Court Administration

JUL 29 2025

Halifax, N.S.

2025 **Hfx No. 542329**

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

AND IN THE MATTER OF an application by Mernova Medicinal Inc. and Creso Canada Limited (collectively, the "**Applicants**") for relief under section 11 of the CCAA and other relief

BRIEF OF LAW OF THE APPLICANTS IN SUPPORT OF APPLICATION FOR APPROVAL AND REVERSE VESTING ORDER

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TO: The Service List

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BRIEF OF LAW

To the Honourable Justice Bodurtha, the Applicants submit:

I. OVERVIEW

1. This Brief is submitted on behalf of the Applicants, in support of an application (the "**Sale Approval Application**") for:

   (a) if necessary, an order abridging and validating the time for service and filing of this notice of motion and motion record;

   (b) a reverse vesting order (the "**RVO**") approving the sale of all of the shares of Mernova Medicinal Inc. ("**Mernova**") to Canada's Island Garden Inc. ("**CIG**") by way of a Share Purchase Agreement dated July 29, 2025 (the "**SPA**") between Mernova, Creso Canada Limited ("**Creso**"), and CIG pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36, as amended (the "**CCAA**");

   (c) releases for the current directors and officers of Mernova and Creso, as well as Mernova's and the Monitor's legal counsel;

   (d) a declaration that the Applicants and their former employees meet the criteria established by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR 12008-222 (the "**WEPP Regulations**"); and

   (e) an Order approving the activities of Grant Thornton Limited ("**Grant Thornton**") in its capacity as the monitor (the "**Monitor**") of the Applicants as set out in the Third Report of the Monitor, to be filed in advance of this hearing (the "**Third Report**").

2. The SPA and the transaction contemplated therein (the "**CIG Transaction**") are the result of the Sales Investment and Solicitation Process (the **"SISP**") approved by this Court by order issued July 14, 2025. The CIG Transaction is the result of that extensive marketing

and sales process in respect of Mernova's business and assets, offers the best price, and is supported by the Monitor and La Plata Capital LLC ("**La Plata**" or the "**Interim Lender**"). In addition to being the Interim Lender, La Plata is also the first secured creditor of Mernova.

3. The CIG Transaction is the product of extensive discussion and negotiation among Creso, Mernova, and CIG, in consultation with the Monitor and the Interim Lender.

4. The CIG Transaction involves a sale of Mernova's shares that will result in the Excluded Contracts, Excluded Assets, and Excluded Liabilities (each as defined in the SPA) being transferred to Creso, which will act as ResidualCo, and CIG acquiring all of the outstanding shares of Mernova, such that, at the conclusion of the transaction, CIG will be the sole shareholder of Mernova.

5. The CIG Transaction will not generate sufficient proceeds to satisfy claims with a lower priority than the first secured creditor. The SISP has shown that there is no value beyond the CIG Transaction and no economic basis on which Mernova could present a plan to its creditors. The only other option is liquidation, likely through a bankruptcy proceeding.

6. The Monitor supports the CIG Transaction and the RVO structure for the SPA, which is necessary to preserve the licenses needed to operate the highly-regulated cannabis business of Mernova. Stakeholders are no worse off under the proposed reverse vesting structure than they would be under a traditional vesting order. There is no viable alternative to the reverse vesting structure to monetize the ongoing business operations of Mernova that would produce a more favourable economic result.

7. The CIG Transaction and the RVO, including the requested releases, satisfy all applicable legal requirements and are in the best interests of Mernova, Creso and their stakeholders and should be granted.

8. This Court, in proceedings under the CCAA, has the discretion to declare that a former employer meets the criteria prescribed by WEPP Regulations where the former employer has terminated all its employees in Canada other than any employees retained to wind-down business operations.

9. The activities of the Monitor, as will be set out in the Third Report, were supportive of the SISP and the ongoing CCAA activities and should be approved.

II. FACTUAL BACKGROUND

10. The facts underlying this Application are more fully set out in the Affidavit of Micheline MacKay, sworn on April 9, 2025 (the "**First Affidavit**"), the Supplemental Affidavit to the First MacKay Affidavit of Ms. MacKay, sworn on April 16, 2025 (the "**Supplemental Affidavit**"), the Second Affidavit of Ms. MacKay, sworn on April 25, 2025 (the "**Second Affidavit**"), the Third Affidavit of Ms. MacKay, sworn on July 13, 2025 (the "**Third Affidavit**") and the Fourth Affidavit of Ms. MacKay, filed with these materials with the sworn copy to follow (the "**Fourth Affidavit**" and, together with the First MacKay Affidavit, the Supplemental Affidavit, the Second MacKay Affidavit, and the Third MacKay Affidavit, the "**MacKay Affidavits**").

11. Capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the MacKay Affidavits.

A. Status of the CCAA Proceedings

12. On April 16, 2025, Mernova and Creso sought and obtained an order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36, as amended (the "**CCAA**"). Pursuant to the Initial Order, Grant Thornton Limited was appointed monitor of the Applicants (the "**Monitor**").

13. On April 25, 2025, the Honourable Justice Bodurtha granted the ARIO which, among other things, extended the initial stay period until July 18, 2025.

14. On April 25, 2025, the Honourable Justice Bodurtha also granted the SISP Order which, among other things, approved the SISP.

15. On July 14, 2025, the Honourable Justice Bodurtha granted a Stay Extension and Approval Order which, among other things, extended the Stay Period up to and including September 30, 2025.

B. Mernova

16. Mernova is a corporation registered pursuant to the laws in Nova Scotia, with its registered head office in Windsor, Nova Scotia. Mernova owns and operates a fully licensed cannabis

cultivation facility in Windsor, Nova Scotia and sells cannabis products to the medicinal and retail cannabis markets in Canada.[1]

17. Creso is a corporation incorporated pursuant to the *Canada Business Corporations Act*, with its registered head office in Windsor, Nova Scotia. Mernova is wholly-owned by Creso, who was incorporated solely to hold the shares in Mernova. Aside from these shares, Creso holds no other assets.

