Court File No. CV-12-9617-00CL

*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 First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc. (the "Applicants")**

# FACTUM OF THE APPLICANTS
**(Returnable February 23, 2012)**

February 22, 2012


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

John N. Birch LSUC #38968U
Tel: 416-860-5225
Fax: 416-640-3057
jbirch@casselsbrock.com

David S. Ward LSUC#: 33541W
Tel: 416.869.5960
Fax: 416.360.3154
Lawyers for the Applicants

Court File No. CV-12-9617-00CL

*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 First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc. (the "Applicants")**

## FACTUM OF THE APPLICANTS
## (For the Initial Applicant returnable February 23, 2012)

## PART I – INTRODUCTION

1. First Leaside Wealth Management Inc. ("**FLWM**") and the entities listed in the attached Schedule "A" (collectively, "**First Leaside**", or the "**Company**") seek relief under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. First Leaside, through its various affiliated companies, trusts, and limited partnerships ("**LPs**"), runs numerous businesses, including the investment and development of commercial and multi-residential properties and retirement residences. In general, First Leaside provides investment and wealth management services to more than 1,200 investors who have invested with the Company. First Leaside also provides its investors with estate planning, insurance, accounting, and tax services.

3. First Leaside's success was predicated both on its ability to raise capital that it could invest and develop real estate, and the stability of the real estate market to realize a return on those investments. Thus, the recent economic downturn has had a negative impact on the Company's financial situation: First Leaside has realized lower operating income while simultaneously incurring higher operational costs. Further, since November 2011, the Company has been unable to raise capital to achieve its business plan due to a regulatory investigation by the Ontario Securities Commission ("**OSC**") and the Investment Industry Regulatory Organization of Canada ("**IIROC**").

4. The confluence of these events has created a liquidity crisis at First Leaside. Several of the First Leaside entities are insolvent. Further, one First Leaside entity has already defaulted on its mortgage obligations, and another is facing an imminent default. First Leaside is seeking CCAA protection to shelter the Company from a run to the courthouse by its creditors to immediately enforce their security interests. With the shelter of a CCAA proceeding, First Leaside intends to implement an orderly wind-down of its operations to ensure it has adequate proceeds to satisfy all of its creditors, avoid any further defaults, and, ultimately, to maximize distributions to all of the Company's stakeholders.

## PART II – THE FACTS

5. The facts with respect to this Application are more fully set out in the Affidavit of Gregory MacLeod, sworn February 22, 2012, in support of First Leaside's CCAA filing (the "**MacLeod Affidavit**"). All capitalized terms used but not defined herein shall have the meaning ascribed to them in the MacLeod Affidavit.

MacLeod Affidavit, Application Record, Tab 2

### ***Overview of First Leaside's Operations***

6. First Leaside's operations are centred on two companies: FLWM and its wholly-owned subsidiary, First Leaside Securities Inc. ("**FLSI**").

MacLeod Affidavit para. 5, Application Record, Tab 2

7. FLWM is the ultimate parent of the First Leaside group of companies. In addition to owning several assets including a few small accounting firms and marketable securities, FLWM generated revenue from fees it charged for services its provided to other First Leaside entities, including capital raises.

MacLeod Affidavit paras. 19, 21, 22, Application Record, Tab 2

8. FLSI is an investment dealer under Ontario securities law and is regulated by the OSC and IIROC. FLSI is a one-stop investment shop for First Leaside's clients. Clients used FLSI to manage a portfolio of investment products including bonds, t-bills, and marketable securities (collectively, the "**Marketable Securities**").

MacLeod Affidavit para. 6, Application Record, Tab 2

9. The Marketable Securities are held in segregated accounts with Penson Financial Services Canada Inc. ("**Penson**"). These accounts are all intact. Thus, the Company's clients will not suffer a loss of Marketable Securities either now or as a

result of the CCAA proceeding. Indeed, it is First Leaside's intent to seek this Court's permission to allow the Company's clients to transfer the Marketable Securities and any cash balances held at Penson to another investment dealer.

MacLeod Affidavit paras. 7 and 27, Application Record, Tab 2

10. Clients also used FLSI to invest in equity and debt securities issued by First Leaside ("**FL Products**"). The FL Products were intended to provide First Leaside's investors with consistent distributions, potential capital appreciation and, in the case of equity investments, potential tax deductions.

