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
(Initial Application)

August 15, 2017

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PART I – OVERVIEW

1. This is an application by Index Energy Mills Road Corporation ("**Index Energy Ajax**" or the "**Applicant**") for an initial order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*[1] (the "**CCAA**"), among other things: (i) declaring that the CCAA applies to Index Energy Ajax; (ii) providing a stay of all proceedings and remedies taken or that might be taken in respect of the Applicant or any of its property and its directors and officers, except where otherwise set forth in the Initial Order or otherwise permitted by law; (iii) authorising the Applicant to carry on business in a manner consistent with the preservation of its property and business and to make certain payments in connection with its business; (iv) appointing Grant Thornton Limited ("**GTL**") as the court-appointed monitor (the "**Monitor**") in these proceedings; (v) authorising Index Energy Ajax to borrow the maximum sum of $5,000,000 pursuant to a credit facility (the "**DIP Facility**") as interim financing from Index Equity US LLC ("**Index US**", in such capacity, the "**DIP Lender**") with a maximum amount of $1,600,000 being advanced by the DIP Lender prior to the CCAA comeback hearing (the "**Comeback Hearing**"); and sealing on

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

the Court file certain confidential information as described in the Pre-Filing Report of the Monitor filed August 15, 2017 (the "**Pre-Filing Report**").

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**"). Unfortunately, as a result of various design and construction issues, as discussed below, Index Energy Ajax encountered difficulties in retrofitting the Biomass Facility and actual energy output has been lower and operational costs have been higher than anticipated. Index Energy Ajax 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, including a lien claim of approximately $31.3 million (the amount of security required to vacate this claim was recently reduced by Court order) registered by HMI (the "**HMI Lien Claim**").[2]

3. With less than forecast output, Index Energy Ajax is in default of various obligations to the Syndicate (as defined below), its senior secured lenders, who have made demand for payment of amounts in excess of $45 million.[3] As well, Index Energy Ajax is experiencing significant liquidity constraints and the existence of the HMI Lien Claim has impaired the Applicant's ability to obtain additional financing. Index Energy Ajax is insolvent.[4]

4. While the underlying business remains strong, Index Energy Ajax ultimately requires a restructuring to inject new funds into its operations to address the various deficiencies in the Biomass Facility. Accordingly, Index Energy Ajax seeks protection under the CCAA to allow it a period of time to develop and implement a sales and investment solicitation process ("**SISP**"), and to access urgently required interim financing on a priority basis to preserve value for all

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[2] Affidavit of Rickard Haraldsson, Application Record, Tab 2 ("***Haraldsson Affidavit***") at paras.2-3.
[3] *Ibid*, at para. 3.
[4] *Ibid,* at paras. 3 & 80.

stakeholders and ensure its viability as a going-concern. The Applicant, Index US and the Syndicate are currently in negotiations to reach agreement on terms of a mutually acceptable SISP which would include a stalking horse bid, and to allow further advances under the DIP Facility beyond the initial permitted draw amount, on a consensual basis, all of which would be subject to further court approval.[5]

5. Given the Applicant meets the technical requirements set out in the CCAA for protection, the benefits to stakeholders of ensuring the Applicant remains a going concern, and the support of its senior secured creditors, the Applicant submits that it is appropriate for this Court to grant the Initial Order substantially in the form sought.

PART II – FACTS

6. The relevant facts in this proceeding are set out in detail in the affidavit of Rickard Haraldsson, to be dated and notarised August 16, 2017 (the "**Haraldsson Affidavit**"). Mr Haraldsson is a director of the Applicant and a director and the Chief Executive Officer of Index Equity Sweden AB, the parent company of Index Energy Sweden AB (publ) ("**Index Energy Sweden**"). Capitalized terms in this factum not otherwise defined have the same meanings as in the Haraldsson Affidavit.

<u>Corporate Overview</u>

7. Index Energy Ajax was incorporated pursuant to the laws of Ontario on November 7, 2006. Its registered office is located at 170 Mills Road, Ajax, Ontario.[6]

8. Index Energy Ajax is owned by three shareholders:[7]

(a) Index Energy Sweden is the owner of 70% of the issued common shares and certain non-voting second preferred shares in the capital stock of Index Energy Ajax;

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[5] *Ibid*, at para. 82.
[6] *Ibid,* at para. 11.
[7] *Ibid*, at para. 12.

(b) R. Andrews Investment Company, LLC ("**R. Andrews**") is the owner of 10% of the issued common shares in the capital stock of Index Energy Ajax; and

(c) Jacqueline Kerr ("**J. Kerr**") is the owner of 20% of the issued common shares in the capital stock of Index Energy Ajax.

9. Index Energy Sweden acquired its interest in Index Energy Ajax from Index Residence AB (formerly Index International AB (publ)) ("**Index Residence**"), a related Swedish company.[8]

10. Index Residence, Index Sweden, and Index US are part of an affiliated global real estate, energy and investment group based in Sweden (collectively, the "**Index Group**").

