Court File No. CV-17-580840-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDEX ENERGY MILLS ROAD CORPORATION

(the "**Applicant**")

FACTUM OF THE APPLICANT

(Motion for Approval of Stalking Horse Agreement and SISP)
(Returnable September 11, 2017)

September 7, 2017

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Shayne Kukulowicz LSUC# 30729S
Tel: 416.860.6463
Fax: 416.640.3176
skukulowicz@casselsbrock.com

Jane Dietrich LSUC# 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Lance Williams LSBC# 508874
Tel: 604.691.6112
Fax: 604.691.6120
lwilliams@casselsbrock.com

Lawyers for Index Energy Mills Road Corporation

TO: THE SERVICE LIST

INDEX

Court File No. CV-17-580840-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE _COMPANIES' CREDITORS ARRANGEMENT ACT_, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDEX ENERGY MILLS ROAD CORPORATION

(the "**Applicant**")

FACTUM OF THE APPLICANT

(Motion for Approval of Stalking Horse Agreement and SISP)
(Returnable September 11, 2017)

PART I – OVERVIEW

1. This is a motion by Index Energy Mills Road Corporation ("**Index Energy Ajax**") pursuant to the *Companies' Creditors Arrangement Act*[1] (the "**CCAA**"), for certain relief including:

(a) an order substantially in the form attached as Schedule "A" to the Notice of Motion (the "**Stay Extension Order**") that, *inter alia*:

(i) extends the Stay Period (defined below) to and including December 22, 2017;

(ii) authorizes Index Energy Ajax to obtain and borrow up to the maximum principal amount of $5,000,000 pursuant to the previously approved DIP Financing (defined below);

[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ["***CCAA***"].

(iii) approves the activities of Grant Thornton Limited in its capacity as the court-appointed monitor (the "**Monitor**") of Index Energy Ajax, as set out in the first report of the Monitor (the "**First Report**");

(iv) seals Confidential Exhibit "A" to the affidavit of Derek Blais sworn on September 1, 2017 ("**Blais Affidavit**"),

(b) an order substantially in the form attached as Schedule "B" to the Notice of Motion (the "**SISP Approval Order**") that *inter alia*:

(i) approves the sales and investment solicitation process ("**SISP**") and the Stalking Horse Agreement (defined below) for the purposes of the SISP; and

(ii) approves the Escrow Agreement (defined below) and extends the protections of the Monitor contained in the Initial Order (defined below) to the Escrow Agent (defined below).

PART II– FACTS

BACKGROUND AND GRANTING OF INITIAL ORDER

2. Index Energy Ajax owns and operates an electrical co-generation facility located in Ajax, Ontario that generates electricity by burning wood waste from the construction industry to produce steam to drive turbine generators (the "**Biomass Facility**").[2]

3. Index Energy Ajax entered into a feed-in-tariff contract (the "**FIT Contract**") with the Ontario Power Authority, now the Independent Electricity System Operator of Ontario ("**IESO**") which required the retrofitting of the Biomass Facility (the "**Retrofit**").[3]

---

[2] Affidavit of Derek Blais, Motion Record, Tab 2 ("**Blais Affidavit**") at para 4.
[3] Blais Affidavit, *supra* note 2 at para 5(a).

4. Index Energy Ajax encountered difficulties in retrofitting the Biomass Facility, has been engaged in protracted litigation with its former engineering, procurement and construction contractor, HMI Construction Inc. ("**HMI**"), and has been forced to deal with numerous liens arising from the construction associated with the Biomass Facility.[4]

5. Index Energy Ajax is in default of various obligations to a syndicate of lenders composed of National Bank of Canada, Canadian Western Bank, Laurentian Bank of Canada and Business Development Bank of Canada (collectively, the "**Syndicate**"). National Bank of Canada is also the agent of the Syndicate (in that capacity, the "**Agent**"). The Syndicate has made demand for payment of Index Energy Ajax's obligations in excess of $45 million.[5]

6. Index Residence AB (publ) ("**Index Residence**"), a party related to the majority shareholder of Index Energy Ajax, is also owed approximately $102 million by Index Energy Ajax, and is a secured creditor subordinate in priority to the Syndicate.[6]

7. On August 16, 2017, Index Energy Ajax was granted protection under the CCAA pursuant to an order of the Honourable Regional Senior Justice Morawetz (the "**Initial Order**").[7]