MacLeod Affidavit paras. 24, 45, 46, 47, Application Record, Tab 2

11. Like FLWM, FLSI earned revenue through fees it charges for its services.

MacLeod Affidavit para. 25, Application Record, Tab 2

12. FLWM maintains $2.0 million regulatory capital in FLSI.

MacLeod Affidavit para. 111, Application Record, Tab 2

***First Leaside's Corporate Structure – Operating Companies***

13. In addition to FLWM and FLSI, First Leaside has 5 other operating companies: First Leaside Finance Inc. ("**FL Finance**"), FL Securities Inc. ("**FL Securities**") First Leaside Management Inc. ("**FL Management**"), First Leaside Insurance Inc. ("**Fl Insurance**"), and First Leaside Accounting and Tax Services ("**FL Services**") (FLWM, FLSI and the other operating companies shall hereinafter be referred to as the "**Operating Companies**").

MacLeod Affidavit para. 19, Application Record, Tab 2

14. FL Finance acted as a "central bank" for the Company. Traditionally, First Leaside entities have raised more capital than required for their immediate needs. For example, many LPs sold units to investors before the LP had identified a specific project

or land had been purchased. However, since the Company promised its investors substantial regular distributions on their investments, and adequate returns could not be obtained by allowing the invested funds to sit in a bank account, the LPs with idle cash required a way to generate income to fund those distributions.

MacLeod Affidavit para. 30, Application Record, Tab 2

15. To fund the distributions to its investors, First Leaside used FL Finance as a lending conduit whereby FL Finance would borrow surplus funds from those Company entities that had idle cash, and in turn lend those surplus funds to other First Leaside entities that required the cash for various reasons, including to rehabilitate a property. The interest rates on those intercompany loans were typically between 6% to 7% a year.

MacLeod Affidavit para. 31, Application Record, Tab 2

16. In addition to acting as a central bank for First Leaside, FL Finance has also repurchased clients' positions in FL Products. Before the fall of 2011, the Company had an informal policy of arranging purchases of otherwise illiquid LP units from investors who wished to liquidate their investments. Each unit was initially issued at $1 a unit and repurchased at this same rate.

MacLeod Affidavit para. 33, Application Record, Tab 2

17. FL Securities, an exempt market dealer, acts as an asset manager and promoter of real estate assets. FL Securities charges fees for these services.

MacLeod Affidavit para. 35, Application Record, Tab 2

18. Similarly, FL Management is the property manager of certain Canadian First Leaside properties. It too charges fees for its services.

MacLeod Affidavit para. 36, Application Record, Tab 2

19. FL Insurance is licensed as a corporate insurance agency in Ontario. FL Insurance sells, as an agent, third party insurance policies to Company investors. FL Insurance earns a small commission on these sales.

MacLeod Affidavit para. 39, Application Record, Tab 2

20. Finally, FL Services provides personal income tax preparation for Canadian and U.S. investors.

MacLeod Affidavit para. 41, Application Record, Tab 2

***First Leaside's Corporate Structure - LPs***

21. First Leaside's investors invest in the Company's various projects by purchasing LP units.

MacLeod Affidavit para. 43, Application Record, Tab 2

22. Generally, First Leaside formed LPs to raise capital so that it could locate and acquire real estate that had not been fully or effectively developed. The LPs acquired property through arm's-length transactions. The costs to identify, acquire, and rehabilitate a property usually generated a loss for the LP in the first few years. The LP's investors could realize this loss and offset it against their other income, thereby creating a tax benefit.

MacLeod Affidavit para. 45, Application Record, Tab 2

23. If an LP were to subsequently acquire a property that was leased after its rehabilitation, the rental payments would produce operating income and cash flow that could be distributed to the LP's investors. If a property was sold after it was rehabilitated, investors could realize the cash proceeds, and either withdraw their share of those proceeds, or roll them into new LPs that were subsequently created.

MacLeod Affidavit para. 47, Application Record, Tab 2

24. Additionally, each year a certain percentage of funds that had been invested in an LP was distributed by the LP to its investors as a return of capital.

MacLeod Affidavit para. 46, Application Record, Tab 2

25. First Leaside implemented this development model through an array of LPs. These LPs were either aggregator LPs that held multiple LPs that in turn each held a property, or individual LPs that acquired and operated a single property or development.