11. Index Energy Ajax was incorporated to retrofit (the "**Retrofit**") an existing energy plant located at 170 Mills Road and 176 Mills Road, Ajax, Ontario (the "**Property**") to become the Biomass Facility, a bio-mass fired, co-generation facility that would supply steam to industrial clients and generate electricity for delivery to Ontario's power grid.[9]

Events Leading Up to CCAA Filing

12. Index Energy Ajax entered into a feed-in-tariff contract with the Ontario Power Authority dated May 5, 2010 (the "**FIT Contract**"). In order to complete the Retrofit and meet the performance targets in the time periods required under the FIT Contract, Index Energy Ajax entered into an engineering, procurement and construction contract with HMI dated December 21, 2012 (as amended from time to time, the "**EPC Contract**").[10]

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[8] *Ibid*, at para. 13.
[9] *Ibid,* at para. 16.
[10] *Ibid,* at paras. 17-20.

13. HMI began work on the project in mid-2013, but Index Energy Ajax was forced to terminate the EPC Contract in August, 2015 due to substantial concerns with the work done by HMI.[11]

14. Various of HMI's subcontractors registered claims for construction liens on title to the Property (the "**Subcontractor Lien Claims**") and on or about April 28, 2015, HMI also registered the HMI Lien Claim on title to the Property in the amount of approximately $31.3 million.[12]

15. Since 2015, there has been substantial litigation between Index Energy Ajax and HMI with regard to the HMI Lien Claim, which has most recently been addressed in a judgment of the Divisional Court in Toronto on June 22, 2017[13] upholding a November 23, 2016 decision of the Ontario Superior Court of Justice (Oshawa) that found HMI exaggerated the lienable amount of the HMI Lien Claim.[14] Index Energy Ajax has expended significant resources on the HMI litigation, and continues to dispute any liability thereunder.[15]

16. On March 24, 2017, the Ontario Superior Court of Justice (Oshawa) granted a consent order, whereby Index Energy Ajax paid an agreed holdback amount of $7,053,890 plus HST (the "**Holdback Funds**") into Court and all of the Subcontractor Lien Claims were vacated from title to the Property.[16]

17. The Biomass Facility has not been operating as intended following the Retrofit.[17] Since Index Energy took over the plant operation it has undertaken substantial mitigation work to

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[11] *Ibid*, at para. 24.
[12] *Ibid*, at para. 26.
[13] *Ibid*, at Exhibit "D".
[14] *Ibid*, at Exhibit "C".
[15] *Ibid*, at para. 31.
[16] *Ibid,* at Exhibit "E".
[17] *Ibid,* at para. 32.

complete the Retrofit and improve the operations of the Biomass Facility.[18] However, despite these mitigation efforts, the Biomass Facility continues to produce far less electricity than it was intended to.[19]

18. On June 16, 2015, Index Energy Ajax obtained Commercial Operation under the FIT Contract.[20]

19. In addition, Index Energy Ajax recently undertook an extensive management change in July and August 2017. It appointed two new officers: a new chief executive officer, with over 40 years' experience in various capacities in power-generation facilities, and a previous employee with extensive experience with the Biomass Facility returned in the role of Plant Manager and President and Secretary.[21]

Index Energy Ajax's Creditors

The Syndicate

20. On or about July 15, 2013, Index Energy Ajax entered into a credit agreement (the "**Syndicate Credit Agreement**") with a syndicate of lenders comprised 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**").[22]

21. Pursuant to the Syndicate Credit Agreement, the Syndicate agreed to provide a non-revolving construction facility in the maximum sum of $60,000,000 and a non-revolving term

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[18] *Ibid,* at para. 33.
[19] *Ibid,* at para. 35.
[20] *Ibid*, at para. 33.
[21] *Ibid*, at para. 36.
[22] *Ibid*, at para. 41.

facility available once the Retrofit was satisfactorily completed, (collectively the "**Syndicate Facilities**").[23]

22. An interest hedging facility with National Bank of Canada and Laurentian Bank of Canada as lenders ("**Interest Hedging Facility**") was also established as required by the Syndicate Facilities.[24]

23. The obligations of Index Energy Ajax under the Syndicate Facilities are secured by, among other things, (collectively, the "**Syndicate Security**") limited recourse guarantees from Index Energy Sweden, J. Kerr and R. Andrews; and liquid security in the amount of $10 million provided by Index Residence (the "**Liquid Security**").[25]

24. The failure of HMI to complete the Retrofit as set out in the EPC Contract caused delays which amounted to the Retrofit not being completed by the outside date provided in the Syndicate Credit Agreement, which was a default under the Syndicate Credit Agreement.[26]

25. Accordingly, from May 2015 until December 2016, the Agent had issued two default letters and has entered into two accommodation agreements with Index Energy Ajax whereby the Syndicate agreed to forbear from enforcing on the Syndicate Security.[27]