8. The Initial Order, among other things: (i) granted a stay of proceedings in favour of Index Energy Ajax until and including September 15, 2017 (the "**Stay Period**"); and (ii) authorized Index Energy Ajax to borrow the maximum sum of $5,000,000 (the "**Principal Amount**") pursuant to a credit facility (the "**DIP Financing**") as interim financing from Index Equity US LLC ("**Index US**" and, in this capacity, the "**DIP Lender**") with a maximum amount of $1.6 million (the "**Initial Advance**") permitted to be advanced by the DIP Lender prior to approval of a SISP acceptable to the Agent or further order of the Court.[8]

---

[4] Affidavit of Rickard Haraldsson, Initial Application Record, Tab 2 ("**Haraldsson Affidavit**") at para 3; Blais Affidavit, *supra* note 2 at para 5(b).
[5] Haraldsson Affidavit, *supra* note 4 at para 3; Blais Affidavit, *supra* note 2 at para 5(c).
[6] Blais Affidavit, *supra* note 2 at para 5(d).
[7] *Ibid* at para 6.
[8] *Ibid* at para 7(a) and (b).

9. Index Energy Ajax sought protection under the CCAA in order to allow it a period of time to develop and implement the SISP, and to access urgently required interim financing on a priority basis to preserve value for all stakeholders and ensure its viability as a going-concern.[9]

10. Further details of Index Energy Ajax, its background and its creditors are contained in the Affidavit of Rickard Haraldsson sworn August 15, 2017 in support of the application for the Initial Order, the body of which is attached as Exhibit "A" to the Blais Affidavit.

OVERVIEW OF INDEX ENERGY AJAX'S ACTIVITIES SINCE THE INITIAL ORDER

11. Since the Initial Order was granted, Index Energy Ajax has continued its efforts to improve the operations of the Biomass Facility and has continued operating the Biomass Facility. With the assistance of the Monitor, Index Energy Ajax has engaged with vendors, employees and other stakeholders to ensure a smooth transition into these proceedings and to minimize disruption to the business.[10]

12. As outlined in the First Report, Index Energy Ajax's stakeholders have been notified of the CCAA proceedings by Index Energy Ajax and the Monitor as required. Further, counsel to Index Ajax Energy has been in contact with the IESO regarding the CCAA proceedings and the FIT Contract.

DIP ADVANCE

13. Pursuant to the Initial Order, DIP Financing was approved in the amount of the Principal Amount from the DIP Lender, and a DIP Lender's Charge (as defined in the Initial Order) was created to secure the same. However, Index Energy Ajax was only permitted to draw the Initial

---

[9] *Ibid* at para 8.
[10] *Ibid* at para 11.

Advance prior to the approval of a SISP acceptable to the Agent or a further order of the Court.[11]

14. Consistent with the provisions of the DIP Financing and the Initial Order, on August 17, 2017 Index Energy Ajax requested and obtained the Initial Advance.[12]

15. If the proposed SISP is approved by the Court, the conditions under the Initial Order for an advance of the full Principal Amount will have been met.[13] As illustrated in the cash flow projection attached as Appendix "5" to the First Report, the Principal Amount is necessary to meet Index Energy Ajax's cash needs during the proposed restructuring period, and the Monitor believes that it is appropriate that Index Energy Ajax be permitted to obtain and borrow the Principal Amount.[14]

STALKING HORSE BID, SISP AND ESCROW AGREEMENT

16. In consultation with the Agent and the Monitor, Index Energy Ajax has sought to utilise the CCAA process to ensure its assets are fully and transparently exposed to the market, while ensuring a minimum recovery to the Agent in the event that the SISP does not garner superior results. In that regard, Index Energy Ajax seeks the approval of three components to its SISP process:

(a) the SISP;

(b) the Stalking Horse Agreement; and

(c) the Escrow Agreement.

The Stalking Horse Agreement

17. As part of the SISP (described in detail below and the in the First Report) Index Energy Ajax and Index Residence (in its capacity as purchaser under the Stalking Horse Agreement,

---

[11] Haraldsson Affidavit, *supra* note 4 at para at 8(a)-(e); Blais Affidavit, *supra* note 2 at para 16.
[12] Blais Affidavit, *supra* note 2 at para 17.
[13] *Ibid* at para 18; First Report of the Monitor dated September 6, 2017 ["**First Report**"], at para 63.
[14] First Report, *supra* note 13 at para 63.

the "**Stalking Horse Purchaser**") have entered into a stalking horse agreement dated September 1, 2017 (the "**Stalking Horse Agreement**"), that is subject to court approval.[15]

18. Pursuant to the terms of the Stalking Horse Agreement, the Stalking Horse Purchaser has agreed to purchase substantially all of Index Energy Ajax's property and assets (the "**Purchased Assets**") including the FIT Contract on an "as is, where is" basis[16].