MacLeod Affidavit para. 43, Application Record, Tab 2

26. First Leaside Expansion Limited Partnership ("**FLEX**") is an example of an aggregator LP. FLEX owns four different LPs that each own a separate property. Amongst the parcels of land that FLEX owns directly, or through its LPs, is a parcel of land that was to be First Leaside's head office in Uxbridge, Ontario ("**Victoria St. Building**"). This parcel of land is now subject to eleven construction liens relating to that property project.

MacLeod Affidavit para. 49(a), Application Record, Tab 2

27. Not all of First Leaside's property holdings are in Canada—the Company used Wimberly Apartments LP ("**WALP**"), an Ontario limited partnership, to acquire, through a series of Texas LPs, numerous properties in Texas. These properties are at various stages of development and require ongoing capital expenditures to realize their rehabilitation plans. However, although WALP is seeking CCAA protection, none of the operating Texas LPs are seeking protection at this stage (whether in Canada or the U.S.) because First Leaside expects the properties to generate sufficient cash flows to continue operations for at least the short term assuming that capital expenditures can be cut, revenues increased, and several properties sold (offers have been received from potential purchasers).

MacLeod Affidavit paras. 49(b), 137 – 142, Application Record, Tab 2

28. In addition to LPs that had identified property projects, First Leaside also raised capital without knowing where the capital would be invested. Each of the LPs that raised funds in this manner is known as a "blind pool" (a "**Blind Pool LP**"). Some of the funds that have been raised by Blind Pool LPs have been lent to FL Finance which, in turn, re-lent the funds to WALP to fund its rehabilitation projects and operating losses.

MacLeod Affidavit para. 50, Application Record, Tab 2

***First Leaside Corporate Structure – Funds***

29. Finally, First Leaside also allowed its investors to invest in units of Company trusts (the "**Funds**"). The Funds were created to generate interest income for investors from the properties that were already owned within the First Leaside group. The Funds created access to capital for other First Leaside entities that could use the funds for operations and rehabilitation programs, and to make additional property acquisitions.

MacLeod Affidavit para. 52, Application Record, Tab 2

***The Lead Up to the CCAA Filing***

30. The OSC began investigating First Leaside in the fall of 2009, and its investigation is ongoing.

MacLeod Affidavit para. 54, Application Record, Tab 2

31. First Leaside cooperated with the OSC's investigation and provided hundreds of binders of materials at the OSC's request.

MacLeod Affidavit para. 55, Application Record, Tab 2

32. In connection with the OSC investigation, on March 5, 2011, the Company, through its counsel, retained Grant Thornton Ltd. ("**GTL**") as a consultant to review,

report, and make recommendations about First Leaside's business, assets, and operations.

MacLeod Affidavit para. 56, Application Record, Tab 2

33. From March to August, 2011, GTL met with First Leaside personnel to analyze the Company's business and prepare its report. On August 19, 2011, GTL released a detailed report on the Company's operations ("**GTL Report**").

MacLeod Affidavit para. 57, Application Record, Tab 2

34. The GTL Report concluded, among other things, that all First Leaside LPs and companies had a positive fair market value of assets in excess of underlying mortgage debt.

MacLeod Affidavit para. 59, Application Record, Tab 2

35. However, the GTL also identified numerous issues that continue to threaten the Company today.

MacLeod Affidavit para. 60, Application Record, Tab 2

36. After the release of the GTL Report, and in light of the recommendations made therein, on November 3, 2011, First Leaside's board of directors took steps to strengthen its corporate governance by appointing an independent committee of directors (the "**Independent Committee**") to assume all decision-making authority in respect of the Company and to oversee its operations.

MacLeod Affidavit para. 62, Application Record, Tab 2

37. The GTL Report was provided to the OSC and IIROC upon its release. As a result of the continuing regulatory investigation, First Leaside advised the OSC and IIROC that it would implement interim protective measures with the hope that the business could be restructured within several months. Amongst these protective

measures was a voluntary cease trade that the Company implemented on October 31, 2011 ("**Cease Trade**").

MacLeod Affidavit para. 64, Application Record, Tab 2

38. Moreover, on November 4, 2011, First Leaside retained GTL as an independent monitor to, in part, satisfy the OSC and IIROC that the Company was implementing a restructuring plan and establishing rigid reporting requirements.