26. On January 18, 2017, the Agent sent Index Energy Ajax a letter (the "**Demand Letter**") demanding payment in full of all amounts owing to the Syndicate under the Syndicate Facilities, which at that date totalled $49,427,871.94, with interest continuing to accrue together with a

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[23] *Ibid*, at para. 42.
[24] *Ibid*, at para. 43.
[25] *Ibid*, at para. 45.
[26] *Ibid*, at para. 49.
[27] *Ibid*, at paras. 52 & 56.

notice of intention to enforce security under s.244 of the *Bankruptcy and Insolvency Act*[28] (the "**BIA Notice**").[29]

27. On January 23, 2017, the Agent notified Index Energy Ajax that the Agent had exercised its set-off rights with respect to the Liquid Security, which were applied to reduce amounts outstanding under the Interest Hedging Facility and the Syndicate Facilities. The remaining amount owing to the Syndicate is approximately $44 million, plus interest and charges which continue to accrue.[30]

28. Upon the expiry of the 10-day notice period pursuant to the BIA Notice, the Syndicate advised that it would extend the notice period on a day-to-day basis provided, among other things, that the Agent could terminate the notice period on one (1) business day's prior notice in writing to Index Energy Ajax or to its counsel (the "**Daily Extension Letter**").[31]

29. The parties have been acting in accordance with the Daily Extension Letter, and the Agent has not given notice that the notice period is terminated.[32]

Index Residence

30. Prior to entering into the Syndicate Credit Agreement, Index Energy Ajax had borrowed certain funds from Index Residence pursuant to a loan letter dated May 10, 2008, as amended, which was secured by a general security agreement over all of Index Energy Ajax's present and after-acquired personal property, and a mortgage on the Property.[33]

31. Pursuant to an assignment agreement, Index Residence fully subordinated and assigned its interest in these facilities and its security to, and as security for, the Syndicate

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[28] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3, as amended ["**BIA**"].
[29] *Haraldsson Affidavit, supra*, note 2, at para. 58.
[30] *Ibid*, at para. 59.
[31] *Ibid*, at para. 60.
[32] *Ibid*, at para. 61.
[33] *Ibid*, at paras. 62 & 65.

Facilities and the Syndicate Security.[34]

32. In November 30, 2015 as part of the first accommodation agreement between the Syndicate and Index Energy Ajax, Index Residence agreed to contribute additional funds to Index Energy Ajax of at least $2,600,000.[35]

33. As at the date hereof, the total amount owing by Index Energy Ajax to Index Residence pursuant to the Index Residence Credit Agreement and the Index Residence Security including accrued interest totals $102,496,654.[36]

Other Secured Creditor

34. Other than the Syndicate, Index Residence and the construction lien claimants discussed above, the only other secured creditor of Index Energy Ajax is Caterpillar Financial Services Limited ("**Caterpillar**"), which is the lessor of a 2014 Caterpillar 950K wheel loader (the "**Loader**").[37]

Other Creditors

(a) *Suppliers*

35. Index Energy Ajax is indebted to a number of suppliers associated with its ongoing operations, including trade suppliers, and professional and administrative services providers. As at August 8, 2017 these obligations totalled in excess of $4 million.[38]

36. A number of the suppliers to Index Energy Ajax are vital to its ongoing operations, its potential value in a SISP, and its ultimate success as a restructured business (the "**Required Suppliers**"). Some of the Required Suppliers are very small and due to the nature of their

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[34] *Ibid*, at para. 66.
[35] *Ibid*, at para. 52.
[36] *Ibid*, at para. 68.
[37] *Ibid*, at para. 69.
[38] *Ibid*, at para. 71.

businesses are highly reliant on Index Energy Ajax. It may be necessary for them to be paid all or a portion of the obligations arising prior to the date of the Initial Order, if granted, to ensure their survival and their continued ability to provide supplies to Index Energy Ajax.[39]

37. Members of the Index Group are minority shareholders of two of the Required Suppliers, Durham Disposal Services Ltd. ("**Durham**") and Simtor Environmental Ltd. ("**Simtor**" together with Durham, the "**Related Suppliers**"), but these Related Suppliers are not majority controlled by any member of the Index Group. Durham is the sole contractor responsible for removing the by-products created by the Biomass Facility. Simtor supplies high quality wood to Index Energy Ajax at the most affordable price on the market. The operation of the Biomass Facility, and the maximising of value for the stakeholders, would be materially prejudiced if the Related Suppliers ceased to carry on business. The Related Suppliers are subject to government compliance requirements which require capital expenditure, and if not met, will result in them ceasing to carry on business and the Related Suppliers may be unable to afford these capital expenditures without being paid the amounts they are owed by Index Energy Ajax and therefore if the Related Suppliers do not receive a portion of the amounts owing to them they may be required to shut down operations.[40]

(b) *Index Group*

38. Index Energy Sweden has extended numerous unsecured shareholder loans to Index Energy Ajax in excess of $4,000,000 in aggregate to permit the Applicant to continue operations while addressing the Deficiencies. Index Energy Sweden is unwilling to inject further funds into Index Energy Ajax unless it restructures.[41]

(c) *Landlord*

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[39] *Ibid*, at para. 72.
[40] *Ibid*, at para. 74.
[41] *Ibid*, at para. 75.