19. As set out in the Stalking Horse Agreement and described in the First Report,[17] the other material terms of the Stalking Horse Agreement are as follows:

(a) **Purchased Assets**: The Purchased Assets under the Stalking Horse Agreement include all of Index Energy's rights and title relating to the assets, property and undertaking owned or used by Index Energy Ajax including cash and accounts receivable, real property, inventory, fixed assets and equipment, the FIT Contract, any claims, refunds, causes of action related to the Business or any of the Purchased Assets including Index Energy Ajax's interest in any order or decree issued in respect of any action but excluding the Excluded Assets (as defined in the Stalking Horse Agreement).

(b) **Excluded Assets:** As noted above, the Purchased Assets do not include the Excluded Assets, which include, *inter alia*, the corporate records of Index Energy Ajax, assets disposed of in the ordinary course of business, and other assets as may be agreed to between the Stalking Horse Purchaser and Index Energy Ajax before the closing of the transaction (provided there will not be an adjustment to the Stalking Horse Purchase Price (as defined below).

(c) **Assumed Liabilities**: The Stalking Horse Purchaser has agreed to assume all of the Assumed Liabilities (as defined in the Stalking Horse Agreement) as of the

---

[15] Blais Affidavit, *supra* note 2 at para 22.
[16] First Report, *supra* note 13 at para 39.
[17] *Ibid* at paras 38-47.

Closing Date, other than the Excluded Liabilities. These include government withholdings and the indebtedness of Index Energy Ajax to Index Residence and the DIP Lender ("**Index Secured Debt**").

(d) **Excluded Liabilities**: The Stalking Horse Purchaser will not assume liabilities other than those specifically assumed. These excluded liabilities include: any intercompany accounts payable (other than the Index Secured Debt), the liabilities and obligations in connection with the HMI Lien claim and litigation related thereto, liabilities and obligations to the Syndicate and other liabilities not expressly assumed.

(e) **Purchase Price**: the purchase price under the Stalking Horse Agreement (the "**Stalking Horse Purchase Price**") is the aggregate of:[18]

(i) the amount of the Escrow Funds (defined below), which is approximately $10 million in cash;

(ii) $10 million in cash;

(iii) the amount of the Administration Charge and the Directors' Charge (each as defined in the Initial Order) as at the closing of the Stalking Horse Agreement;

(iv) the amounts secured by any other encumbrances (other than permitted encumbrances) that ranks in priority to the debt owing to the Syndicate;

((i) to (iv) collectively, the "**Cash Component**")

[18] *Ibid* at para 40.

(v) the remaining amount of the Index Secured Debt (including the amounts outstanding under the DIP Financing) after payments of the Cash Component; and

(vi) the amount of the other Assumed Liabilities pursuant to the Stalking Horse Agreement (excluding the Index Secured Debt)

((v) and (vi) collectively, the "**Assumed Obligations**").

Under the Stalking Horse Agreement, the Stalking Horse Purchase Price is to be paid by:

(vii) the payment of the Cash Component to the Monitor (including by the release of the Escrow Funds) one day prior to closing; and

(viii) the assumption of the Assumed Obligations, including release of any obligation of Index Energy Ajax for the Index Secured Debt and the release of any related security.

(f) **Conditions**: The closing of the transaction contemplated in the Stalking Horse Agreement is conditional on, among other things: (i) the Stalking Horse Purchaser being selected as the Successful Bidder (as defined in the SISP) under the SISP; (ii) the Court granting the SISP Approval Order; (iii) the issuance of an approval and vesting order by the court, which would provide that the Purchased Assets be transferred to the Stalking Horse Purchaser free and clear of all encumbrances (other than those specifically assumed) on closing of the transaction; (iv) IESO's consent to the assignment to the Stalking Horse Purchaser of the FIT Contract with such amendments as may be necessary to permit the Stalking Horse Purchaser to be in compliance with such agreement at the time of the assignment, and (v) that no Material Adverse Change (as defined in the Stalking Horse Agreement) has occurred.

(g) **Closing Date**: The Stalking Horse Agreement contemplates a closing date of January 12, 2018, or such other date as the parties and the Monitor agree to, acting reasonably.

