

**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 HERITAGE CANNABIS HOLDINGS
CORP., 1005477 B.C. LTD., HERITAGE CANNABIS WEST
CORPORATION, MAINSTRAIN MARKET LTD., HERITAGE
CANNABIS EAST CORPORATION, PUREFARMA
SOLUTIONS INC., 333 JARVIS REALTY INC., 5450 REALTY
INC., HERITAGE CANNABIS EXCHANGE CORP., AND
PREMIUM 5 LTD.**

Applicants

**FACTUM OF THE APPLICANTS
(Motion returnable June 26, 2024)**

June 24, 2024

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TO: THE SERVICE LIST

PART I: OVERVIEW¹

1. This factum is filed by Heritage Cannabis Holdings Corp. (“**Heritage**”), 1005477 B.C. Ltd., Mainstrain Market Ltd., Purefarma Solutions Inc. (“**Purefarma**”), 333 Jarvis Realty Inc. (“**333 Jarvis**”), 5450 Realty Inc. (“**5450 Realty**”), Premium 5 Ltd. (“**Premium 5**”), Heritage Cannabis Exchange Corp., Heritage Cannabis East Corporation (“**Heritage East**”) and Heritage Cannabis West Corporation (“**Heritage West**”) (collectively, the “**Applicants**”) in support of a motion for the following orders:

- (a) an approval and reverse vesting order (the “**ARVO**”), among other things:
 - (i) approving the amended and restated stalking horse subscription agreement dated June 17, 2024 (the “**Amended and Restated Stalking Horse Agreement**”) among Heritage, Heritage West and Heritage East (collectively, the “**Companies**”), BJK Holdings Ltd. (“**BJK**”) and HAB Cann Holdings Ltd. (the “**Purchaser**”) and the transactions contemplated thereby (the “**Transactions**”);
 - (ii) upon the delivery of the Monitor’s Closing Certificate (as defined in the ARVO) to the Companies and the Purchaser (the “**Closing Time**”):
 - (A) adding 1000921087 Ontario Inc. (“**Residual Co.**”) as an Applicant in these *Companies’ Creditors Arrangement Act*² (“**CCAA**”) proceedings and amending the style of cause to reflect the addition of ResidualCo;

¹ Capitalized terms used but not defined herein have the meaning ascribed to them in the Affidavit of David Schwede sworn on June 18, 2024 (the “**Third Schwede Affidavit**”) attached as Tab 2 of the Motion Record of the Applicants dated June 18, 2024 (the “**Motion Record**”), the draft Approval and Reverse Vesting Order (the “**ARVO**”) attached as Tab 3 to the Motion Record, and the draft Ancillary Relief Order (the “**Ancillary Order**”) attached as Tab 4 to the Motion Record.

² [R.S.C., 1985, c. C-36](#) [CCAA].

- (B) vesting all of the right, title and interest of Heritage, Heritage West, Heritage East, Purefarma, 333 Jarvis, 5450 Realty and Premium 5 (collectively, the “**Purchased Entities**”) in and to the Excluded Assets (as defined in the Amended and Restated Stalking Horse Agreement) absolutely and exclusively in Residual Co.;
- (C) vesting in Residual Co. all of the Excluded Liabilities (as defined in the Amended and Restated Stalking Horse Agreement) such that the Excluded Liabilities shall become the obligations of Residual Co. and no longer be liabilities of the Purchased Entities;
- (D) directing the Companies to issue the Purchased Shares (as defined in the Amended and Restated Stalking Horse Agreement) to the Purchaser;
- (E) terminating and cancelling without consideration all Equity Interests (as defined in the Amended and Restated Stalking Horse Agreement) of the Companies outstanding prior to the issuance of the Purchased Shares;
- (F) ordering that the Purchased Entities shall cease being Applicants in these CCAA proceedings;
- (G) granting the releases (together with the releases contemplated in (H) below, the “**Releases**”) in favour of: (a) the current directors, officers, employees, consultants, legal counsel and advisors of the Applicants; (b) the current directors, officers, employees, consultants, legal counsel

and advisors of Residual Co.; and (c) the Monitor and its legal counsel and their respective current directors, officers, partners, employees, consultants and advisors (collectively, the “**Released Parties**”), of all present and future liabilities and claims arising in connection with or relating to, among other things, the CCAA proceedings, the Amended and Restated Stalking Horse Agreement, the consummation of the Transactions, any closing agreement or transaction involving the Purchased Entities arising in connection with the foregoing, and/or any matter relating to the Purchased Entities’ cannabis excise licenses and/or GST/HST arrears owing by any of the Purchased Entities for the period prior to the Initial Order, save and except for any claim for fraud or wilful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA; and

(H) granting releases in favour of BJK and the Purchaser of all present and future liabilities and claims based on any act or occurrence existing or taking place prior to the Closing Time, undertaken or completed in connection with the ARVO and that relate to the Amended and Restated Stalking Horse Agreement, the DIP Facility, the consummation of the Transactions, and/or any closing agreement or transaction involving the Purchased Entities arising in connection with the foregoing.