39. The rent accrued for May, June, and July 2017, on warehouse space that Index Energy Ajax rents, for approximately $5,457.90, has not been paid. [42]

(d) *CRA*

40. All amounts due from Index Energy Ajax to the Canada Revenue Agency ("**CRA**") and the Ontario Ministry of Finance for (i) employee source deductions, (ii) sales tax, and (iii) corporate tax (other than noted below) owing by Index Energy Ajax are current and continue to be paid in the ordinary course of business with the exception of $33,201.61 in employee source deductions due August 10, 2017, that was not paid due to current liquidity constraints. However, this amount is intended to be paid using funds from the first advance of the DIP Facility if the Initial Order is granted.[43]

DIP Facility

41. As detailed in the Pre-Filing Report, Index Energy Ajax, with the assistance of the Monitor, undertook an extensive process to solicit an appropriate DIP financier.[44] As detailed in the Haraldsson Affidavit, after consultation with Index Sweden and Index Residence, one party was selected as a potential DIP lender, however after protracted negotiations with this potential lender the parties were not able to come to terms on a credit agreement and unfortunately, those negotiations ceased shortly before the Applicant filed for CCAA protection. As an alternative, Index US has agreed to act as DIP Lender with the consent of the Syndicate on terms more favourable to Index Energy Ajax than those offered by this potential lender.[45]

42. The DIP Lender has agreed to provide Index Energy Ajax with DIP Facility in order for Index Energy Ajax to meet its immediate funding requirements during these proceedings in

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[42] *Ibid*, at para. 78.
[43] *Ibid*, at para. 79.
[44] Pre-Filing Report of Grant Thornton Limited as Proposed Monitor ("**Pre-Filing Report**"), at paras. 46-53.
[45] *Haraldsson Affidavit, supra*, note 2, at para. 94.

accordance with the cash flow projection, including costs and expenses in connection with these proceedings.

43. The DIP Facility extended by the DIP Lender is in the maximum amount of $5,000.000 (the "**Principal Amount**") with a maximum amount of $1,600,000 being advanced by the DIP Lender prior to the CCAA comeback hearing (the "**Comeback Hearing**") pursuant to a credit agreement dated as of August 14, 2017 (the "**DIP Credit Agreement**").[46] It is anticipated that the Applicant will seek approval of the SISP at the Comeback Hearing.

44. Index Energy Ajax consulted with the proposed Monitor on the DIP Facility and believes that the DIP Facility will meet Index Energy Ajax's funding requirements during the CCAA process.[47]

45. The DIP Facility requires that the DIP Lender receive a court ordered priority charge over the assets of Index Energy Ajax (the "**DIP Lender's Charge**"), which charge will attach to all of the Index Energy Ajax property, other than the Holdback Funds to the extent they are subject to valid lien claims, to rank ahead of all secured and unsecured creditors of Index Energy Ajax, other than Caterpillar in relation to the Loader or the proceeds thereof.[48]

PART III– ISSUES

46. The key issues on this Application are as follows:

(a) Does Index Energy Ajax qualify for CCAA protection?

(b) Should a stay of proceedings be granted as requested?

(c) Is it appropriate to allow payment of certain pre-filing amounts on the terms requested?

(d) Should the Monitor be appointed as requested?

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[46] *Ibid,* at para. 95.
[47] *Ibid*, at para. 97.
[48] *Ibid*, at para. 96(c).

(e) Should the requested Charges be granted and the DIP Facility approved? and

(f) Should the Court approve the requested sealing order?

PART IV– LAW

I. JURISDICTION

47. The CCAA applies to a "debtor company" with total claims against it of more than $5 million.[49] Index Energy Ajax is such a "debtor company" and is entitled to relief under the CCAA.

A. Index Energy Ajax is a "company"

48. The CCAA defines "company" as follows:

> "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.

49. Index Energy Ajax is incorporated pursuant to the *Business Corporations Act* (Ontario)[50] and, therefore, is a "company" as defined in the CCAA.

B. Index Energy Ajax is insolvent

50. A "debtor company" is "any company that is bankrupt or insolvent."[51]

51. "Insolvent" is not expressly defined in the CCAA. However, for purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**") or if it is "reasonably expected to

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[49] CCAA, *supra,* note 1, at s.2(1).
[50] *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16 ["**OBCA**"].
[51] CCAA, *supra,* note 1, at s 2.

run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[52]

52. Section 2 of the BIA defines an "insolvent person" as a person who, among other things, is "insolvent" under one of the following tests:

(a) is for any reason unable to meet his obligations as they generally become due,

(b) 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.[53]

53. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.[54]

54. As set out in the Haraldsson Affidavit, Index Energy Ajax's liabilities exceed the current value of its assets and Index Energy Ajax has insufficient funds to pay its debts and has ceased to meet its obligations as they become due and owing in the ordinary course of business.[55] Index Energy Ajax reasonably expects to run out of liquidity by the end of this week.[56] As such Index Energy Ajax is insolvent.