(h) **Fees and Expenses**: The Stalking Horse Agreement provides that, if the Stalking Horse Purchaser is not the Successful Bidder under the SISP, it will be entitled to an expense reimbursement and transaction fee of $300,000 (the "**Expense Reimbursement and Transaction Fee**"), which would be payable from the sale or investment proceeds in priority to all existing security. The Monitor notes in its report that the Expense Reimbursement and Transaction Fee is on the lower end of the range of break fees typical for this type of transaction, and was negotiated between the Stalking Horse Purchaser and the Agent.[19]

The SISP

20. As is customary in stalking horse bid scenarios, the Stalking Horse Agreement will act as the "floor bid" under the SISP. The SISP seeks to market the assets of Index Energy Ajax to potentially interested parties on an "as is, where is" basis (a "**Sale Proposal**") and/or to make an investment in the business of Index Energy Ajax (an "**Investment Proposal**"), either of which is superior to the offer contemplated in the Stalking Horse Agreement.[20]

21. Given the Stalking Horse Purchaser is related to Index Energy Ajax, the proposed SISP will be run by the Monitor to ensure fairness and transparency,[21] and the SISP contemplates a ten week marketing/diligence period.[22]

---

[19] *Ibid* at paras 46-47.
[20] Blais Affidavit, *supra* note 2 at para 19.
[21] *Ibid* at para 21; First Report, *supra* note 13 at para 22(b).
[22] Blais Affidavit, *supra* note 2 at para 20; First Report, *supra* note 13 at para 28.

22. As detailed in the First Report, the key terms of the SISP are as follows:[23]

(a) **Teaser:** The SISP will be initiated by distribution of a process summary or solicitation letter (the "**Teaser**") to potential interested parties that describes the sale or investment opportunity, outlines the process under the SISP, and invites interested parties to express their interest pursuant to the SISP.[24] The Teaser is to be distributed to a list of potential bidders compiled by the Monitor in consultation with management of Index Energy Ajax and the Agent, and distributed no later than September 19, 2017.[25] The SISP will also be advertised in *The Globe and Mail* (National Edition) and any other newspapers and/or publications as the Monitor, in consultation with Index Energy Ajax, considers appropriate.[26]

(b) **Participant Requirements:** Upon the execution of a non-disclosure agreement, an acknowledgement of the SISP by an interested party, and sufficient evidence and financial disclosure for the Monitor to determine that an interested party would have the financial and other capabilities to consummate a Sale Proposal or an Investment Proposal,[27] the Monitor will provide the interested party with a confidential memorandum providing additional information regarding the business of Index Energy Ajax and access to due diligence materials contained in an electronic data room (the "**Data Room**").[28]

---

[23] First Report, *supra* note 13 at paras 22-37.
[24] Sale and Investment Solicitation Process, Exhibit "D" to the Blais Affidavit ["**SISP**"] at para 4(c)
[25] SISP, *supra* note 24 at paras 4(a)-(b), 5;
[26] *Ibid* at para 4(b); First Report, *supra* note 13 at para 24.
[27] SISP, *supra* note 25 at para 6.
[28] *Ibid* at paras 4(d)-(e).

(c) **Bid Deadline**: The deadline for the submission of bids under the SISP is proposed to be 5:00 p.m. (Eastern Time) on November 21, 2017 (the "**Bid Deadline**").[29]

(d) **Final Bids:** Bidders must submit their final bid by the Bid Deadline in the form of a template sale agreement or investment agreement contained in the Data Room (with changes blacklined in a comparison) which must, among other things (i) be binding, and irrevocable until the earlier of 30 days following the Bid Deadline and approval of the Court of the Accepted Bid (as defined below); (ii) be accompanied by a refundable deposit in the amount of 10% of the purchase price or investment amount; and (iii) contemplate closing the transaction by no later than January 12, 2018 (the "**Closing Date Deadline**").[30]

(e) **Qualified Bids:** Following the Bid Deadline, the Monitor, in consultation with the Agent, will determine if each bid may be deemed a qualified bid (a "**Qualified Bid**") and notify such bidder on or before November 24, 2017. The Stalking Horse Agreement is deemed to be a Qualified Bid. In order to constitute a Qualified Bid, a bid must provide for value to Index Energy Ajax's creditors and stakeholders in excess of the value of the Stalking Horse Agreement, which includes the Break-up Fee and Expense Reimbursement, as determined in accordance with the SISP (the "**Minimum Bid Amount**"). As also described in the First Report, the Minimum Bid Amount is only measured in relation to the Cash Component of the Stalking Horse Purchase Price and the amount outstanding under the DIP Financing.[31]

---

[29] *Ibid* at para 12.
[30] *Ibid*; First Report, *supra* note 13 at para 29.
[31] SISP, *supra* note 25 at paras 17 and 18; First Report, *supra* note 13 at para 30.