(b) an ancillary relief order (the “**Ancillary Order**”), among other things:

(i) extending the Stay Period (defined below) until August 30, 2024;

(ii) approving the extension of the maturity date of the DIP Term Sheet until and

including August 30, 2024;

- (iii) amending paragraph 31 of the ARIO (defined below), which provides for the Administration Charge (defined below), by replacing “Owens Wright LLP” with “WeirFoulds LLP” to reflect the change in the Applicants’ corporate counsel;
- (iv) granting certain enhanced powers to KPMG Inc. (“**KPMG**”), in its capacity as Court-appointed monitor of the Applicants (the “**Monitor**”); and
- (v) approving the Pre-Filing Report of the Monitor dated April 2, 2024 and the First Report of the Monitor dated April 10, 2024, and the Monitor’s activities and conduct set out therein.

2. The Applicants’ Motion Record was served on all parties listed on the Service List in this CCAA proceeding. As of the date of this factum, the Applicants are not aware of any party intending to appear to oppose the relief sought on this motion. The relief sought by the Applicants is fully supported and recommended by the Monitor.

PART II: FACTS³

3. Heritage is a vertically integrated licensed cannabis producer, operating two Health Canada licensed manufacturing facilities in Canada. It focuses on extraction and creation of extract and extract-derivative products and brands for adult use and cannabis-based medical solutions. Heritage offers products to the medical and recreational legal cannabis markets in Canada and the U.S., and to the

³ The facts underlying this motion are more fully set out in the Third Schwede Affidavit, in the affidavit of David Schwede sworn April 9, 2024 (the “**Second Schwede Affidavit**”) and in the affidavit of David Schwede sworn April 2, 2024 (the “**Initial Schwede Affidavit**”).

medical cannabis markets internationally.⁴

4. The Applicants sought and were granted by the Ontario Superior Court of Justice (Commercial List) (the “**Court**”): (a) relief under the CCAA by Order dated April 2, 2024 (the “**Initial Order**”); and (b) an amended and restated initial order dated April 11, 2024 (the “**ARIO**”).⁵ Also on April 11, 2024, the Court granted a sales and investment solicitation process order (the “**SISP Order**”).⁶

5. Pursuant to the SISP Order, the Court: (i) authorized and approved the execution of the stalking horse subscription agreement dated April 10, 2024 among Heritage, Heritage West, BJK and the Purchaser (the “**Initial Stalking Horse Agreement**”); and (ii) directed the Monitor to conduct the sale and investment solicitation process (“**SISP**”) with the assistance of the Applicants.⁷

The SISP

6. The SISP solicited interest in and opportunities for a sale of, or investment in, all or part of the Applicants’ business operations and property, providing the latitude to pursue both asset and share transactions (including through a reverse vesting structure), or a recapitalization of the Applicants.⁸

7. The bid in the Initial Stalking Horse Agreement (the “**Stalking Horse Bid**”) served as a baseline bid for interested parties to consider during their participation in the SISP. It provided certainty that a going-concern solution for the Applicants had been identified, and it provided a minimum purchase price and a deal structure to encourage superior bids from interested parties.⁹

8. As of the bidding offer deadline of 5:00 p.m. on May 10, 2024, the Monitor received no

⁴ Third Schwede Affidavit at para 2.

⁵ Third Schwede Affidavit at paras 6-7 and Exhibits C and D.

⁶ Third Schwede Affidavit at para 8 and Exhibit E.

⁷ Third Schwede Affidavit at para 8 and Exhibit E.

⁸ Third Schwede Affidavit at para 10.

⁹ Third Schwede Affidavit at para 11; Monitor’s Second Report at para 29.