C. Claims Total More than $5 million and other Technical Requirements Met

55. As described above, the liabilities of Index Energy Ajax exceed the statutory threshold that a debtor company have claims against it that exceed $5 million dollars.

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[52] *Re Stelco Inc*, 2004 CarswellOnt 1211 (SCJ), leave to appeal refused 2004 CarswellOnt 2936 (ONCA) at para 26, leave to appeal refused 2005 CarswellOnt 5200 (SCC) at para 26, Book of Authorities of the Applicant ["**BOA**"], Tab A, ["***Re Stelco***"]; followed in *Canwest Global Communications Corp* (Re), [2009] OJ No 4286 (SCJ) at para 25, BOA, Tab B. ["***Canwest Global 6184***"].
[53] BIA, *supra* note 28, at s. 2(1)
[54] *Re Stelco*, *supra* note 52, at para 28.
[55] *Haraldsson Affidavit, supra*, note 2, at para. 80.
[56] *Ibid.*

56. Index Energy Ajax has met the other threshold requirements required by section 10 of the CCAA.[57] Further, since the chief place of business of Index Energy Ajax is the location of the Biomass Facility in Ajax, Ontario, this Court has jurisdiction to hear this application pursuant to section 9(1) of the CCAA.[58]

57. Accordingly, Index Energy Ajax respectfully submits that it is a debtor company that qualifies for protection under the CCAA.

II. A STAY OF PROCEEDINGS IS APPROPRIATE

58. Given its current financial condition, a stay of proceedings at this time is in the best interests of the Applicant and its stakeholders and is both appropriate and necessary.

59. The proposed Initial Order seeks a stay of proceedings in this case for an initial period of 30 days. Pursuant to section 11.02 of the CCAA, the Court has discretion to make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose", provided the court is satisfied that circumstances exist that make the order appropriate.[59]

60. Here, the stay is necessary and appropriate. The stay of proceedings is crucial to preserving the status quo among the stakeholders of Index Energy Ajax while Index Energy Ajax stabilises operations and designs and implements the SISP. Moreover, the stay is necessary because it is a requirement of the DIP Facility, and such financing is a key element in the Applicant's strategy for maximizing value for its creditors and other stakeholders. A stay of proceeding is, in sum, crucial to the Applicant's restructuring plans. It would be detrimental to

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[57] Section 10(2) of the CCAA provides that an initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company – see Exhibit "P" to the *Haraldsson Affidavit*;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement – see the Monitor's Pre-Filing Report; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement – *see* Exhibits "F" and "G" to the *Haraldsson Affidavit*.

[58] *Haraldsson Affidavit, supra*, note 2, at para. 17.

[59] CCAA, *supra,* note1, at ss. 11.02(1), (3).

Index Energy Ajax's ability to restructure if proceedings were commenced or continued or rights and remedies were exercised against the Applicant.

61. The requested stay of proceedings will forestall manoeuvres by creditors and create a level playing field while Index Energy Ajax seeks to maximize recoveries for all stakeholders and achieve a solution to its operational and financial difficulties.

III. PRE-FILING PAYMENTS

62. The proposed Initial Order contains typical language restraining all persons with oral or written agreements with the Applicant or with a third party on behalf of the Applicant from discontinuing, altering, interfering with or terminating the supply of goods or services required by the Applicant. The Applicant also seeks authorization to pay pre-filing expenses up to the amount of $450,000 if it is determined, in consultation with the Monitor, to be necessary to the continued operation of the business or preservation of the property.[60]

63. This Court has frequently authorized an applicant to pay certain amounts, including pre-filing amounts, to suppliers where the applicant is not seeking a charge in respect of critical suppliers. In granting this authority, the Courts have considered a number of factors, including:

(a) whether the goods and services are integral to the business of the applicants;

(b) the applicants' dependency on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the monitor;

(d) the monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

(e) whether the applicant has sufficient inventory of the goods on hand to meet its needs; and

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[60] Initial Order, Application Record, Tab 3 ("**Initial Order**"), at para. 6.

(f) the effect on the debtors' ongoing operations and ability to restructure if it were unable to make pre-filing payments to their critical suppliers.[61]

64. The continued availability of supplies is necessary to ensure a successful SISP and ultimate emergence of a restructured business in some form. A number of the suppliers to Index Energy Ajax are vital to its ongoing operations, its potential value in a SISP, and its ultimate success as a restructures business (the "**Required Suppliers**"). Some of the Required Suppliers are very small and due to the nature of their business are highly dependent on Index Energy Ajax. It may be necessary for them to be paid all or a portion of the obligations arising prior to the date of the Initial Order, if granted, to ensure their survival and their continued ability to provide supplies to Index Energy Ajax.[62]

65. The operation of the Biomass Facility, and the maximizing of value for the stakeholders, would be materially prejudiced it the Required Suppliers ceased to carry on business and ceased to supply Index Energy Ajax.[63]

66. Accordingly, Index Energy Ajax seeks the authority to pay such amounts as are required, including amounts owing prior to the date of the Initial Order, to ensure continued supply and a successful restructuring.