(f) **Auction:** If one or more Qualified Bids other than the Stalking Horse Agreement is received, all such Qualified Bids will proceed to an auction to be held on November 28, 2017 (the "**Auction**") in accordance with the procedures set out in Schedule "B" to the SISP. During the Auction Qualifed Bidders may increase their bids in increments of $200,000.[32]

(g) **Accepted Bid:** The accepted bid will be either (i) the Stalking Horse Bid if no Qualified Bid is received by the Bid Deadline or so designated by the Monitor; or (ii) the highest and best bid as determined by the Monitor at the Auction ("**Accepted Bid**"). If an Auction is conducted, the next highest or otherwise best Qualified Bid after the Accepted Bid will be designated as a backup bid and must remain open and irrevocable until the closing of the transaction under the Accepted Bid.[33]

(h) **Court Approval:** Within 7 days of the selection of the Accepted Bid, Index Energy Ajax is to file a motion with the Court seeking an order approving and implementing the Accepted Bid.[34]

23. The following chart summarizes the relevant milestones for the proposed SISP:[35]

Milestone	**Approximate Date**
Commencement of SISP	September 12, 2017
Teaser Distribution	September 12, 2017
Bid Deadline	November 21, 2017
Selection of a Qualified Bid(s)	November 24, 2017
Auction (if required)	November 28, 2017
Closing Date Deadline	January 12, 2018

[32] SISP, *supra* note 25 at para 19 and at Schedule "C" to the SISP at para 8.
[33] *Ibid* at para 20.
[34] *Ibid* at para 22.
[35] *Ibid* at para 3.

24. The SISP was developed by way of negotiations among Index Energy Ajax, the Agent, the Stalking Horse Purchaser and their respective legal advisors. The Monitor and its legal counsel were also involved in discussions regarding the SISP. The SISP and its timeline are supported by the aforementioned parties and were developed to balance the time required to administer a commercially reasonable sale and investment process with the available financial resources of Index Energy Ajax. The Monitor has set out in its report that it believes the SISP provides for a process that is reasonable in the circumstances.[36]

The Escrow Agreement

25. As a condition of the Syndicate's support for the proposed SISP, the Syndicate, Index Energy Ajax, the DIP Lender, and the Monitor as escrow agent (in such capacity the "**Escrow Agent**") have entered into an escrow agreement dated September 1, 2017 (the "**Escrow Agreement**"). Pursuant to the Escrow Agreement, the Stalking Horse Purchaser has agreed to deposit $10 million with the Escrow Agent (the "**Escrow Funds**") to be released in accordance with the Escrow Agreement.[37] Pursuant to the Escrow Agreement:

(a) the Escrow Funds will be released to the Stalking Horse Purchaser on the closing of transaction to a purchaser other than the Stalking Horse Purchaser;[38]

(b) the Escrow Funds will be applied to the purchase price to be paid by the Stalking Horse Purchaser if the Stalking Horse Agreement is the Accepted Bid;[39] or

(c) if a sale transaction for the assets of Index Energy Ajax has not closed by February 28, 2018, the Agent has the option to require Index US or an affiliate of Index US to purchase the debt owing to the Syndicate by Index Energy Ajax, in

---

[36] First Report, *supra* note 13 at para 36.
[37] Blais Affidavit, *supra* note 2 at para 24.
[38] *Ibid.*
[39] *Ibid.*

which case the Escrow Funds will be applied to the purchase of the Syndicate debt.[40]

26. The Escrow Agreement provides certainty and security to the Syndicate in the event that the SISP is not successful and the Stalking Horse Agreement fails to close. The Escrow Agreement is pivotal to the Syndicate's support of the SISP.

27. Under the terms of the Escrow Agreement, the Monitor agreed to act as the Escrow Agent,[41] and seeks that the protections afforded to it as Monitor extend to its role as Escrow Agent.