18. Mernova owed the following amounts in unremitted taxes to the Canada Revenue Agency (the "**CRA**") as of April 4, 2025:

(a) Excise tax liability ("**Excise Tax Liability**") $1,287,612.82; and

(b) Harmonized sales tax liability ("**HST Liability**" and, together with the Excise Tax Liability, the "**Tax Liability**") of $307,307.31. [2]

19. On May 1, 2025, the CRA issued a letter to Mernova stating that it was auditing its HST account from the period of April 1, 2025 to April 16, 2025.[3]

20. After Mernova provided the CRA with responses to its various questions and documentation request, the CRA subsequently responded with an assessment of HST owing by Mernova for this period of $48,587.88.[4] It is the Applicants' position that the HST in this assessment is a pre-filing claim.

C. The SISP

21. As outlined in further detail in the Second Report of the Monitor dated July 7, 2025 (the "**Second Report**"), the Monitor, with the assistance of the Applicants and the Interim Lender implemented the SISP contemplated in the SISP Order in respect of Mernova's assets and business (the "**Sales Process**").

22. In summary, the Monitor and the Applicants:

[1] Fourth Affidavit, at para 7(a).
[2] Fourth Affidavit, at para 52.
[3] Fourth Affidavit, at para 54.
[4] Fourth Affidavit, at para 55.

(a) developed a targeted list of 74 potentially interested parties to solicit interest in the opportunity (the "**Interested Parties**");

(b) ran advertisement of the SISP and the opportunity (the "**Advertisements**") in the following publications:

(i) allNovaScotia, allNewfoundland and allNewBrunswick from May 12, 2025 to May 26, 2025; and

(ii) StratCann Services Inc., an online publication of the legal Canadian cannabis sector, from May 13, 2025 to June 23, 2025;

(c) prepared a letter outlining the opportunity for solicitation to potentially interested parties (the "**Solicitation Letter**");

(d) prepared a non-disclosure and confidentiality agreement in form and substance satisfactory to the Monitor and Mernova and their respective counsel (an "**NDA**"); and

(e) prepared a comprehensive package of marketing materials (including the development of all relevant financial, accounting, asset and facility listings, inventory schedules, liabilities, contractual agreements, valuation materials, and other materials (the "**VDR Materials**"), to be made available in a virtual data room ("**VDR**").[5]

23. The Applicants and the Monitor canvassed the market and made the best efforts to obtain potential bids for all or part of Mernova's property.[6]

24. Since the close of the bid deadline on June 23, 2025, the Applicants have worked with the Monitor and the Interim Lender to review and assess bids, and have been engaged in extensive negotiations with the successful bidders to finalize their respective purchase agreements and advance the Applicants' goals of ensuring all of Mernova's assets and/or business are monetized and the proceeds obtained therefrom are maximized for the benefit of all stakeholders.[7]

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[5] Fourth Affidavit, at para 15.
[6] Fourth Affidavit, at para 16.
[7] Fourth Affidavit, at para 18

D. The SPA in Respect of Mernova

25. The SPA is the product of extensive discussions and negotiations among the Applicants and CIG, in consultation with the Monitor and the Interim Lender.[8]

26. The CIG Transaction has been structured as a share sale in the form of a "reverse vesting" transaction, whereby CIG will acquire all of the issued and outstanding shares of Mernova, which includes the business and remaining assets on a "free and clear" basis (other than Permitted Encumbrances) and all Excluded Assets, Excluded Contracts, and Excluded Liabilities (each as defined in the SPA) will be transferred to Creso, which will act as ResidualCo.[9] Creso is the Vendor under the SPA as the parent company of Mernova and any proceeds from the SPA shall be paid to the Monitor for the benefit of the creditors of Creso and Mernova on the terms set out in the RVO.

27. Mernova's business is subject to onerous cannabis-related regulations and requires certain licenses to operate. Mernova holds: (i) licenses with Health Canada under the *Cannabis Act* that permits it to cultivate, process, and sell cannabis; (ii) a license to conduct cannabis research and testing; and (iii) a license with Canada Revenue Agency requiring it to apply cannabis excise stamps to its cannabis products in accordance with the *Excise Act, 2001* (collectively, the "**Licenses**").[10] All three Licenses are required for Mernova to cultivate, process, sell, test and research cannabis in Canada.

28. The primary purpose of the reverse vesting structure in these circumstances is to preserve the ongoing business and operations of Mernova following the closing of the CIG Transaction as the Licenses are not transferrable to a purchaser in a traditional asset sale transaction structure.[11]

29. The RVO in respect of the CIG Transaction, if granted, also provides for the releases (the "**Releases**") in favour of the current director and officer of Mernova, the current director and officer of Creso, Mernova's legal counsel, and the Monitor and its legal counsel (collectively, the "**Released Parties**") in respect of the Released Claims (defined below).[12] If Mernova is going to be able to continue its ongoing business and operations post-closing

[8] Fourth Affidavit, at para 20.
[9] Fourth Affidavit, at para 21.
[10] Fourth Affidavit, at para 29.
[11] Fourth Affidavit, at paras 30 & 31.
[12] Fourth Affidavit, at para 37.

it requires the ongoing participation of the Released Parties, including Ms. McKay as the Responsible Person. Accordingly, the Releases are a critical element of the CIG Transaction and necessary in order for Mernova to continue its ongoing business and operations post-closing of the CIG Transaction.

30. The Releases sought are limited to releasing the Released Parties from claims arising in connection with any act or omission, transaction dealing or other occurrence existing or taking place prior to the Closing Time or arising in connection with or relating in any manner whatsoever to the SPA, the CIG Transaction, the RVO, or the conduct of the CCAA proceedings (collectively, the "**Released Claims**").[13]

31. As stated above, the proposed RVO also provides for the release of the current directors and officers of Mernova (collectively, the "**Released D&Os**"). The Releases of the Released D&Os are limited to any claims, including but not limited to, claims for unpaid source deductions, GST liability, and excise taxes, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to commencement of the CCAA proceedings in respect of Mernova, the business, operations, assets, property, and affairs of Mernova and/or the CCAA proceedings (collectively, the "**D&O Released Claims**").[14]

32. The Releases of the Released D&Os do not waive or bar any claim or liability arising out of any gross negligence or willful misconduct on the part of the applicable Released D&O. The Releases also carve out claims that are barred from release pursuant to section 5.1(2) of the CCAA.[15]

33. The purchase price under the SPA is also subject to the priority claim of the Interim Lender under the terms of the Interim Financing Charge and the first secured creditor.