67. In order to ensure transparency, and that such payments are limited to those which are necessary, the form of Initial Order sought requires that any such payments must be reviewed and approved by the Monitor prior to being made. The proposed process provides Index Energy Ajax with the necessary flexibility to continue to operate its business in order to maximize value for stakeholders and is appropriate under the circumstances.

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[61] *Cinram International Inc.*, 2012 ONSC 3767 (Ont SCJ [Comm List]), at para. 68 of Schedule "C," BOA, Tab C ["***Cinram***"]; *Smurfit-Stone Container Canada Inc.*, 2009 CanLII 2493 (Ont SCJ), at para. 21, BOA, Tab D ["***Smurfit-Stone***"].
[62] *Haraldsson Affidavit, supra*, note 2, at para. 72.
[63] *Ibid*, at para. 74.

IV. APPOINTMENT OF MONITOR

A. Monitor

68. Pursuant to section 11.7 of the CCAA, the Court is required to appoint a person to monitor the business and financial affairs of a debtor company at the same time that an initial CCAA order is made.[64]

69. Section 11.7 requires that the monitor be a trustee, within the meaning of subsection 2(1) of the BIA and there are certain restrictions on who may be monitor, set out in subsection 11.7(2).[65] In this case, the proposed Monitor, GTL, is a trustee within the meaning of subsection 2(1) of the BIA and not subject to any restrictions on who may be a monitor pursuant to section 11.7(2) of the CCAA. GTL has also consented to its appointment as Monitor.[66]

V. CHARGES

70. The proposed Initial Order provides for the following charges, in the following priority:

(a) **First** – The Administration Charge (to the maximum amount of $1,000,000);

(b) **Second** – the DIP Lender's Charge; and

(c) **Third** – The Directors' Charge (to the maximum amount of $250,000).

71. The Applicant proposes that the Administration Charge (defined below) rank in priority to the DIP Lender's Charge (as defined below). The Applicant proposes that the Charges attach to all of its property, other than the Holdback Funds, to the extent they are subject to valid lien claims, to rank ahead of all secured and unsecured creditors of Index other than Caterpillar in relation to the Loader or the proceeds thereof.

A. DIP Facility and DIP Lender's Charge

72. Index Energy Ajax is seeking approval of a $5,000,000 DIP Facility. Index Energy Ajax consulted with the proposed Monitor on the DIP Facility and believes that the DIP Facility will

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64 CCAA *supra,* note 1, at s. 11.7.
65 CCAA *supra* ,note 1, at s. 11.7(2).
66 *Haraldsson Affidavit, supra*, note 2, at para. 101.

meet Index Energy Ajax's funding requirements during the CCAA process. In addition, the Syndicate supports the DIP Facility.[67]

73. Upon commencement of a CCAA, DIP financing provides "some assurance of stability to the marketplace, including the customers of the applicant and its suppliers and dealers."[68] DIP financing is "a benefit to all stakeholders, as it allows the debtor to protect going-concern value while [it] attempts to devise a plan acceptable to creditors."[69] Courts have approved interim financing provided by a party related to the debtor in circumstances where the DIP financing would enhance the restructuring process.[70]

74. The fact that the DIP Lender is a related party and member of the Index Group is illustrative of the commitment the Index Group has to the success and future of Index Energy Ajax. It is worthy of note that the DIP Facility was sourced through a robust process with the assistance of GT, is not opposed by the Syndicate, and that the terms are more favourable to the Applicant than were available from the market.

75. That Index Energy Ajax will have adequate funding to continue operations throughout the CCAA proceedings, that the Index Group is supportive of the CCAA proceedings and the business of Index Energy Ajax, and that the DIP Facility has the support of the Monitor and the Syndicate provides reassurance regarding Index Energy Ajax's ability to pay employees, suppliers and other stakeholders, and thereby preserves the value of Index Energy Ajax's business and assets and enhancing the prospects of a successful SISP of a going-concern entity, consistent with the fundamental purpose of the CCAA.[71] Without this interim financing the Index Energy Ajax business would likely collapse yielding materially less value for stakeholders.

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[67] *Ibid*, at para. 95.
[68] *Re Mobilicity Group*, 2013 ONSC 6167, at para 31, BOA, Tab E ["***Re Mobilicity***"].
[69] *Canwest Global 6184*, *supra,* note 52 at para 31.
[70] *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145, at paras. 4, 15, and 18, BOA, Tab F.
[71] *Re Ted Leroy Trucking (Century Services) Ltd., Re,* 2010 SCC 60, at para. 70, BOA, Tab G.

