAA process on the table provides for a firm plan for the full payout of the Mortgages.[114] By contrast, if the receivership goes ahead, value will be destroyed. Given the size of the Eglinton Project and current market conditions, the only way that funds could be recovered through a receivership on any kind of near-term basis would involve breaking up of the Project, undoing the fourteen years of work by Morgis Group assembling the Project and destroying value.[115] Moreover, for the reasons fully outlined in Confidential Affidavit of Mr. Morgis, [116] the CCAA process will allow for an additional significant aspect of the Project to go ahead through the closing of additional transactions. If a receivership is granted the closing of the transactions will not occur, destroying a significant aspect of the ultimate value of the Project.

45. From the perspective of creditors, the concept of value maximization is also considered through the lens of ensuring that the costs of the CCAA process do not unduly eat into creditor recovery. Here, given the substantial equity remaining in the

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[111] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paras 40 and 42; *PSINET Ltd., Re*, 2001 CanLII 28266 (ON SC), at para 8.
[112] *Re Skydome Corp,*1998 CarswellOnt 5914 (Ont Sup Ct J (Gen Div) [Comm List]) at paras 12 – 18. The court considered the impact on the enterprise value under a CCAA or receivership, and favoured the CCAA based on the preservation of the debtor's enterprise value.
[113] *Dondeb Inc. (Re)*, 2012 ONSC 6087 at paras 27 – 29, where the creditors successfully argued that professional fees could eat into creditor recovery under a CCAA; *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500 at para 14, where there was no viable restructuring plan and the court found that creditor recovery would be impacted by the implementation of a CCAA process.
[114] Morgis Confidential Affidavit affirmed May 9, 2024, schedule 4 at paras 2 – 4.
[115] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 29.
[116] Morgis Confidential Affidavit, schedule 1 affirmed May 9, 2024.

Project,[117] the proposed Administration Charge taking super-priority under the CCAA process will not impact Trilend receiving full repayment on the Mortgages. Any DIP financing sought at the Comeback Hearing will be subordinated to the Mortgages. In fact, Trilend is in a better position under the CCAA than the receivership because receivership contemplates $500,000 Receiver's Borrowings Charge ahead of the Mortgages[118] whereas the DIP would be in a subordinate position.

iv. The Effects on Morgis Group's Stakeholders Favour a CCAA Process

46. One of the fundamental policy objectives of the CCAA is "avoiding the social and economic losses resulting from liquidation of an insolvent company."[119] The Court must be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company."[120] The community interests engaged are a factor in contested CCAA and receivership applications.[121]

47. In this case, beyond the obvious importance to the Morgis Group and its stakeholders,[122] the Project's importance extends to a large community: the Project promises to revitalize and develop an area of the city, consistent with the objectives of

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[117] The affidavit of Donald Ierfino sworn May 16, 2024, at para 13 bizarrely suggests that there is a risk to Trilend based on eroding equity. Despite a modest decrease in the appraised value, the loan to value ratio remains in the 50% range. Mr. Ierfino's assertion also ignores the charge provided on the Lawrence property for the extensions: Morgis Confidential Affidavit, affirmed May 22, 2024, at para 10.
[118] Trilend Application Record, Order (Appointing Receiver), Tab 3 at para 20. Trilend presents no evidence regarding the funding of the receiver's Borrowings Charge, leaving open the possibility that the receivership will not be funded in the event the court approves the receivership.
[119] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 70.
[120] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 60.
[121] See e.g., *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 at para 15 the court cited a lack of community interest as a reason to grant the receivership. By contrast, in the leading case of *Canadian Airlines Corp. (Re)*, 2000 CanLII 28202 (AB KB), community interest of employees and customers was a significant factor in favour of the CCAA process.
[122] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 35.

federal and local governments,[123] while also having a significant charitable component supporting women and children in need.[124] The apparent lack of benefit to other stakeholders in other cases involving real estate has been a reason why receiverships have been granted over a CCAA process.[125] But the situation here is fundamentally different than those cases and distinguishes them; because of the stakeholder interests at play which create a community interest in the Project, the core objectives of the CCAA are squarely engaged. This favours the CCAA Application.

v. The Behaviour of the Parties Supports a CCAA Process

48. Courts consider the behaviour of both the debtor[126] and the creditor[127] when weighing competing CCAA and receivership applications. To obtain CCAA protection a