28. The Monitor has confirmed that it believes that the SISP and the Stalking Horse Agreement, supported by the Escrow Agreement, provide for a broad, open and fair process for seeking interested buyers or investors in the property, assets and operations of Index Energy Ajax, has appropriate independent oversight as it is being conducted by the Monitor, and is the best viable alternative for identifying a going-concern transaction for the benefit of the stakeholders.[42]

STAY EXTENSION

29. The Initial Order granted the Stay Period up to and including September 15, 2017 in order to preserve the *status quo* among the stakeholders of Index Energy Ajax while Index Energy Ajax stabilized operations and designed and implemented the SISP. The Stay Period was a requirement of the DIP Facility, and it would also have been detrimental to Index Energy Ajax's ability to restructure if proceedings were commenced or continued or rights and remedies were exercised against Index Energy Ajax.[43]

30. In this motion, Index Energy Ajax is seeking an extension of the Stay Period up to and including December 22, 2017 in order for the Monitor, with the assistance of Index Energy Ajax,

---

[40] *Ibid* at para 25.
[41] First Report, *supra* note 13 at para 48.
[42] *Ibid* at para 66.
[43] Blais Affidavit, *supra* note 2 at para 27.

to move forward with the SISP and bring a transaction contemplated by the SISP to Court for approval.[44] Subject to this Honourable Court authorizing further draws under the DIP Facility, it is forecast that Index Energy Ajax will have sufficient liquidity to pay post-filing service and supplies until December 22, 2017.[45]

31. Since the granting of the Initial Order, Index Energy Ajax, in close consultation and with the assistance of the Monitor, has acted and continues to act in good faith and with due diligence, including developing the SISP and the Stalking Horse Agreement, which is the best opportunity to expose the business of Index Energy Ajax to the market while balancing the interests of all stakeholders to have the matter completed expeditiously.[46]

32. In the Monitor's view, Index Energy Ajax has acted in accordance with the Initial Order and the Monitor is satisfied that: (i) Index Energy Ajax has sufficient funds (as demonstrated in the Cash Flow Projection) to continue operations and these proceedings until December 22, 2017; (ii) management and Index Energy Ajax are acting in good faith and with due diligence; and (iii) no stakeholder of Index Energy Ajax will suffer any material prejudice if the stay period is extended as requested.[47]

PART III– ISSUES

33. The key issues on this Motion are as follows:

   (a) Is the approval of the execution of the Stalking Horse Agreement reasonable in the circumstances?

   (b) Is the approval of the SISP appropriate, fair and reasonable as contemplated by the objectives in the CCAA?

---

[44] *Ibid* at para 28.
[45] *Ibid* at para 29.
[46] *Ibid* at para 30.
[47] First Report, *supra* note 13 at para 65.

(a) Is the approval of the Escrow Agreement and the extension of the protections of the Monitor contained in the Initial Order to the Escrow Agent reasonable in the circumstances?

(b) Should the stay period be extended to provide Index Energy Ajax the opportunity to take the necessary steps involved in restructuring its business?

PART IV- LAW

I. APPROVING THE STALKING HORSE AGREEMENT & SISP & ESCROW AGREEMENT

34. Index Energy Ajax is seeking Court approval of the Stalking Horse Agreement for purposes of the SISP. If the Stalking Horse Agreement is the Accepted Bid, a full approval and vesting order would be sought at that time.

35. CCAA courts have often approved the use of stalking horse agreements in connection with a SISP.[48]

36. In *Re PCAS*, Brown J. approved a sale process that included a stalking horse credit bid from the DIP lender and held as follows:[49]

> "The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process."

37. In *Re Brainhunte*r, Morawetz J. (as he then was) approved a stalking horse bid process and held that there is a distinction between the approval of a sale process and the approval of a

[48] *Re PCAS Patient Care Automation Services Inc*, 2012 ONSC 2840 at paras 7-8, 17 and 21, Book of Authorities of the Applicant, Tab D ["***Re PCAS***"], citing *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, 2012 ONSC 1750 at paras 6-8, 2012 CarswellOnt 5922, Book of Authorities of the Applicant, Tab G; Re *Brainhunter Inc* (2009), 62 CBR (5th) 41 at paras 13 and 21, 2009 CarswellOnt 8207 ["***Re Brainhunter***"], Book of Authorities of the Applicant, Tab A.; Re *Nortel Networks Corp* (2009), 55 CBR (5th) 229 at paras 49, 56 and 58, 2009 CarswellOnt 4467 ["***Re Nortel Networks Corp.***"], Book of Authorities of the Applicant, Tab C.

[49] Re *PCAS, supra* note 48 at para 17, Book of Authorities of the Applicant, Tab D.

sale.[50] Section 36 of the CCAA is engaged when determining whether to approve a sale, whereas the factors set out in *Re Nortel Networks Corp.* are engaged when considering whether to approve a sales process. The factors identified in *Re Nortel Networks Corp.*, are as follows:[51]

(i) is a sale transaction warranted at this time?

(ii) will the sale benefit the whole "economic community"?

(iii) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(iv) is there a better viable alternative?