Qualified Offers other than the Stalking Horse Bid. Accordingly, as contemplated by the Court-approved SISP, the Monitor declared the Stalking Horse Bid to be the Successful Bid.¹⁰

Amended and Restated Stalking Horse Agreement¹¹

9. Following the Monitor's determination that the Stalking Horse Bid was the Successful Bid, the Applicants and the Purchaser elected to amend the Initial Stalking Horse Bid which culminated in the Amended and Restated Stalking Horse Agreement.¹²

10. The Amended and Restated Stalking Horse Agreement contemplates the use of a reverse vesting share purchase transaction structure pursuant to which, among other things: (i) the Excluded Contracts, Excluded Assets and Excluded Liabilities will be transferred to Residual Co.; (ii) the Companies will issue to the Purchaser shares in the share capital of the Companies (the "**Purchased Shares**"); (iii) all outstanding Equity Interests in the Companies will be cancelled for no consideration; and (iv) the Monitor will hold cash in the amount of \$187,500 (the "**Administrative Expense Amount**") to pay for the costs and expenses of the Monitor and its legal counsel incurred after Closing.¹³

11. The total aggregate consideration payable by the Purchaser for the Purchased Shares (the "**Purchase Price**") is estimated to be approximately \$8.5 million, comprising of: (a) a release of all amounts outstanding under the Senior Loan Agreement with BJK at closing, totaling \$6,837,059.71 (excluding legal fees and expenses) as of June 14, 2024; (b) release of all amounts outstanding under

¹⁰ Third Schwede Affidavit at paras 14-15; Monitor's Second Report at para 30(i).

¹¹ The principal terms of the Amended and Restated Stalking Horse Agreement are summarized at paragraph 18 of the Third Schwede Affidavit.

¹² The Amended and Restated Stalking Horse Agreement incorporates certain revisions in the Initial Stalking Horse Agreement, including: (a) the Purchaser shall purchase, in addition to Heritage, Heritage West, Heritage East and Purefarma, 333 Jarvis, 5450 Realty and Premium 5 as part of the Transactions; (b) at Closing, in addition to subscribing for the shares of Heritage and Heritage West, the Purchaser will subscribe for shares of Heritage East; and (c) the Outside Date (as defined in the Amended and Restated Stalking Horse Agreement) is extended from August 2, 2024 to August 30, 2024.

¹³ Third Schwede Affidavit at para 18.

the DIP Term Sheet at closing; (c) the Administrative Expense Amount (i.e. \$187,500); (d) cash in an amount sufficient to satisfy amounts owing in respect of obligations secured by the Administration Charge and Directors' Charge; and (e) amounts sufficient to satisfy priority payments prescribed by under subsections 6(3), 6(5)(a) and 6(6) of the CCAA.¹⁴

PART III: ISSUES

12. The issues to be addressed before this Honourable Court are whether:
- (a) the Amended and Restated Stalking Horse Agreement and the proposed reverse vesting structure should be approved;
 - (b) Residual Co. should be added as an Applicant in these CCAA proceedings;
 - (c) the Releases should be approved;
 - (d) the Monitor should be granted certain enhanced powers; and
 - (e) the extension of the Stay Period should be granted.

PART IV: LAW & ARGUMENT

A. The Amended and Restated Stalking Horse Agreement and the Reverse Vesting Structure Should be Approved.

13. This Court has the jurisdiction to approve a reverse vesting transaction pursuant to: (a) s. 11 of the CCAA, which gives the Court broad powers to make any order that it considers appropriate in the circumstances; and (b) s. 36(3) of the CCAA, which sets out the factors that the Court is to consider in

¹⁴ Third Schwede Affidavit at para 18.

deciding whether to grant authorization to dispose of assets.¹⁵

14. Section 36(3) of the CCAA enumerates a list of factors that ought to be considered by the Court when determining whether to approve a sale of assets outside the ordinary course of business. These factors include: (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.¹⁶

15. The s. 36(3) factors overlap with the factors set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair Corp.*¹⁷, which are: (a) whether sufficient effort has been made to obtain the best price and that the debtors have not acted improvidently; (b) the efficacy and integrity of the process by which offers have been obtained; (c) whether the interests of all parties have been considered; and (d) whether there has been unfairness in the working out of the process.¹⁸

16. In *Re Nortel Networks Inc.*, the court also held that the following factors were relevant in determining whether to approve the sale of a debtor's assets absent a plan of arrangement: (a) whether a sale is warranted at this time; (b) whether the sale will benefit the whole economic community; (c) whether any of the debtor's creditors have a *bona fide* reason to object to the sale; and (d) whether

¹⁵ CCAA at [ss 11](#) and [36 \(3\)](#).

¹⁶ CCAA at [s 36\(3\)](#).

¹⁷ [Re CanWest Publishing Inc., 2010 ONSC 2870 at para 13; Royal Bank of Canada v Soundair Corp., 1991 CanLII 2727 \(Ont. CA\) \[Soundair\]](#).