MacLeod Affidavit para. 67, Application Record, Tab 2

39. Later that same month, First Leaside recognized that, in order to restructure the Company, it would have to conserve its resources. As such, the Independent Committee ceased all distributions to LP unitholders, interest payments on client debt, and dividends on outstanding shares.

MacLeod Affidavit para. 69, Application Record, Tab 2

40. In early December, with the OSC's input and approval, the Independent Committee appointed G.S. MacLeod & Associates Inc. as Chief Restructuring Officer of First Leaside ("**CRO**"). The Independent Committee tasked the CRO with developing a workout plan for First Leaside.

MacLeod Affidavit para. 71, Application Record, Tab 2

41. During the course of the CRO's engagement, it became apparent that First Leaside's business could not be successfully reorganized to operate as a going concern due to the Company's limited cash reserves. The Company's cash reserves had been negatively impacted by the Cease Trade. Given the limited reserves, the CRO realized that it was a matter of months before First Leaside exhausted the reserves. If the reserves were exhausted, the investors' recovery would be diminished if the Company

fell back to a wind-up strategy after a failed recovery plan if the Company chose to continue its business.

MacLeod Affidavit para. 72, Application Record, Tab 2

42. The CRO ultimately concluded in late January 2012 that it was too risky for First Leaside to pursue a resumption of its previous operations, and thus the Company should undertake an orderly wind-down of its operations.

MacLeod Affidavit para. 72, Application Record, Tab 2

43. The CRO presented this recommendation to the Independent Committee which approved the proposed wind-down and resultant CCAA filing.

MacLeod Affidavit para. 74, Application Record, Tab 2

***First Leaside's Assets***

44. First Leaside has over $370 million in assets under management, which includes both Marketable Securities and FL Products.

MacLeod Affidavit para. 77, Application Record, Tab 2

45. The Marketable Securities are all intact and the Company intends to facilitate the clients' transfer of those assets and cash balances to another investment dealer during the CCAA proceedings.

MacLeod Affidavit para. 27, Application Record, Tab 2

***First Leaside's Liabilities***

46. First Leaside is currently indebted to its secured creditors, namely mortgagees, in the approximate amount of $176 million.

MacLeod Affidavit para. 79, Application Record, Tab 2

47. The Company has $175 million in mortgages at seven First Leaside LPs, including FLEX and WALP. The remaining amount of secured debt is a loan from Toronto-Dominion Bank to FL Services.

MacLeod Affidavit paras. 86 and 95, Application Record, Tab 2

48. There are also eleven construction liens that have been filed against the Victoria St. Building in Uxbridge, Ontario, and two adjacent properties that are held by other FLEX LPs. The total amount of these construction liens is $3,446,276.29.

MacLeod Affidavit para. 96, Application Record, Tab 2

49. The Company is indebted to its unsecured creditors, including investors who hold notes or other debt instruments, in the approximate amount of $131.8 million.

MacLeod Affidavit para. 97, Application Record, Tab 2

50. Finally, First Leaside has raised approximately $199.2 million in equity to date through the sale of LP units and its common and preferred shares.

MacLeod Affidavit para. 102, Application Record, Tab 2

51. Since the aggregate value of real property assets exceeds the value of underlying mortgages, there will net proceeds remaining in many LPs which can be used to make payments to unsecured creditors, and, in some cases, to equity holders. after all creditors are paid in full to provide at least some return to equity holders, including First Leaside's LP unit holders. However, the recovery will obviously vary depending on the entity.

MacLeod Affidavit para. 80, Application Record, Tab 2

52. Regardless, it is apparent that there is a material equity-holder deficit in both individual First Leaside entities and the overall First Leaside group.

MacLeod Affidavit para. 80, Application Record, Tab 2

***First Leaside is Insolvent***

53. FLWM's financial position has worsened substantially since the Cease Trade was implemented in November 2011. FLWM's cash reserves have fallen from $2.8 million in November 2011 to $1.6 million at the end of January 2012. There are no recurring revenue streams from asset management at present. As a result, absent cash proceeds from asset disposals, First Leaside will exhaust its current cash reserves in April.

MacLeod Affidavit para. 111, Application Record, Tab 2

54. Further, one First Leaside entity has already defaulted on its mortgage obligations. Another First Leaside LP is also in danger of an imminent default because it does not have sufficient net operating income to service its mortgage obligations.