76. The DIP Facility sought would be secured by a DIP Lender's Charge, which would attach to all of the Applicant's property, other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of Index Energy Ajax (other than Caterpillar in relation to the Loader or the proceeds thereof) and subject only to the Administration Charge.

77. The granting of the DIP Lender's Charge is a condition precedent under the DIP Credit Agreement and is an integral part of the negotiated consideration for the DIP Facility.

78. In order to enable a debtor company to obtain financing to be used to restructure its affairs (consistent with the purpose of the CCAA), the Court has jurisdiction to grant a priority DIP financing charge pursuant to section 11.2 of the CCAA:

> **11.2** (1) **Interim financing —** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) **Priority — secured creditors —** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

79. Sub-section 11.2(4) of the CCAA sets out factors to be considered by the court in determining whether to grant a priority DIP financing charge:

> **11.2** (4) **Factors to be considered –** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
> (b) how the company's business and financial affairs are to be managed during the proceedings;
> (c) whether the company's management has the confidence of its major creditors;
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> (e) the nature and value of the company's property;

> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.[72]

80. These factors are not exhaustive and in *Canwest Global Communications Corp., Re*, ("***Canwest***") Justice Pepall stressed the importance of meeting the following three criteria:

(a) whether notice has been given to secured creditors likely to be affected by the security of the charge;

(b) whether the amount to be granted under the DIP financing is appropriate and required having regard to the debtor's cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the Order was made (which it should not).[73]

81. In this case, the proposed DIP Lender's Charge satisfies the relevant criteria and should be granted.

82. First, Index Energy Ajax's secured creditors who would be primed by the proposed DIP Lender's Charge, the Syndicate, Index Residence and HMI, were given notice of the proposed DIP Lender's Charge. Caterpillar, the secured creditor who will not be primed, was not given notice of the DIP Lender's Charge.

83. Second, the maximum amount of the DIP Facility is appropriate and based on the anticipated cash requirements, as reflected in cash flow projections prepared with the assistance of GT, to fund ordinary course operations while Index Energy Ajax works to propose a viable SISP. As noted above, the amount advanced under the DIP Facility is limited to $1,600,000 until the Comeback Hearing, when more comprehensive service will have occurred.

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[72] See *Re Performance Sports Group Ltd.*, 2016 ONSC 6800, at para. 21, BOA, Tab H ["***Re Performance Sports Group***"] for a recent example of how the Court has applied the factors in section 11.2(4) of the CCAA. In that case, DIP financing was approved to alleviate a looming liquidity crisis, where the debtors intended to pursue a post-filing sales process.
[73] *Canwest Global 6184*, *supra,* note 52 at paras 32-34.

84. Third, Index Energy Ajax's business and affairs will be managed by Index Energy Ajax management with additional oversight and consultation provided by the Monitor. The management have the strong support of the significant pre-filing secured creditors canvassed by the Applicant to date.

85. Fourth, the proposed DIP Facility will enhance the value expected to be available for all stakeholders. Index Energy Ajax's goals in the restructuring process, which include maximizing value, are uniquely shared by Index US because it is an affiliate of Index Energy Ajax. This alignment of interest is beneficial to this restructuring and will assist with maximizing value for all stakeholders.[74]

86. The provisions of the DIP Facility specifically exclude any pre-filing obligations.[75]

87. In addition, Courts in CCAA proceedings acknowledge that companies seeking interim financing may not have the financial flexibility and liquidity to wait for DIP funding until the CCAA comeback hearing and have granted a provisional execution of the DIP credit agreement and the DIP charge in order to provide the necessary security and comfort to the DIP Lender to allow for the flow of funds from the date of the initial order.[76]

88. Accordingly, this Court has jurisdiction and it is appropriate to grant the DIP Lender's Charge with the priority and provisional execution requested.

B. Directors' Charge

89. The proposed Initial Order contemplates the indemnification of the Applicant's directors and officers, the creation of a Directors' Charge in relation thereto, and a related stay of

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[74] The Ontario Superior Court of Justice (Commercial List) recently granted a DIP facility and DIP charge involving a DIP lender related to the debtor in the H.B. White Canada Corp. CCAA proceedings. Please see the Initial Order of Justice Newbould dated July 7, 2016, in Court File No. CV16-11452-00CL.

[75] *Haraldsson Affidavit*, supra, note 2, at Exhibit "Q".

[76] The Ontario Superior Court of Justice (Commercial List) recently granted provisional execution of a DIP facility and DIP charge in the Sears Canada Inc. CCAA proceedings. Please see the Amended and Restated Initial Order of Justice Hainey dated June 22, 2017, in Court File No. CV-17-11846-00CL, at para. 46, BOA Tab I. See also the endorsement of Justice Morawetz (as he then was) in *Dondeb Inc. et al.*, dated January 15, 2013, in Court File No. CV-12-00009794-00CL, at page 18, BOA Tab J.

proceedings in respect of claims against Index Energy Ajax's directors and officers.[77] The statutory authority is found in sections 11.03 and 11.51 of the CCAA.[78]

90. A directors' charge reflects the specific risks to which these individuals are exposed in the event of an insolvency.[79] In this case, it is appropriate to extend coverage to the directors and officers, and it is necessary and appropriate to grant the requested charge as Index Energy Ajax does not have any directors' and officers' insurance coverage and it is important to have the Directors' Charge to keep the directors and officers in place during the restructuring and to protect them against liabilities that they could incur during the restructuring.