¹⁸ CCAA at [s 36\(3\)](#); *Soundair* at para 16. See also, [Harte Gold Corp. \(Re\), 2022 ONSC 653 \[Harte Gold\]](#) at [paras 20-21](#); [Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 6354 at paras 31-32 \[Just Energy\]](#).

there was a better viable alternative.¹⁹

17. A reverse vesting order is both an equitable and extraordinary remedy, and one that ought not to be regarded as the “norm”. The evidence must establish that the reverse vesting structure is necessary in the particular circumstances of each case.²⁰ Justice Penny, in *Harte Gold Corp. (Re)*, articulated the factors to be considered by a court in respect of a proposed reverse vesting transaction, which include:

- (a) Why is the reverse vesting order necessary in this case?
- (b) Does the reverse vesting structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the reverse vesting structure than they would have been under any other viable alternative?
- (d) Does the consideration being paid for the debtor’s business reflects the importance and value of assets being preserved under the reverse vesting structure?²¹

18. A reverse vesting order may be a suitable restructuring tool in the following circumstances:

- (a) where the debtor operates within a stringently regulated environment in which the debtor possesses licenses, permits or other valuable rights that are difficult or impossible to assign to a purchaser;
- (b) where the debtor holds key agreements with assignment restrictions that would be similarly difficult or impossible to assign to a purchaser; and

¹⁹ [Nortel Networks Corporation \(Re\)](#), 2009 CanLII 39492 (ONSC) at para 49.

²⁰ *Just Energy* at paras 31-32; [Arrangement relatif à Blackrock Metals Inc.](#), 2022 QCCS 282, leave to appeal to QCCA denied, August 5, 2022 [*Blackrock Metals*]; and *Harte Gold*.

²¹ *Harte Gold* at [para 38](#).

- (c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.²²

19. This Court has, on numerous occasions, approved the use of a reverse vesting order structure to facilitate transactions involving cannabis companies.²³

(i) ***The CCAA s. 36 factors, and the Soundair principles, are satisfied.***

20. The Amended and Restated Stalking Horse Agreement satisfies both s. 36(3) of the CCAA and the *Soundair* test, and is in the best interest of the Applicants' stakeholders for the following reasons:

- (a) The process leading to the Amended and Restated Stalking Horse Agreement was fair, transparent and reasonable in the circumstances. The SISP was developed by the Monitor, approved by this Court, and was conducted by the Monitor in accordance with its terms and in accordance with the SISP Order. As described in the Monitor's Second Report dated June 10, 2024, the market was thoroughly canvassed. All interested parties were provided a reasonable opportunity to submit a bid. Based on the actions and activities described in the Second Report, the Monitor has made sufficient efforts to obtain the best price.²⁴
- (b) Despite extensive solicitation efforts during the SISP, no Qualified Bids were received. Accordingly, the Amended and Restated Stalking Horse Agreement represents the only available option for the Purchased Entities to continue as a going-concern for the benefit of all stakeholders and the preservation of the Applicants' business.²⁵ The

²² *Just Energy* at [para 34](#).

²³ See [Approval and Reverse Vesting Order, in the Matter of Aleafia Health Inc. et. al, dated October 30, 2023](#), Court File No. CV-23-00703350-00CL; see also [Approval and Vesting Order, in the Matter of Eve & Co Incorporated et. al, dated October 7, 2022](#), Toronto, Court File No. CV-22-00678884-00CL; see also [Approval and Vesting Order, in the Matter of Beleave Inc. et. al, dated September 18, 2020](#), Toronto, Court File No. CV-20-00642097-00CL.

²⁴ Monitor's Second Report at para 30.

²⁵ Third Schwede Affidavit at para 20(c).

Transactions will result in: (i) most of the employees preserving their employment; (ii) customers maintaining their ongoing relationships; and (iii) suppliers of goods and services maintaining their business relationships. The Transactions are subject to customary closing conditions and are capable of implementation in a timely manner, which will minimize professional fees.²⁶

- (c) The DIP Lender has advised that it is not prepared to provide funding absent the certainty of a transaction meaning that, absent the Transactions, the Applicants will cease operations and liquidate their assets in a bankruptcy.²⁷ In the Second Report, the Monitor states that the Amended and Restated Stalking Horse Agreement would be more beneficial for the Applicants' stakeholders than a liquidation of the Purchased Entities in a bankruptcy.²⁸
- (d) BJK, the Applicants' senior secured lender and the DIP Lender, who is the only creditor with any realizable economic interest in the Applicants, was consulted and is supportive of the Amended and Restated Stalking Horse Agreement.²⁹
- (e) There is no prejudice to any creditor as a consequence of the Transactions and there are no viable alternatives. On the contrary, the Transactions benefit the economic community of stakeholders as a whole by permitting the Purchased Entities' business to continue as a going concern.³⁰
- (f) The Monitor is supportive of the Amended and Restated Stalking Horse Agreement (including the amendments made to the Initial Stalking Horse Agreement) and the

²⁶ Third Schwede Affidavit at para 19; Monitor's Second Report at para 41.