38. The Monitor, Syndicate and Stalking Horse Purchaser are supportive of the SISP which includes the terms of the Stalking Horse Agreement.[52] In *Re Ivaco*, Cumming J. held that:[53]

> "Absent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the CCAA, when it has been recommended by the Monitor and is supported by the disinterested major creditors."

39. In light of the Nortel criteria, the proposed SISP should be approved by this Court for the following reasons:

(a) the proposed SISP is warranted at this time as it will provide a means for testing the market, gauging interest in Index Energy Ajax and its assets and determining whether a transaction is available that is more advantageous than the Stalking Horse Agreement. Index Energy Ajax in consultation with the Monitor, the Syndicate and the DIP Lender, has determined that it is in the best interests of

---

[50] *Re Brainhunter, supra* note 48 at paras 16-17, Book of Authorities of the Applicant, Tab A.
[51] *Re Nortel Networks Corp., supra* note 48 at para 49, Book of Authorities of the Applicant, Tab C; *Re Brainhunter, supra* note 48 at para 13, Book of Authorities of the Applicant, Tab A.
[52] First Report, *supra* note 13 at para 36.
[53] *Re Ivaco Inc* (2004), 3 CBR (5th) 33 at para 21, 2004 CarswellOnt 2397, ["***Re Ivaco***"], Book of Authorities of the Applicant, Tab B.

Index Energy Ajax and its stakeholders to enter into the Stalking Horse Agreement and to pursue the SISP.[54] In addition, this Court will retain its jurisdiction to approve any proposed sale to any successful bidder under section 36 of the CCAA;

(b) the SISP provides an opportunity to market the sale of Index Energy Ajax's business as a going-concern for the benefit of the entire "economic community" including creditors, employees and suppliers.

(c) Index Energy Ajax is not aware of any objections to the SISP or the limited approval of the Stalking Horse Agreement for purposes of the SISP sought at this time. The Monitor supports the Stalking Horse Agreement and SISP, and the Syndicate consents to the approval of the Stalking Horse Agreement and SISP.[55] The SISP has been designed to be a fair, transparent process run by the Court's appointed officer and supported by the parties with the major economic interest in the assets of Index Energy Ajax.

40. The Stalking Horse Agreement provides that, if the Stalking Horse Purchaser is not the Successful Bidder under the SISP, it will be entitled to the Expense Reimbursement and Transaction Fee. At $300,000, this represents 1.5% of the cash portion of the Stalking Horse Purchase Price, which the Monitor notes is on the lower end of the range of break fees typical for this type of transaction.[56]

41. Expense reimbursement payments have been approved by the courts as part of stalking horse agreements. Such fees are necessary for attracting stalking horse purchasers to compensate for the time, resources and risk taken in developing a stalking horse agreement.

---

[54] Blais Affidavit, *supra* note 2 at para 30.
[55] *Ibid* at para 23; First Report, *supra* note 13 at paras 36 and 66.
[56] First Report, *supra* note 13 at paras 46-47.

Such payments also represent the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected.[57]

42. It has also been recognized that where bid protections have been carefully considered a court does not substitute its own judgment for the judgment of the debtor and its advisors.[58] As noted by the Monitor, the Expense Reimbursement and Transaction Fee was actively negotiated.[59]

43. The Escrow Agreement is an integral component of the SISP and the Syndicate's support for the SISP was conditional upon the entering into of the Escrow Agreement.[60] The deposit of the Escrow Funds by the Stalking Horse Purchaser pursuant to the Escrow Agreement provides financial security in support of the Stalking Horse Agreement.

44. In order to facilitate the escrow arrangements in support of the SISP, the Monitor has agreed to act as Escrow Agent, subject to the Court granting an order authorizing the Monitor to act as Escrow Agent and confirming that the protections of the Monitor granted in the Initial order apply to it in its capacity as Escrow Agent.

45. For the reasons set out above, Index Energy Ajax submits that this Court should approve the Stalking Horse Agreement, the SISP and the Escrow Agreement, and extend the protections of the Monitor contained in the Initial Order to the Escrow Agent.

II. EXTENSION OF THE STAY PERIOD

46. Index Energy Ajax seeks this Court's approval to extend the Stay Period up to and including December 22, 2017, which reflects the deadline prescribed by the SISP to close a transaction involving the assets of Index Energy Ajax.