MacLeod Affidavit paras. 112 and 113, Application Record, Tab 2

55. Moreover, the ongoing regulatory investigations and related legal and consultant fees have caused the Company to incur several million dollars in unanticipated expenses. Additionally, the Cease Trade, in and of itself, resulted in significant lost agency and business development fees for FLWM.

MacLeod Affidavit para.115, Application Record, Tab 2

56. Despite these cash constraints and the related defaults, including the mortgage default and the construction liens, First Leaside has generally made regular mortgage payments to its creditors. While the majority of the properties have generated sufficient revenue to service their corresponding mortgage obligations, given the cash constraints on First Leaside, it will be difficult, if not impossible, for the Company to continue to make mortgage payments in the near future absent a CCAA proceeding and implementation of the wind-down plan.

MacLeod Affidavit para. 117, Application Record, Tab 2

## PART III – ISSUES

57. The issues on this Application are as follows:

a. Should this Court grant protection under the CCAA to First Leaside?

b. Should this Court grant the Charges (defined below)?

c. Should this Court grant superpriority to the Charges?

d. Should this Court appoint Representative Counsel?

## PART IV – LAW AND ARGUMENT

### A. First Leaside Should be Granted Protection under the CCAA

***The First Leaside Filing Entities are "Debtor Companies" to which the CCAA Applies***

58. The CCAA applies to a debtor company or affiliated debtor companies if the total claims against the debtor company or affiliated debtor companies is more than $5 million. The CCAA defines company as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province."

*CCAA* ss. 3(1), 2(1).

59. The Applicants are all companies that were incorporated pursuant to the laws of the province of Ontario, and, as such, are companies to which the CCAA applies. Further, as detailed herein and in the MacLeod Affidavit, the claims against the Applicants far exceed $5 million.

60. A debtor company is defined in the CCAA as a company that is, *inter alia*, bankrupt or insolvent.

*CCAA* s. 2(1).

61. The CCAA does not define the term "insolvent". As a result, courts have frequently looked to the definition of insolvent person in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") to define insolvent for the purposes of the CCAA. The BIA, s. 2, defines insolvent person as:

> [A] person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
> (a) who is for any reason unable to meet his obligations as they generally become due,
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

62. In *Stelco Inc. (Re)*, the Court reasoned that in a restructuring context the definition of insolvency, in so far as it relates to the inability to meet obligations as they become due, should be given a "contextual and purposive interpretation" and should be applied when "there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of 'cash' to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by court authorization." Alternatively, strictly looking at the meaning of insolvent in the context of the CCAA, the question is whether but for the granting of the CCAA order, the applicant would face a liquidity crisis and run out of cash.

> *Stelco Inc. (Re)* (2004), 48 CBR (4th) 299, at 40 (Ont Sup Ct J (Commercial List)).

63. First Leaside is insolvent: absent new cash from asset disposals, the Company will exhaust its current cash reserves in April. It is unlikely that the Company would complete a successful exit from CCAA protection before its reserves are exhausted.

64. Further, at least one First Leaside entity, First Leaside Venture LP, has defaulted on its mortgage obligations. Another LP, First Leaside Investors LP, does not generate sufficient net operating income to service its mortgage such that absent CCAA protection, default is imminent. Thus, under *Stelco Inc.*, First Leaside is insolvent and is entitled to seek relief under the CCAA.

### *The CCAA Applies Despite the Fact that the Applicants Intend to Implement a Wind Down*

65. The CCAA applies not only to those companies that intend to restructure their operations and continue as a going concern after emerging from CCAA protection, but also to those companies that plan to restructure by winding down their operations. Courts have expressly recognized that the CCAA applies to "winding-up or liquidation of a company . . . provided the same is proposed in the best interests of the creditors generally."

> *Lehndorff General Partner Ltd. (Re)*, 17 CBR (3d) 24, at 7 [*Lehndorff*] (Ont Ct J (Gen Div - Commercial List));
> *Associated Investors of Canada Ltd. (Re)* (1987), 67 CBR (NS) 237, at 36 (Alta QB), rev'd on other grounds (1988), 71 CBR (NS) 71;
> See also *Brake Pro Ltd. (Re)* (2008), 2008 CarswellOnt 3195 (WL Can) 10 (Ont Sup Ct).