91. Accordingly, Index Energy Ajax requests that this Court exercise its discretion to approve the Directors' Charge proposed in the Initial Order, to rank subordinate to the DIP Lender's Charge, in the maximum amount of $250,000. It is respectfully submitted that this amount is appropriate to protect the directors and officers from possible exposure and that the Directors' Charge is appropriate to avoid destabilization that would result without the experienced directors and officers during the restructuring proceeding.[80]

VI. SEALING ORDER

92. The Pre-Filing Report contains confidential appendices regarding sensitive commercial information related to the process undertaken to obtain DIP financing and the optimization plan of the Applicant. If publicly available, this information could have a material detrimental effect on the Applicant's restructuring (including potential future DIP financing) and the integrity of the SISP. Accordingly, the Applicant is seeking to have these appendices sealed. Courts will grant a sealing order where:

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[77] *Initial Order*, *supra* note 60, at paras. 18-20.
[78] CCAA, *supra* note 1, at ss. 11.03(1) and 11.51.
[79] See for example *Re Jetsgo Corp*, JE 2005-881 (QCCS), 2005 CanLII 13012 (QCCS), at para 42, BOA, Tab K ["***Re Jetsgo***"] and *Canwest Global 6184*, *supra* note 52 at para 48.
[80] *Haraldsson Affidavit*, *supra* note 2, at para. 108.

(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.[81]

93. The requested sealing order is necessary in order to protect the integrity and fairness of the process by ensuring that potential future DIP financiers and potential investors and purchasers in the SISP do not obtain an unfair advantage by obtaining sensitive valuation and other information in respect of the Applicant contained in the confidential appendices. 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.

PART V– RELIEF SOUGHT

94. The Applicant requests that this Court grant relief by making an order substantially in the form of the Initial Order included in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2017.

per [signature]

Cassels Brock & Blackwell LLP

Lawyers for Index Energy Mills Road Corporation

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[81] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, at para. 53. Please see the Commercial List Authorities Book.

SCHEDULE "A"

LIST OF AUTHORITIES

1 *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Ont SCJ [Comm List]) *Re Stelco Inc*, 2004 CarswellOnt 1211 (SCJ), leave to appeal refused (2004), 48 CBR (4th) 299 (ONCA), leave to appeal refused 2005 CarswellOnt 5200 (SCC).

2 *Canwest Global Communications Corp. (Re)*, [2009] OJ No 4286 (Ont SCJ [Comm List]).

3 *Cinram International Inc.*, 2012 ONSC 3767 (Ont. SCJ [Comm List]).

4 *Smurfit-Stone Container Canada Inc.*, 2009 CanLII 2493 (Ont. SCJ [Comm List]).

5 *Re Mobilicity Group*, 2013 ONSC 6167 (Ont. SCJ [Comm List]).

6 *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145 (Ont. SCJ [Comm. List]).

7 *Re Ted Leroy Trucking (Century Services) Ltd., Re,* 2010 SCC 60 (Supreme Court of Canada).

8 *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 (Ont SCJ [Comm List]).

9 *Re H.B. White Canada Corp.,* Initial Order of Justice Newbould dated July 7, 2016, in Court File No. CV16-11452-00CL (Ont. SCJ [Comm List]).

10 *Re Sears Canada Inc. et al.,* Amended and Restated Initial Order of Justice Hainey dated June 22, 2017, in Court File No. CV-17-11846-00CL (Ont. SCJ [Comm List]).

11 *Re Dondeb Inc. et al.*, dated January 15, 2013, in Court File No. CV-12-00009794-00CL (Ont. SCJ [Comm List]).

12 *Re Jetsgo Corp*, JE 2005-881 (QCCS), 2005 CanLII 13012 (QCCS).

SCHEDULE "B"

RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3 Definitions**

2. (1) In this Act,

"insolvent person".

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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

2. (1) In this Act,

"company

"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"

"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;

"director"

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called;

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.

Resignation or removal of directors

5.1 (4) Where 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 debtor company shall be deemed to be a director for the purposes of this section.

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.

Documents that must accompany initial application

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

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

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 30 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.

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.

Persons deemed to be directors

11.03 (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.

(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.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

Court may order security or charge to cover certain costs

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

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

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

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

Priority

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

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*.

Fixing deadlines

12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

***Construction Lien Act* R.S.O. 1990, C-30**

Creation of lien

14. (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

When lien arises

15. A person's lien arises and takes effect when the person first supplies services or materials to the improvement.

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

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