34. The Proposed Transactions purchase price is insufficient to satisfy amounts due and owing to the Interim Lender and the first secured creditor. Any amounts outstanding and owed behind the Interim Lenders Charge and the first secured creditor, and that is not a Retained Liability under the terms of the SPA, will be vested out pursuant to the terms of the RVO.

[13] Fourth Affidavit, at para 38.
[14] Fourth Affidavit, at para 39.
[15] Fourth Affidavit, at para 40.

III. ISSUES

35. The issues to be determined by the Court are whether:

(a) the applicable notice period should be abridged;

(b) the SPA and the CIG Transaction contemplated therein should be approved;

(c) the Releases in favour of the Released Parties should be approved;

(d) a declaration should be made that the Applicants' and their former employees meet the criteria established in the WEPP Regulations; and

(e) the activities of the Monitor as outlined in the Third Report should be approved.

IV. LAW AND ARGUMENT

A. The Applicable Notice Period Should be Abridged

36. The Applicants bring this motion under, *inter alia,* section 11.02(2) of the CCAA. Pursuant to section 11 of the CCAA, the Court has broad authority to make any order it considers appropriate "on notice to any other person or without notice as it may see fit."[16]

37. Section 10(1) of the CCAA provides that applications pursuant to the CCAA shall be made in accordance with the practice of the Court in which the application is made.[17] Accordingly, this motion is governed by the Nova Scotia *Civil Procedure Rules* (the "**Rules**"), which requires a moving party to provide five days' notice for a half hour hearing.

38. Rule 2.03(1)(c) of the Rules permits the Court to excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

39. On July 15, 2025, Gavin MacDonald, local counsel for the Applicants, sent a notice to the Service List advising of this August 5, 2025 motion at 2:00pm (Atlantic time), "to consider (among other relief) approval of a transaction arising from the sale process which is scheduled to close in mid-August."[18]

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[16] *Companies' Creditors Arrangement Act,* RSC 1985, c C-36; s. 11. [***CCAA***]
[17] *CCAA*, s 10(1).
[18] Affidavit of Service of Valeria del Aguila, sworn July 29, 2025.

40. As of July 28, 2025, the parties were still in the process of negotiating the terms of the SPA.[19] On July 28, 2025, the signed Notice of Motion was sent to the Service List, indicating that further materials would be provided.[20]

41. Copies of the motion materials will be shared with the Service List by electronic mail. A further affidavit of service will be filed in advance of the hearing.

42. Given the nature of the relief sought, the surrounding circumstances and the history of this proceeding, the Applicants submit that it is appropriate in the circumstances for the Court to abridge the time for the hearing of this motion and validate the means of service by e-mail pursuant to section 11 of the CCAA and Rule 2.03(1)(c).

B. The Court Should Approve the CIG Transaction

43. The Applicants seek approval of the SPA and the CIG Transaction contained therein, which would result in CIG acquiring 100% of the shares in the capital of Mernova.

44. Pursuant to section 36 of the CCAA, the Court has the jurisdiction to approve a sale transaction within the context of CCAA proceedings. Section 36(3) of the CCAA sets out the relevant factors for consideration as follows:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale or disposition;

(c) whether the Monitor filed with the Court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effect of the proposed sale or disposition on the creditors and other interested parties; and

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[19] Fourth Affidavit, at para 32.
[20] Affidavit of Service of Valeria del Aguila, sworn July 29, 2025

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[21]

45. The above factors, however, are not intended to be exhaustive nor to be considered a checklist that must be followed in every transaction.[22]

46. Canadian Courts have also continued to consider the *Soundair* criteria as relevant to whether or not a sale approval should be approved in a CCAA proceeding. Those factors are similar to those in section 36(3) of the CCAA, and are as follows:

(a) whether the Court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) the interest of all parties;

(c) the efficacy and integrity of the process by which the offers are obtained; and

(d) whether there has been unfairness in the working out of the process.[23]

47. An RVO generally involves a series of steps that result: (a) in the purchaser becoming the sole shareholder of the debtor company; (b) the debtor company retaining its assets, including contracts, licenses and other attributes; and (c) the liabilities not assumed by the purchaser being vested out and transferred, together with any excluded assets, into a newly incorporated entity or an existing shell entity, referred to as "ResidualCo".[24]

48. While not expressly contemplated in the CCAA, it is now well established that courts have the discretionary jurisdiction to approve a transaction through an RVO, including pursuant to sections 11 and 36 of the CCAA.[25] Specifically, section 11 of the CCAA gives the Court the authority to make any order it considers appropriate in the circumstances.

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[21] *CCAA*, s. 36(3).
[22] *Target Canada Co (Re),* 2015 ONSC 1487 at para 16 [***Target***], at **TAB 1** of Book of Authorities.
[23] *Royal Bank of Canada v Soundair Corp,* 1991 CanLII 2727 (ONCA) at para 16 [***Soundair***], at **TAB 2** of Book of Authorities; see also *Target* at paras 14 to 17, at **TAB 1** of Book of Authorities.
[24] *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al,* 2022 ONSC 6354 at para 27 [***Just Energy***], at **TAB 3** of Book of Authorities.
[25] CCAA, ss 11 and 36; *Delta 9 Cannabis Inc (Re)*, 2025 ABKB 52 at para 57 [***Delta 9***], at **TAB 4**; *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 24 – 37 [***Harte Gold***], at **TAB 5** of Book of Authorities; *Quest University Canada (Re),* 2020 BCSC 1883 at paras 40 and 157 [***Quest***], at **TAB 6** to Book of Authorities; *Just Energy* at para 29, at **TAB 3** of Book of Authorities.