66. As noted above, and as further detailed in the MacLeod Affidavit, First Leaside intends to effectuate an orderly wind down of its operations; it does not plan to continue its business operations at the conclusion of these proceedings. However, that the

Company does not intend to operate as a going concern at the conclusion of these proceedings does not bar it from seeking relief under the CCAA. Thus, First Leaside is entitled to relief under the CCAA regardless of the fact that it intends to conduct an orderly wind up of its operations and liquidation of its assets.

***A Stay of Proceedings Against the Applicants is Appropriate***

67. Pursuant to section 11.02 of the CCAA, upon granting an initial application, a court may make an order on any terms for the period of time it deems necessary, but for not more than 30 days, *inter alia*, restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company, and prohibiting, until otherwise ordered by the court, the commencement of any action, suit, or proceeding against the debtor company where the applicant has satisfied the court that circumstances exist that make the order appropriate.

68. In *Lehndorff General Partner Ltd. (Re)*, the Court reasoned that the "power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection." A court's power to grant a stay, therefore, extends to not only creditors, but to all parties that could potentially jeopardize the success of a plan of reorganization and the continuance of the company. Moreover, the court may stay all rights of secured creditors.

*Lehndorff*, at para 10 and 11.

69. In order to successfully implement a plan, it is imperative that the debtor company be provided respite from litigation and other rights creditors may seek to exercise against the debtor company.

*Lehndorff*, at para 14.

70. First Leaside requires the protection of the stay of proceedings in order to successfully implement its plan and maximize the recovery of the Company's creditors. The stay of proceedings will allow the Company to implement its wind-down plan and effectuate orderly sales of its assets. A stay would also allow First Leaside, with the assistance of the Monitor, to develop a claims process for the Company's investors so that realizations can be distributed, with court approval, amongst the investors in an equitable manner.

71. Thus, First Leaside respectfully submits that circumstances exist that support the issuance of an order under the CCAA staying proceedings against First Leaside for 30 days.

**B. The Administration Charges Should be Granted and Given Superpriority Over all Other First Leaside Creditors**

72. A court may grant an administration charge and give it super-priority status pursuant to CCAA section 11.52:

> 11.52(1) Court may order security or charge to cover certain costs — 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.
>
> 11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> *CCAA*, s.11.52

73. Similarly, section 11.51 of the CCAA allows a court to also grant a charge for the benefit of a debtor's directors and officers on a super-priority basis:

> 11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> 11.51(3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> CCAA, s.11.51

74. To grant super-priority to a charge over a debtor's property in a CCAA proceeding, a court must first consider whether or not notice has been given to the debtor's secured creditors who will likely be affected by the security or charge.

> *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) at paras. 32, 39 and 46.

75. First Leaside seeks a charge over the Company's assets for the benefit of its legal advisors, the Monitor, and the Monitor's proposed counsel (the "**Estate Professionals**"). The Estate Professionals will assist First Leaside throughout what will likely be a complicated CCAA proceeding and proposed wind down. The institutional knowledge that the Estate Professionals currently possess is invaluable given the complicated nature of First Leaside's structure and financing.

> MacLeod Affidavit paras. 187 and 185, Application Record, Tab 2

76. Thus, it is necessary to pay the Estate Professionals' reasonable fees and disbursements. The Company is seeking a charge of $1 million ("**Administrative Charge**") on First Leaside's assets as security for the amounts owing to the Estate Professionals by the Company.

> MacLeod Affidavit para. 187, Application Record, Tab 2

77. First Leaside is also seeking a charge over the Company's assets for the benefit of its directors and officers and the Independent Committee's counsel ("**D&O Charge**", with the Administrative Charge, the "**Charges**")). First Leaside does not, and historically never has had, directors and officers insurance. Although the Company tried to obtain such insurance in 2011, it was not able to do so at reasonable rates and with a

reasonable scope of coverage, given that coverage was sought after First Leaside's problems were apparent and the OSC's investigation was underway.

MacLeod Affidavit paras. 162 and 161, Application Record, Tab 2

78. First Leaside requires the continued participation of its directors and officers in order to successfully restructure its business and finances. The directors and officers do not currently have the protection of liability insurance and, given the potential liabilities to which they could be subject, it is unlikely that the directors and officers will continue their service with First Leaside unless the D&O Charge is granted.