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[123] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 26. The objective in this case is the densification of the Eglinton LRT corridor based on the $12 billion LRT being opened as well as a critical need for housing.
[124] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 25.
[125] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, see especially paras 87 – 90, where the Court noted that there was no benefit to stakeholders, as under the CCAA proposal, the debtors' employees would have lost their jobs and the project would not proceed until financing was secured, which had not progressed at all. The Court also took a dim view of a related party transaction which it framed as the only benefit to a "stakeholder". *Encore Developments Ltd. (Re.)*, 2009 BCSC 13 at paras 23 – 24 and 29, where the Court noted that the land was raw land with no work currently in progress and a substantial equity shortfall to secured lenders, making a receivership appropriate. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para 36, where the court noted that the "CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met" but speculated in *obiter* comments that it may be difficult to present a "more advantageous than the remedies available to its creditors".
[126] Positive behaviour by a debtor militates in favour of granting a CCAA application over a receivership: *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 81 at para 57. Dishonesty on the part of the debtor favours the granting of a receivership: *SLMSoft Inc., Re,* 2003 CarswellOnt 4402, where there was evidence that the debtor entered into self-dealing transactions to the detriment of creditors; *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.,* [2024] (Ont SCJ [Commercial List]), Court File No CV-23-00710361-00CL concerning a previous finding of fund misappropriation in another court Action; *Retail Funding Inc. v. Cotton Ginny Inc.,* 2008 CarswellOnt 4808 at paras 71 – 72, where the debtor broke forbearance agreements through unauthorized fund distribution.
[127] See e.g., *Royal Bank v. Chongsim Investments Ltd.*, 1997 CanLII 12112 (ON SC).

debtor must act with good faith and due diligence.[128] This requirement is met. The Eglinton Project Entities have consistently communicated with Trilend, including with respect to the status of repayment efforts of the Mortgages.[129] The Eglinton Project Entities have also advanced the refinancing so that Trilend will be repaid shortly from the Commitment.[130] All this has occurred while the Project has been advanced through the complex planning and zoning approval process.[131] This conduct supports Morgis Group's continued involvement in the Project through the CCAA process.

49. The conduct of Trilend is less commendable. As fully set out in Mr. Morgis' affidavit, Trilend's conduct includes the pulling of its commitment after repeated representations that it could relied on as a long-term financing partner.[132]

vi. There is No Prejudice to Trilend Under the CCAA Process

50. Courts will consider prejudice to creditors in determining whether a receivership or CCAA is preferable, an assessment which is typically framed in terms of whether the CCAA will meaningfully delay creditor recovery.[133] There is no practical prejudice to Trilend in terms of repayment timing of the Mortgages. Current market conditions mean that Trilend will receive proceeds from the Receivership Application far later than the

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[128] CCAA section 11.02(3b). *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras 47 – 52.
[129] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 48; Morgis Confidential Affidavit affirmed May 9, 2024, schedule 1 at para 4; Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 60.
[130] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 58 - 60.
[131] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at para 67; as more fully set out in Morgis Confidential Affidavit affirmed May 9, 2024, Schedule 3 at paras 2 – 5.
[132] Morgis Non-Confidential Affidavit affirmed May 9, 2024, at paras 52 – 53.
[133] *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 at para 71 – 75. A secondary factor is whether the CCAA process will eat into creditor recovery: *Shire International Real Estate Investments Ltd. (Re)*, 2010 ABQB 84 at para 9. The substantial equity in the Project means this is not a material concern in this case.

prospective Commitment closing, and realistically in line with a SISP process. Granting the CCAA will allow for the Commitment to close and Mortgages payout by August 31.[134] If the Commitment does not close by that date, then the Eglinton Project Entities will come back to Court for the approval of a SISP that would be run by the monitor.[135]

G. The Court Should Approve the Sealing Request

51. The Court has discretion to order that any document be sealed.[136] *Sherman Estate v. Donovan* sets out three core considerations regarding sealing orders: (i) court openness poses a risk to a public interest; (ii) the order sought is necessary to prevent this risk; and (iii) whether proportionally the benefits outweigh negative effects.[137] This test has been applied in the insolvency context to protect debtors' interests.[138]

52. These core considerations are met. The sealing of the confidential affidavits relates only to commercially sensitive information that would jeopardize refinancing and the ability of the Eglinton Project Entities to payout the Mortgages, threatening the Project and the public interest based on the stakeholder interests engaged.[139] The Debtors have undertaken to have the information unsealed as soon as possible.