49. On an application to approve an RVO transaction, it is appropriate to consider the following:

(a) the statutory basis for an RVO and whether an RVO is appropriate in the circumstances; and

(b) the factors outlined in section 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.[26]

50. In *Harte Gold*, the Honourable Justice Penny of the Ontario Superior Court of Justice outlined the following non-exhaustive factors to consider in respect of a proposed reverse vesting transaction:

(a) why is the RVO necessary in this case;

(b) whether the reverse vesting structure produce an economic result at least as favourable as any other viable alternative;

(c) whether any stakeholders is worse off under the reverse vesting structure than they would have been under any other viable alternative; and

(d) whether the consideration being paid for the debtor's business reflect the importance and value of assets being preserved under the reverse vesting structure.[27]

51. Reverse vesting transactions have been recognized in at least three types of circumstances:

(a) where the debtor operates in a highly-regulated environment in which its existing permits, licenses or other rights are difficult or impossible to assign to a purchaser;

(b) where the debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and

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[26] *Harte Gold* at para 23, at **TAB 5** of Book of Authorities; *Just Energy* at paras 29 to 31, at **TAB 3** of Book of Authorities; *Delta 9* at para 61, at **TAB 4** of Book of Authorities.
[27] *Harte Gold* at para 38, at **TAB 5** of Book of Authorities.; *Delta 9* at para 61, at **TAB 4** of Book of Authorities.

(c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.[28]

52. Canadian Courts have regularly approved the use of reverse vesting structures to facilitate transactions involving cannabis companies.[29] The Court in *Atlas Global Brands Inc.* made the following comments regarding the use of reverse vesting structures in restructuring cannabis companies:

> It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start "from scratch" to obtain regulatory approval to operate the business in question rather than assuming the relevant licenses as part of the transaction.[30]

(i) Section 36(3) of the CCAA and the Soundair Principles are Satisfied

53. The SPA and the CIG Transaction contemplated therein satisfies both section 36(3) of the CCAA and the *Soundair* test, and is in the best interests of the Applicants' stakeholders, given that:

(a) the process leading to the SPA was fair, transparent and reasonable in the circumstances. The SISP was developed by the Applicants in consultation with the Monitor, approved by the Court, and was conducted by the Applicants and the Monitor, with the assistance of the Interim Lender, in accordance with its terms and the SISP Order;

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[28] *Just Energy* at para 34, at **TAB 3** of Book of Authorities; *Arrangement relative a Blackrock Metals Inc.*, 2022 QCCS 2828 at paras 114 to 116 [***Blackrock***], at **TAB 7** of Book of Authorities.
[29] Atlas Global Brands Inc. et al, Approval and Reverse Vesting Order granted on October 29, 2024, Court File No. CV-24-00722386-00CL (ONSC) [**Atlas RVO (Oct 29, 2024)**], at **TAB 19** of Book of Authorities; Indiva Limited, et al, Approval and Reverse Vesting Order granted October 21, 2024, Court File No. CV-24-00722044-00CL (ONSC) [**Indiva RVO**], at **TAB 20** of Book of Authorities; BZAM Ltd., et al, Approval and Vesting Order, granted October 15, 2024, Court File No. CV-24-00715773-00CL (ONSC), at **TAB 21** of Book of Authorities; Phoena Holdings Inc., et al, Reverse Vesting Order granted March 21, 2024, Court File No.: CV-23-0069728500CL (ONSC) at **TAB 22** of Book of Authorities; Fire & Flower, Reverse Vesting Order granted August 29, 2023, Court File No.: CV-23-0070058100CL (ONSC), at **TAB 23** of Book of Authorities; Aleafia Health Inc., Reverse Vesting Order granted October 30, 2023, Court File No.: CV-2300703350-00CL (ONSC) [**Aleafia RVO**], at **TAB 24** of Book of Authorities; Trees Corporation, Reverse Vesting Order granted April 5, 2024, Court File No.: CV-2300711935-00CL (ONSC), at **TAB 25** of Book of Authorities; Eve & Co et al, Reverse Vesting Order granted October 7, 2022, Court File No.: CV-2200678884-00CL (ONSC), at **TAB 26** of Book of Authorities; Delta 9 Cannabis Inc. et al, Approval and Reverse Vesting Order granted on January 29, 2025, Court File No. 2401-09688 (ABKB) [**Delta 9 RVO**], at **TAB 27** of Book of Authorities; Freedom Cannabis Inc, Approval and Reverse Vesting Order granted April 30, 2025, Court File No. 2403-15089 (ABKB) [**Freedom RVO**], at **TAB 28** of Book of Authorities.
[30] *Atlas Global Brands Inc.*, 2024 ONSC 5570 at para 36 [***Atlas Global***] at **TAB 8** of Book of Authorities.

(b) the market was thoroughly canvassed and all interested parties were provided a reasonable opportunity to submit a bid;

(c) the CIG Transaction represents the best option available to Mernova's going-concern exit from these CCAA proceedings and benefits many of its stakeholders, including employees, customers, and suppliers;

(d) the Purchase Price pursuant to the CIG Transaction is fair and reasonable;

(e) we are informed that the Third Report will indicate the Monitor is supportive of the CIG Transaction and believes that the approval of the SPA and the CIG Transaction contemplated therein is in the best interests of Mernova's stakeholders; and

(f) the Interim Lender, who is also the primary secured creditor, supports the CIG Transaction. [31]

(ii) The Reverse Vesting Structure Should be Approved

54. The Applicants submit that the reverse vesting structure as contemplated is appropriate in the circumstances and satisfies the *Harte Gold* factors:

(a) <u>The RVO is Necessary:</u> The proposed RVO is necessary due to the highly regulated nature of Mernova's business, the value of which is dependent on maintaining the essential Licenses.[32] The reverse vesting structure is the best (and only) viable way to preserve the Licenses, by ensuring that Mernova continues operating its business, while allowing the Excluded Assets, Excluded Contracts, and Excluded Liabilities to be transferred to Creso.