MacLeod Affidavit paras. 159, 160, and 161, Application Record, Tab 2

79. First Leaside gave notice of this application, and its intent to seek super-priority of the Charges, to all creditors likely to be affected by the Charges. The Company identified these creditors from its review of First Leaside's books and records and by searches of the provincial Personal Property Security Registries and real property searches. Further, on November 28, 2011 and February 8, 2012, First Leaside provided notice to all its investors of its intention to pursue CCAA protection. Moreover, the Company and its advisors have been involved in ongoing discussions with its secured creditors about the CCAA application for a few weeks.

MacLeod Affidavit paras. 70 and 76, Application Record, Tab 2

80. First Leaside respectfully submits that this is an appropriate case in which to grant a super-priority to the Charges. The Estate Professionals and the Company's directors and officers will play a critical role in the restructuring of First Leaside and it is unlikely that the Estate Professionals and the directors and officers will participate in the

CCAA proceedings unless the Charges are granted to secure their fees and disbursements.

81. First Leaside also seeks a term of the order that the legal fees of counsel to the Independent Committee of the board of directors of FLWM be secured as part of the D&O Charge.

MacLeod Affidavit para. 157, Application Record, Tab 2

82. This court may grant super-priority to the Charges over the interests of First Leaside's creditors due to the paramountcy of the CCAA.

83. The CCAA is paramount over provincial legislation. In *Metcalf & Mansfield Alternative Invstment II Corp. (Re)*, the Ontario Court of Appeal stated, among other things:

> The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount.
>
> *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, (2008) 92 O.R. (3d) 513 at para. 104.

84. Paramountcy applies where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament.

*Nortel Networks Corp (Re)*, [2009] O.J. No. 4967 (C.A.) at para. 38 [*Nortel*].

85. The purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors. This purpose persists regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to achieve the highest price for the benefit of all stakeholders.

*Nortel,* at paras. 33-40.

86. First Leaside requires the services of the beneficiaries of the Charges in order to pursue a successful restructuring of its business and finances. Absent charges that rank in priority to First Leaside's current creditors, First Leaside will likely be deprived of the services of the Estate Professionals and the Company's directors and officers to the detriment of First Leaside's stakeholders. This would frustrate First Leaside's ability to accomplish a successful restructuring and thus the central purpose of the CCAA.

87. This Court may also grant a super-priority to the Charges over the $2 million in regulatory capital that First Leaside maintains pursuant to IIROC requirements. IIROC derives its authority from provincial legislation. IIROC is a self-regulatory organization for the investment industry and is recognized as such under provincial securities statutes by each of the provincial securities regulators.

88. As a creature of provincial statute, IIROC's requirements may be overridden by a court order pursuant to the CCAA where the requirements frustrate a successful reorganization. To the extent that granting the super-priority of the Charges, conflicts with IIROC requirements, First Leaside respectfully submits that the doctrine of paramountcy is properly invoked in this case and that this Court should exercise its

discretion and order super-priority of the Charges over the Company's encumbrances in order to ensure the continued participation of the Estate Professionals and the Company's directors and officers in First Leaside's' CCAA proceedings, and to avoid frustration of First Leaside's restructuring efforts.

89. First Leaside has, however, negotiated with IIROC so that the D&O Charge will not apply to FLSI assets and the Administration Charge will apply to FLSI assets subject to certain limitations.

> MacLeod Affidavit para. 122, Application Record, Tab 2

**C. Representative Counsel Should be Appointed**

90. A Court has broad authority, pursuant to section 11 of the CCAA, to make any order that it considers appropriate in the circumstances when a debtor company has applied for relief under the CCAA. This broad grant of authority includes the ability to appoint representative counsel.

> *Fraser Papers Inc. (Re)* (2009), 2009 CarswellOnt 6169,
> at 7 (Ont Sup Ct J (Commercial List))

91. In determining whether or not to appoint representative counsel, courts have considered numerous factors including: the vulnerability and resources of the group sought to be represented; the benefit of the appointment to the debtor; any social benefit to be derived from the representation of the group; the appointment's ability to facilitate the administration of the CCAA proceedings; the avoidance of a multiplicity of legal retainers; the balance of convenience, and whether it is fair and just to make the appointment; whether representative counsel has already been appointed for those with similar interests; and the position of other stakeholders and the Monitor.