PART V - ORDER REQUESTED

53. The Eglinton Project Entities request that the Court grant the Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May 2024.

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[134] Morgis Confidential Affidavit affirmed May 22, 2024, at paras 7 – 8.
[135] Morgis Confidential Affidavit affirmed May 22, 2024, at paras 6 – 8. The familiarity of a monitor with a project is a well recognized way of moving a SISP forward quickly: *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 at para 93.
[136] *Courts of Justice Act*, R.S.O. 1990, c C.43, at section 137(2).
[137] *Sherman Estate v. Donovan*, 2021 SCC 25 at para 38.
[138] See, for example, *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347 at paras 23 - 28.
[139] Morgis Confidential Affidavit affirmed May 9, 2024, at paras 1 - 5.

Tyr LLP
Lawyers for the Eglinton Project Entities

SCHEDULE "A"
LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10

2. *2607380 Ontario Inc (Re),* [2020] (Ont SCJ [Commercial List]), Court File No CV-20-00636875-00CL

3. *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.,* [2024] (Ont SCJ [Commercial List]), Court File No CV-23-00710361-00CL

4. *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432

5. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953

6. *Callidus v. Carcap*, 2012 ONSC 163

7. *Canadian Airlines Corp. (Re),* 2000 CanLII 28202 (AB KB)

8. *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC)

9. *Canwest Publishing Inc.,* 2010 ONSC 222

10. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

11. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327

12. *Dondeb Inc. (Re)*, 2012 ONSC 6087

13. *Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd.*, 2013 BCSC 2358

14. *Encore Developments Ltd. (Re.)*, 2009 BCSC 13

15. *Hush Homes Inc. (Re)*, 2015 ONSC 370

16. *Inducon Development Corp., (Re)*, 1991 CarswellOnt 219

17. *Lehndorff General Partners Ltd. (Re)*, 1993 CarswellOnt 183 (Gen. Div.)

18. *Lydian International Limited (Re),* 2019 ONSC 7473

19. *McEwan Enterprises Inc.*, 2021 ONSC 6453

20. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586

21. *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500

22. *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347

23. *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775

24. *PSINET Ltd., Re*, 2001 CanLII 28266 (ON SC)

25. *Retail Funding Inc. v. Cotton Ginny Inc.,* 2008 CarswellOnt 4808

26. *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 81

27. *Romspen Investment Corporation v. 6711162 Canada Inc*., 2014 ONSC 2781

28. *Royal Bank v. Chongsim Investments Ltd*., 1997 CanLII 12112 (ON SC)

29. *Sherman Estate v. Donovan*, 2021 SCC 25

30. *Shire International Real Estate Investments Ltd. (Re)*, 2010 ABQB 84

31. *Skydome Corp (Re),* 1998 CarswellOnt 5914 (Ont Sup Ct J (Gen Div) [Comm List])

32. *SLMSoft Inc., (Re),* 2003 CarswellOnt 4402

33. *Springer Aerospace Holdings Limited*, 2022 ONSC 6581

34. *Tamerlane Ventures Inc. and Pine Point Holding Corp. (Re)*, 2013 ONSC 5461

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

Relevant Portions of the Relevant Portions of the Companies' Creditors Arrangement Act, RSC 1985, c C-36

Section 2

> ... "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability 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.

Relevant Portions of the Companies' Creditors Arrangement Act, RSC 1985, c C-36

Application

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

Jurisdiction of court to receive applications

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

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.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

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

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

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

11.02 (3) The court shall not make the order unless

(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.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the

business and affairs of the company is deemed to be a director for the purposes of this section.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

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

Factors to be considered

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

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

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

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

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

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

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

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

Additional factor — initial application

(5) 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.

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.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(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).

***Courts of Justice Act*, R.S.O. 1990, c C.43, at section 137(2)**

137 (2) Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

Court No. CV-24-

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

FACTUM OF THE EGLINTON PROJECT ENTITIES

Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

Jason Wadden (LSO# 46757M)
Email: jwadden@tyrllp.com
Tel: 416.627.9815

Shimon Sherrington (LSO# 83607B)
Email: ssherrington@tyrllp.com
Tel: 587.777.0367

Lawyers for the Applicants