(b) <u>There is No More Favourable Economic Alternative:</u> The Monitor believes that no stakeholders should be prejudiced by the reverse vesting structure, which in the Monitor's view: (i) provides an economic result at least as favourable as any other viable alternative; and (ii) does not leave any stakeholder worse off than they would be under any other viable alternative.[33]

[31] Fourth Affidavit, at para 47.
[32] Fourth Affidavit, at para 41.
[33] Fourth Affidavit, at para 43. We also anticipate the Third Report will confirm this assertion.

(c) Only Viable Option. The CIG Transaction is the only viable option to preserve Mernova as a going concern and despite the considerable efforts made during the SISP to broadly canvass the market, Mernova did not receive a higher bid than CIG's offer. Mernova's subordinate creditors are not prejudiced or worse off by the CIG Transaction proceeding through an RVO as compared to an alternative transaction structure.[34]

(d) The Consideration Being Paid Reflects the Value of Mernova's Assets and Business: The consideration for the CIG Transaction reflects the value of Mernova's assets and business, including its Licenses, which were extensively marketed by the Applicants and the Monitor in accordance with the Court-approved SISP. The bid received reflects the highest and best price that could be achieved for Mernova's business and assets, particularly when considering the amount payable under the SPA and the significant process undertaken before the CCAA proceedings and the SISP.

55. For the reasons outlined above, the Applicants submit that section 36(3), the *Soundair* test, and the *Harte Gold* factors have all been met in the circumstances and the requested RVO ought to be granted.

C. The Releases in the RVO Should be Approved

56. The Applicants seek the issuance of releases in favour of the Released Parties (including the Released D&Os) in respect of the Released Claims (including the Released D&O Claims).

57. It is well established that CCAA courts have jurisdiction to sanction plans containing third-party releases.[35]

58. The relevant factors for the Court to consider in determining whether to approve releases in CCAA proceedings include:

(a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

[34] Fourth Affidavit, at para 46. We also anticipate the Third Report will confirm this assertion.
[35] *Metcalfe & Mansfield Alternative Investments II Corp, Re*, 2008 ONCA 587 at para 78 [***Metcalfe & Mansfield***], at **TAB 9** of Book of Authorities.

(b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) whether the plan could succeed without the releases;

(d) whether the parties being released were contributing to the plan; and

(e) whether the release benefitted the debtors as well as the creditors generally.[36]

59. It is not necessary for each of these factors to apply in order for the proposed releases to be granted.[37]

60. The same test governs third-party releases within court-sanctioned restructuring transactions, including RVOs. The Court in *Blackrock Metals* stated that it is "now commonplace for third-party releases, in favour of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction."[38]

61. These factors were also recently considered in the context of the cannabis industry in the *Delta 9* and *Freedom* cases.

62. As outlined above, the RVO (if granted) provides for releases involving these CCAA proceedings and the CIG Transaction for various third parties, including the current directors and officers of Mernova and Creso, Mernova's legal counsel, and the Monitor and its legal counsel. The D&O Released Claims include claims against the Released D&Os for unpaid harmonized sales tax and excise taxes relating to the pre-filing period.

63. For the reasons that follow, the Applicants submit that the Releases in the RVO should be granted.

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[36] *Lydian International Limited (Re),* 2020 ONSC 4006 at para 54, at **TAB 10** of Book of Authorities; *Metcalfe & Mansfield* at paras 70 to 71,at **TAB 9** of Book of Authorities; *Green Relief Inc,* 2020 ONSC 6837 at para 27 [***Green Relief***], at **TAB 11** of Book of Authorities; *Just Energy* at para 67, at **TAB 3** of Book of Authorities; *Freedom Cannabis Inc (Re)*, 2025 ABKB 272 at para 27 [***Freedom***], at **TAB 12** of Book of Authorities; see also *Delta 9* at paras 30 and 62, at **TAB 4** of Book of Authorities.

[37] *Green Relief* at para 28, at **TAB 11** of Book of Authorities.

[38] *Blackrock* at para 128, at **TAB 7** of Book of Authorities; see also *Green Relief* at paras 23 to 25, at **TAB 11** of Book of Authorities; *8640025 Canada Inc, Re,* 2021 BCSC 1826 at para 43, at **TAB 13** of Book of Authorities.

(i) The Released Parties were Necessary and Essential to the Restructuring

64. The Released Parties, including the Released D&Os, have made significant contributions to the CCAA proceedings. Prior to and since the initiation of the CCAA proceedings, the Released Parties and, in particular, the Released D&Os have worked diligently and in good faith towards the sale of Mernova's business, resulting in the Proposed Transactions and the maximization of the value of Mernova's business.[39]

65. The Released D&Os were involved in facilitating and overseeing the marketing of Mernova's assets and business, and maintained and supported the operations of the Applicants throughout the proceedings so that the business could be sold as a going concern.

66. Moreover, the continued involvement of the Released Parties is critical to the successful implementation of the CIG Transaction.

(ii) The Claims to be Released are Rationally Connected to the CIG Transaction and Necessary for the Transaction

67. All of the Released Parties are integrally connected to the CIG Transaction. They were all heavily involved in the negotiation and performance of the CIG Transaction and closing of the CIG Transaction is conditional upon the granting of the RVO, the form of which includes the releases of the Released Claims, and the granting of which is a condition precedent to the SPA being closed.[40]

68. The Released Parties are also required in order to enable Mernova to continue as a going concern enterprise with continuity of key management and the Responsible Person. This will ensure that Mernova's operations continue uninterrupted and the Released Parties are critical to the success of the business going forward as Mernova will not be able to operate without the Released Parties and in particular Ms. McKay.[41]

69. Further, when determining whether a release is rationally connected to the purpose of the transaction, Courts have considered:

[39] Fourth Affidavit, paras 53 and 54.
[40] Fourth Affidavit, para 52.
[41] *Freedom* at para 29, at **TAB 12** of Book of Authorities.