> *Canwest Publishing Inc/Publications Canwest Inc. (Re)*,
> 2010 ONSC 1328, at 21 [*Canwest*].

92. Representative counsel has been appointed where the group to be represented is vulnerable, and there is no other counsel available in the CCAA proceedings to represent their interests.

*Canwest*, at 24.

93. First Leaside seeks to appoint Fraser Milner Casgrain ("**FMC**") as representative counsel for the benefit of the Company's investors. First Leaside has over 1,200 investors who are dispersed across the country. The majority of these investors are individuals, some of whom are non-accredited investors, who likely lack the resources to represent themselves in these proceedings. However, even if the investors had the resources to represent themselves, appointment of representative counsel would avoid a multitude of legal retainers.

MacLeod Affidavit paras. 89, 165 and 168, Application Record, Tab 2

94. The appointment of representative counsel would also provide an enormous benefit to First Leaside: it would enable the Company to both communicate more effectively with investors and work more efficiently with one experienced representative instead of with over a thousand individuals who likely do not have experience with complicated CCAA proceedings. First Leaside seeks to include Representative Counsel's fees and disbursements in the Administration Charge and to cap Representative Counsel fees and disbursements at $150,000, subject to further order of the court.

MacLeod Affidavit para. 168, Application Record, Tab 2

95. As detailed in the MacLeod Affidavit, First Leaside's proposed representative counsel, FMC, and more specifically FMC partner Shayne Kukulowicz, has extensive experience with CCAA proceedings, and with acting as representative counsel.

MacLeod Affidavit para. 170, Application Record, Tab 2

96. Finally, the proposed Monitor, GTL, supports the appointment of representative counsel.

97. Thus, the Applicants respectfully request an Order appointing representative counsel for First Leaside's investors; granting a charge for its fees and disbursements; and giving the charge super-priority for the reasons set out *supra* for a super-priority charge for the Charges, namely that it is unlikely that representative counsel would participate in these proceedings absent a charge with super-priority over other First Leaside encumbrances. Absent the participation of representative counsel, First Leaside's restructuring efforts will be frustrated.

## PART V – ORDER REQUESTED

98. First Leaside therefore requests that an Order substantially in the form of the draft Initial Order attached as Tab __ to the Application Record be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd day of February, 2012

**Cassels Brock & Blackwell LLP**

Lawyers for the Applicants

## SCHEDULE "A"

## LIST OF AUTHORITIES

1. *Stelco Inc. (Re)* (2004), 48 CBR ($4^{th}$) 299 (Ont Sup Ct J (Commercial List))
2. *Lehndorff General Partner Ltd. (Re), 17 CBR (3d) 24 (Ont Ct J (Gen Div - Commercial List))*
3. *Associated Investors of Canada Ltd. (Re) (1987), 67 CBR (NS) 237 (Alta QB), rev'd on other grounds (1988), 71 CBR (NS) 71*
4. *Brake Pro Ltd. (Re) (2008), 2008 CarswellOnt 3195 (WL Can) 10 (Ont Sup Ct)*
5. *Canwest Global Communications Corp. (Re) (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.)*
6. *Metcalfe & Mansfield Alternative Investments II Corp. (Re), (2008) 92 O.R. (3d) 513*
7. *Nortel Networks Corp (Re), [2009] O.J. No. 4967 (C.A.)*
8. *Fraser Papers Inc. (Re) (2009), 2009 CarswellOnt 6169 (Ont Sup Ct J (Commercial List))*
9. *Canwest Publishing Inc/Publications Canwest Inc. (Re), 2010 ONSC 1328*

## SCHEDULE "B"

## STATUTES

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

**Section 2(1)**

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;"

**Section 3 (1)**

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.

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.1985, c. C.36, as amended;**

**AND IN THE MATTER OF FIRST LEASIDE WEALTH MANAGEMENT INC. et al**

**Court File No: CV-12-9617-00CL**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS**
**(RETURNABLE FEBRUARY 23, 2012)**


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

John Birch LSUC#38698U
Tel: 416-860-5225
Fax: 416-640-3057

David S. Ward LSUC#: 33541W
Tel: 416.869.5960
Fax: 416.360.3154

Solicitors for the Applicants


Legal*7216880.2