---

[57] *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para 13, 2012 CarswellOnt 3158 ["***CCM Master Qualified Fund***"], Book of Authorities of the Applicant, Tab G; *Danier Leather Inc., Re*, 2016 ONSC 1044 at para 41, 2016 CarswellOnt 2414 ["***Danier***"], Book of Authorities of the Applicant, Tab H.
[58] *Re Brainhunter*, *supra* note 48 at para 20, Book of Authorities of the Applicant, Tab A.
[59] First Report, *supra* note 13 at para 46.
[60] *Ibid* at para 48.

47. Under section 11.02 of the CCAA, the Court may extend a stay of proceedings if the Court is content of the following:

(a) The applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) The applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.[61]

48. The requested extension is necessary and appropriate in the circumstances. In *Canwest Global*, Pepall J. granted a stay extension on the basis that the extension would provide the debtor the ability to work towards a viable restructuring solution, the debtors had acted and continue to act in good faith, the monitor supported the extension, there was a lack of opposition to the extension and, finally, the cash flow indicated that the debtors had the cash flow sufficient to sustain the business up until the requested extension.[62]

49. The proposed extension will provide Index Energy Ajax and the Monitor with the opportunity to move forward with the SISP and bring a transaction contemplated by the SISP to Court for approval.

50. Index Energy Ajax has acted and continues to act in good faith and with due diligence in developing the SISP and Stalking Horse Agreement.[63]

51. Index Energy Ajax has kept all of its stakeholders informed throughout this process and no stakeholder will suffer any material prejudice if the Stay Period is extended.[64] Therefore, Index Energy Ajax submits that the requested stay extension should be granted.

---

[61] *CCAA*, *supra* note 1 at 11.02(3).
[62] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 7169 at para 43, 183 ACWS (3d) 325, ["***Canwest Global***"], Book of Authorities of the Applicant, Tab E.
[63] Blais Affidavit, *supra* note 2 at para 30.
[64] *Ibid.*

III. SEALING ORDER

52. Confidential Exhibit "A" to the Blais Affidavit includes an unredacted copy of the Escrow Agreement including a copy of the Loan Sale and Assignment Agreement attached as Exhibit "C" to the Escrow Agreement. The information contained in Confidential Exhibit "A" is commercially sensitive information related to the assets of Index Energy Ajax and may affect the market value of Index Energy Ajax's assets.

53. If publicly available, this information could have a material detrimental effect on Index Energy Ajax and the integrity of the SISP. Accordingly, Index Energy Ajax is seeking to have this exhibit sealed. Courts will grant a sealing order where:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures would not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible proceedings.[65]

54. The requested sealing order is necessary in order to protect the integrity and fairness of the SISP by ensuring that purchasers in the SISP do not obtain an unfair advantage by obtaining sensitive valuation and other information in respect of Index Energy Ajax's assets contained in the confidential exhibit. If this information formed part of the public record, the recovery for the stakeholders and the integrity of the process could be adversely affected. Accordingly, sealing these materials outweighs the public interest in open and accessible court proceedings.

---

[65] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53, [2002] 2 S.C.R. 522, ["***Sierra Club***"], Book of Authorities of the Applicant, Tab F.

PART V– RELIEF SOUGHT

55. Index Energy Ajax therefore requests that this Honourable Court grant the Orders set out in its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September, 2017

Cassels Brock & Blackwell LLP

Lawyers for Index Energy Mills Road Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

1 *Brainhunter Inc., Re*, 2009 CarswellOnt 7627 (Ont. SCJ [Commercial List]).

2 *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 7169 (Ont. SCJ [Commercial List]).

3 *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.,* 2012 ONSC 1750 (Ont. SCJ [Commercial List]).

4 *Danier Leather Inc., Re*, 2016 ONSC 1044 (Ont. SCJ)

5 *Ivaco Inc., Re*, 2004 CarswellOnt 2397 (Ont. SCJ [Commercial List]).

6 *Nortel Networks Corp., Re,* 2009 CarswellOnt 4467 (Ont. SCJ [Commercial List]).

7 *PCAS Patient Care Automation Services Inc., Re,* 2012 ONSC 2840 (Ont. SCJ [Commercial List]).

8 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (SCC).

SCHEDULE "B"

RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36 .**

Stays, etc. — other than initial application

Burden of proof on application

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

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

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 INDEX ENERGY MILLS ROAD CORPORATION

Court File No. CV-17-580840-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Shayne Kukulowicz LSUC# 30729S
Tel: 416.860.6463
Fax: 416.640.3176
skukulowicz@casselsbrock.com

Jane Dietrich LSUC# 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Lance Williams LSBC# 508874
Tel: 604.691.6112
Fax: 604.691.6120
lwilliams@casselsbrock.com

Lawyers for Index Energy Mills Road Corporation