(a) the extent to which the releasee is involved in the implementation of the transaction;[42]

(b) whether the releases provide finality and clarity to the closing of the transaction;[43] and

(c) whether the release avoid director indemnity claims, preserving funds resulting from the transaction.[44]

70. The Releases are rationally connected to the CIG Transaction as it is a condition of the SPA, as a going concern transaction, that Mernova's operations continue in the ordinary course. The foregoing requires the Released Parties to continue in their roles until the CIG Transaction is closed and the Licenses are successfully maintained.

71. The Licenses are required for Mernova to engage in the growing, production, research and sale of cannabis. Without the Released Parties, Health Canada could suspend or revoke Mernova's Health Canada Licenses and Mernova would be forced to cease operations pending the revival of its licenses or an application for new licenses.

72. The retention of a director with security clearance until closing of a transaction to allow for a going concern transaction was a determinative factor in that Court granting a third-party director release in Delta 9.[45]

73. The Releases are rationally connected to the CIG Transaction, and it is in the interest of all stakeholders that the Released Parties be incentivized to remain and assist with the completion of the CIG Transaction. Any delay or obstruction to completing the CIG Transaction puts the recovery for all stakeholders at risk.

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[42] *Delta 9* at para 114, at **TAB 4** of Book of Authorities.
[43] *Long Run Exploration Ltd. (Re)*, 2024 ABKB 710 at para 23 [***Long Run***], at **TAB 14** of Book of Authorities; *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para 38(d) [***Acerus***] at **TAB 15** of Book of Authorities.
[44] *Delta 9* at para 114, at **TAB 4** of Book of Authorities; *Green Relief* at para 51, at **TAB 11** of Book of Authorities; *Long Run* at para 23, at **TAB 14** of Book of Authorities; *Harte Gold* at para 81, at **TAB 5** of Book of Authorities.
[45] *Delta 9* at para 114, at **TAB 4** of Book of Authorities.

(iii) The Releases Benefit Creditors

74. The Releases will benefit the Applicants' creditors and other stakeholders by protecting Mernova and Creso against potential contribution and indemnity claims, minimizing potential claims, and thus maximizing the proceeds of the CIG Transaction.[46]

(iv) The Released D&O Claims are Appropriate and Necessary

75. None of the Released D&O Claims waive or bar any claim or liability arising out of any gross negligence or willful misconduct on the part of the Released D&Os, that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

76. As outlined above, the director and officer of Mernova risks personal liability for excise tax unpaid during their tenure. However, their continued involvement in Mernova and extensive efforts to maximize the realization for the Applicants' stakeholders have been instrumental in the CCAA proceedings.

77. A release of claims in connection with matters relating to cannabis excise tax for the period prior to the commencement of CCAA proceedings has been granted by Canadian Courts in several recent CCAA proceedings, including in:

(a) Atlas Global Brands Inc., et al;[47]

(b) Indiva Limited, et al;[48]

(c) Heritage Cannabis Holdings Corp, et al;[49]

(d) Aleafia Health Inc.;[50]

(e) Delta 9 Cannabis Inc. et al;[51] and

(f) Freedom Cannabis Inc.[52]

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[46] See *Harte Gold* at para 85, at **TAB 5** of Book of Authorities; *Tacora Resources Inc. (Re),* 2024 ONSC 4436 at para 25 [***Tacora***], at **TAB 16** of Book of Authorities.
[47] Atlas RVO at para 31 and Atlas Global Brands Inc. et al, Approval and Reverse Vesting Order granted on October 4, 2024, Court File No. CV-24-00722386-00CL (ONSC) at para 32, at **TAB 29** of Book of Authorities.
[48] Indiva RVO at para 21, at **TAB 20** to Book of Authorities.
[49] Heritage Cannabis Holdings Corp., et al, Approval and Reverse Vesting Order granted on June 26, 2024, Court File No. CV-24-00717664-00CL (ONSC) at para 25, at **TAB 30** of Book of Authorities.
[50] Aleafia RVO at para 26, at **TAB 24** to Book of Authorities.
[51] Delta 9 RVO at paras 27-28, at **TAB 27** to Book of Authorities.
[52] Freedom RVO at para 15, at **TAB 28** to Book of Authorities.

78. Further, a critical aspect of ensuring that Mernova's operations continued during the CCAA proceedings was to ensure that the provincial authorities would continue to accept Mernova's product. In response to this significant hurdle to Mernova's continued operations, Ms. McKay took on the critical role of liaising with the provincial authorities to give them the comfort needed that Mernova would continue to be a licensed producer so as to ensure that Mernova's products could continue to be sold and Mernova's operations would continue.

79. In light of the important role as liaison with the provincial authorities and other customers that Ms. McKay has filled during the CCAA proceedings, among other things, CIG wishes for Ms. McKay to continue with Mernova following closing of the CIG Transaction.

80. The Released Parties have also continued with Mernova despite increased risks and scrutiny which arose out of the CCAA proceedings, in no small part so that Mernova could continue its operations without disruption. The continued service by the Released Parties has allowed Mernova to remain operational because of, among other things:

   (a) Ms. McKay's security clearance and her continued role as responsible person are both necessary to maintain the Health Canada License;

   (b) the Released Parties were instrumental in ensuring that Mernova's product could continue to be sold and Mernova's operations would continue;

   (c) it will be exceedingly difficult for Mernova to continue its operations post-closing without the Released Parties specific operational and product knowledge and expertise.

81. Accordingly, CIG supports the granting of the Releases. If the Releases are not granted CIG may not proceed to close the CIG Transaction. Additionally, the Interim Lender and first secured creditor, also supports the Releases, notwithstanding that the Interim Lender will experience a significant short-fall with respect to its pre-filing claims.

82. Courts have found that directors have made extensive contributions to CCAA proceedings if they assisted with pre-filing strategic process, the court-approved SISP, negotiations for the subscription agreement and the continued operations during the CCAA.[53]

83. The Released Parties have assisted the Monitor as needed throughout these CCAA proceedings by among other things:

(a) participating in negotiations with the Interim Lender (both before and after the filing date);

(b) reviewing and providing comments on the SISP;

(c) participating in discussions around the development and implementation of the SISP;

(d) communicating with potential bidders under the SISP;

(e) preparing projected cash-flow statements; and

(f) participating in negotiations with CIG to enter into the CIG Transaction.

84. For the foregoing reasons, the Released Parties have significantly contributed to the CIG Transaction.

85. The completion of the CIG Transaction and granting of the RVO will allow Mernova to carry on business as a going-concern, maximize value for the stakeholders of Mernova and will benefit retained employees, vendors, suppliers and customers. There is a strong presumption in the jurisprudence that a transaction which result in Mernova emerging as a going concern will benefit the debtor and creditors generally.[54]

86. The Applicants submit that the RVO mechanism does not harm the CRA and the CRA would be in the same position in both a traditional asset sale scenario and in a bankruptcy. The Court in *Atlas Global* agreed with this position as well in substantially similar circumstances.[55]

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[53] *Acerus* at para 38(b), at **TAB 15** of Book of Authorities; *Tacora* at para 25(a), at **TAB 16** of Book of Authorities.
[54] *Delta 9* at para 94, at **TAB 4** of the Book of Authorities; *Canada v. Canada North Group Inc.*, 2021 SCC 30 at para 20 [***Canada North***], at **TAB 17** of the Book of Authorities.
[55] *Atlas Global* at paras 93 and 94, at **TAB 8** of the Book of Authorities.

87. The releases sought in this case, with respect to matters relating to the Tax Liability, tracks the language used in the foregoing Orders and similar relief should be granted in the present case.

(v) Effect of the Proposed Transactions on the CRA

88. The Applicants acknowledge that the CIG Transaction does not provide sufficient proceeds to satisfy the claims of the CRA for the Tax Liability against Mernova for the pre-filing period. However, as detailed above, this result is a function of the value of Mernova's business, as fully tested under the SISP, and the priority of the CRA claims relative to Mernova's senior secured creditors and the Interim Lender. In light of both factors, the CRA would be no better off under a bankruptcy or a traditional asset sale scenario.

89. In similar circumstances, the court in *Atlas Global* found that those priorities were "clear and carry the day" vis-à-vis the CRA claims.[56]

90. The SISP fully canvassed the market and did not generate any transaction with enough value to satisfy claims subsequent in priority to the Interim Lender's Charge and the first secured creditor. Accordingly, the CRA would be in exactly the same position in a bankruptcy in relation to the Tax Liability as it would be under the CIG Transaction, including the RVO.

91. There are limited circumstances in which the deemed trust for unpaid HST will cede priority to higher-ranking creditors[57]. Here the statutory deemed trust for the unpaid HST is subordinate to the Interim Lenders Charge and will be transferred to Creso, which will ultimately be bankrupted as part of completing the administration of the CCAA proceedings.

92. The CRA's consent is not required before Mernova can transfer the Tax Liability to Creso as an Excluded Liability. This step is equivalent to what occurs in a traditional asset sale – namely, the transfer to the purchaser of the assets and liabilities that a purchaser wishes to assume, leaving behind the liabilities that it does not.

[56] *Atlas Global* at para 97, at **TAB 8** of the Book of Authorities.
[57] *Canada North* at para 54, at **TAB 17** of the Book of Authorities.

93. In this case, the CRA's claims are being left behind because there is no value in excess of the higher-ranking claims to satisfy its claims; the transfer to Creso is merely the mechanism by which this occurs in the RVO structure. Whether the transaction is structured as a sale approval and vesting order or RVO, there are no additional proceeds that can be generated from the CIG Transaction to satisfy the CRA's lower ranking claims.

94. In considering whether there is any prejudice to the CRA the proper benchmark is whether the CRA would receive better treatment under a bankruptcy, not whether CRA would receive more favourable terms under some other hypothetical scenario given the results of the SISP.

95. The Section 36 and *Harte Gold* factors evaluate potential RVO transactions against a bankruptcy or other <u>viable</u> alternatives. There are no other viable alternatives in the present case. Here, we anticipate the Third Report will confirm the Monitor is satisfied that the transfer of Mernova's Tax Liability to Creso is not a worse outcome for the CRA than would be expected in a bankruptcy.

96. In addition, the proposed RVO contains certain protections to ensure that:

(a) pre-filing arrears and refunds are vested in Creso and post-filing arrears (if any) and refunds stay with Mernova; and

(b) preserves the rights of set-off of the CRA in respect of amounts held for security.

97. As a result, the RVO mechanism does not impact or harm the position of the CRA: the CRA would be in the same position in a traditional asset sale scenario and in a bankruptcy.

98. The Excise Tax Liability arose from excise duty payable by Mernova which comprises approximately 40% of Mernova's operating expenses. This is not an instance where the directors have directed Mernova to misappropriate amounts which would otherwise be the subject of a deemed trust claim. The Excise Duty Liability amounts were not collected from purchasers and not remitted, meaning no property of CRA or any other party was wrongly converted.

99. The Released Parties have acted in good faith and with due diligence for the following reasons, among others:

(a) the Released Parties have not and will not receive any benefits from the CIG Transaction;

(b) the Excise Tax Liability were not paid in order to maintain the business as a going concern. The Excise Tax Liability accumulated over an extended period of time, and all times, the Released Parties were actively trying to create repayment strategies;

(c) the Released Parties cannot be treated differently because the cannabis regulatory regime makes them integral to the restructuring through the mechanism of the security clearances and licences; and

(d) the Released Parties should not be forced to forego any incentive for the contributions they have made to the restructuring.

100. The Releases will achieve certainty and finality in the most efficient and appropriate manner given the circumstances. The Releases are critical to the Applicants' restructuring, are necessary to ensure that the CIG Transaction closes and continue its operations uninterrupted going forward. We anticipate the Third Report will confirm the Monitor observed that each Released Party has meaningfully contributed to the CIG Transaction, and more generally, the Applicants' successful restructuring.[58]

101. The Released D&Os are the current directors and officers of Mernova and Creso who have made significant and material significant contributions to enable Mernova to emerge from these CCAA proceedings as a going concern.

D. The Applicants' and the Former Employees Meet the Criteria of s. 3.2 of the WEPP Regulations

102. The Applicants, pursuant to section 5(5) of the *Wager Earner Protection Program Act* S.C. 2005 c. 47, s 1 ("**WEPPA**") are seeking a declaration that the Applicants and their former employees meet the criteria established by section 3.2 of the WEPP Regulations.

103. In light of recent amendments to WEPPA and the WEPP Regulations, this Court now has the discretion, under section 5(5) and 3.2, respectively, to, in proceedings under the

[58] Fourth Affidavit, at para 53. We also anticipate the Third Report will confirm this assertion.

CCAA, order that a former employer meets the criteria prescribed by regulation where the former employer is the employer of all whose employees in Canada have been terminated other than any employees retained to wind-down business operations.

E. The Activities of the Monitor should be Approved

104. The Applicants request to approve the activities of the Monitor as will be set out in the Third Report filed in advance of this hearing.

105. The request to approve the activities set out in the reports of a court-officer is not unusual. As stated by Chief Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) in *Laurentian University of Sudbury*, there are good policy and practical reasons for court approval of a Monitor's report and activities including that court approval: [59]

(a) allows the court officer to move forward with next steps in the proceeding;

(b) brings the court officer's activities before the court;

(c) allows an opportunity for concerns of the stakeholders to be addressed, and any problems to be rectified;

(d) enables the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent manner;

(e) provides protections for the court-officer not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by (i) re-litigation of steps taken to date, and (ii) potential indemnity claims by the court-officer.

106. In this case, the activities as outlined in the Third Report should be approved because the activities were necessary and undertaken in good faith pursuant to the Monitor's duties and powers set out in the CCAA and the orders in this CCAA proceeding. All activities were undertaken in the best interests of the Applicants' stakeholders.

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[59] *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 2 and 23, **TAB 18** of Book of Authorities.

V. RELIEF SOUGHT

107. The Applicants submit that they have met all of the qualifications required to obtain the requested relief and respectfully request that this Court grant the proposed form of RVO, including the Releases and the WEPPA declaration, and the Approval of the Monitor's Activities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF JULY, 2025.

MLT AIKINS LLP

Per: ____________________
Ryan Zahara/Chris Nyberg

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SCHEDULE "A" – LIST OF AUTHORITIES

A. Case Law

1. *Target Canada Co (Re),* 2015 ONSC 1487
2. *Royal Bank of Canada v Soundair Corp,* 1991 CanLII 2727 (ONCA)
3. *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al,* 2022 ONSC 6354
4. *Delta 9 Cannabis Inc (Re)*, 2025 ABKB 52
5. *Harte Gold Corp (Re)*, 2022 ONSC 653
6. *Quest University Canada (Re),* 2020 BCSC 1883
7. *Arrangement relative a Blackrock Metals Inc,* 2022 QCCS 2828
8. *Atlas Global Brands Inc.,* 2024 ONSC 5570
9. *Metcalfe & Mansfield Alternative Investments II Corp, Re*, 2008 ONCA 587
10. *Lydian International Limited (Re),* 2020 ONSC 4006
11. *Green Relief Inc,* 2020 ONSC 6837
12. *Freedom Cannabis Inc (Re)*, 2025 ABKB 272
13. *8640025 Canada Inc, Re,* 2021 BCSC 1826
14. *Long Run Exploration Ltd. (Re)*, 2024 ABKB 710
15. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
16. *Tacora Resources Inc. (Re),* 2024 ONSC 4436
17. *Canada v. Canada North Group Inc.,* 2021 SCC 30
18. *Target Canada Co. (Re)*, 2015 ONSC 7574

B. Court Orders

19. Atlas Global Brands Inc. et al, Approval and Reverse Vesting Order granted on October 29, 2024, Court File No. CV-24-00722386-00CL (ONSC)
20. Indiva Limited, et al, Approval and Reverse Vesting Order granted October 21, 2024, Court File No. CV-24-00722044-00CL (ONSC)
21. BZAM Ltd., et al, Approval and Vesting Order, granted October 15, 2024, Court File No. CV-24-00715773-00CL (ONSC)

22. Phoena Holdings Inc., et al, Reverse Vesting Order granted March 21, 2024, Court File No.: CV-23-0069728500CL (ONSC)

23. Fire & Flower, Reverse Vesting Order granted August 29, 2023, Court File No.: CV-23-0070058100CL (ONSC)

24. Aleafia Health Inc., Reverse Vesting Order granted October 30, 2023, Court File No.: CV-2300703350-00CL (ONSC)

25. Trees Corporation, Reverse Vesting Order granted April 5, 2024, Court File No.: CV-2300711935-00CL (ONSC)

26. Eve & Co et al, Reverse Vesting Order granted October 7, 2022, Court File No.: CV-2200678884-00CL (ONSC)

27. Delta 9 Cannabis Inc. et al, Approval and Reverse Vesting Order granted on January 29, 2025, Court File No. 2401-09688 (ABKB)

28. Freedom Cannabis Inc, Approval and Reverse Vesting Order granted April 30, 2025, Court File No. 2403-15089 (ABKB)

29. Atlas Global Brands Inc. et al, Approval and Reverse Vesting Order granted on October 4, 2024, Court File No. CV-24-00722386-00CL (ONSC)

30. Heritage Cannabis Holdings Corp., et al, Approval and Reverse Vesting Order granted on June 26, 2024, Court File No. CV-24-00717664-00CL (ONSC)

SCHEDULE "B" – TEXT OF STATUTES & REGULATIONS

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

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

> **(a)** relate to contractual rights of one or more creditors; or
>
> **(b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

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.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

> **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> **(b)** whether the monitor approved the process leading to the proposed sale or disposition;
>
> **(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> **(d)** the extent to which the creditors were consulted;
>
> **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

> **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> **(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

> **(a)** a director or officer of the company;
>
> **(b)** a person who has or has had, directly or indirectly, control in fact of the company; and
>
> **(c)** a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

***Wage Earner Protection Program Act*, SC 2005, c 47, s 1**

Prescribed criteria — other proceedings

5(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

***Wage Earner Protection Program Regulations*, SOR/2008-222**

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.