²⁷ Monitor's Second Report at para 41(d).

²⁸ Monitor's Second Report at para 61(c).

²⁹ Third Schwede Affidavit at para 20(e).

³⁰ Third Schwede Affidavit at para 29; Monitor's Second Report at para 41(e).

Transactions.³¹

21. The Transactions are appropriate at this time. The Applicants have limited liquidity remaining and do not have the necessary cash flow to develop and implement a plan of arrangement or compromise.³² The Transactions will limit ongoing professional fees.

(ii) *The reverse vesting structure should be approved.*

22. The reverse vesting structure contemplated under the Amended and Restated Stalking Horse Agreement and ARVO is appropriate in the circumstances because:

(a) *The reverse vesting structure is necessary.* The reverse vesting structure is needed and required by the Purchaser: (i) to maintain and preserve the Purchased Entities' non-transferable licenses (collectively, the "**Licenses**") issued by Health Canada and Canada Revenue Agency ("**CRA**") in a highly regulated environment; (ii) to ensure that the Purchaser obtains the benefit of the permits, arrangements, rights and contractual relationships which are not easily transferable or replaceable; and (iii) to preserve accrued tax losses (which are non-transferable) by maintaining the existing legal entities. If the Transactions were structured as a traditional asset sale, the Licenses would have to be re-issued. The proposed ARVO will ensure that, post-CCAA termination, the Purchased Entities can continue with the Licenses and their material contracts in place. Finally, the Purchased Entities' tax losses, which cannot be preserved within a traditional asset purchase transaction, will be preserved under the proposed reverse vesting structure.³³

(b) *The consideration is reasonable and fair and adequately reflects the value of the assets*

³¹ Monitor's Second Report at paras 61-62.

³² Monitor's Second Report at paras 26-27 and 41(c).

³³ Third Schwede Affidavit at paras 22 and 25-27; Monitor's Second Report at para 41.

being preserved: The consideration to be given by the Purchaser results from extensive negotiation among sophisticated parties, is fair and reasonable in the circumstances, and represents the best and only available offer for the Applicants' business and assets. The Purchase Price reflects the importance and value of the Licenses, key contracts and relationships, tax losses, and other attributes being preserved.³⁴

- (c) There is no stakeholder worse off under the reverse vesting structure and there is no more favourable economic alternative: 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.³⁵ In this case, the economic result of the Transactions are clearly superior as there is no other viable alternative. The SISP produced no Qualified Bids at all, and because the Applicants have insufficient funds to operate in the short term without DIP funding, which the DIP Lender has advised it will not extend absent the Transactions being approved, the only alternative to the Transactions is a liquidation through a bankruptcy. A bankruptcy would result in, among other things, the termination of all employment contracts and the loss of those jobs, as well as the termination of all other contracts to which the Applicants are parties. Given the significant shortfall in payment of the secured debt, none of the creditors and stakeholders subordinate to BJK would receive any distributions under other realization scenarios.³⁶ The Monitor notes in the Second Report that the Transactions are more beneficial for the stakeholders of the

³⁴ Monitor's Second Report at paras 41(a) and 61(c).

³⁵ Monitor's Second Report at para 41(e).

³⁶ Monitor's Second Report at para 41(e).

Applicants than a liquidation of the Purchased Entities in a bankruptcy.³⁷

23. The Implementation Steps (set out in Schedule 2.7(B) of the Amended and Restated Stalking Horse Agreement), which include among other things the cancellation of all outstanding Equity Interests in the Companies, are required by the Purchaser, are a key component of the reverse vesting structure, and are necessary to implement the Transactions.³⁸

24. The Court's jurisdiction to approve the Implementation Steps flows from ss. 11 and 36(1) of the CCAA.³⁹ That jurisdiction includes the jurisdiction to approve transactions outside the ordinary course of business despite the requirement for shareholder approval (as would otherwise be required for the proposed cancellation of existing equity interests). As this Court recognized in *Harte Gold*, where shareholders "have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders."⁴⁰ In this case, secured creditors are not expected to recover all amounts owed to them. Accordingly, there is no economic interest, present or future, for the current shareholders of the Applicants, and no need for shareholder approval.

B. Residual Co. Should be Added as an Applicant in the CCAA Proceedings.

25. The CCAA applies to any debtor company so long as the total claims against the debtor company amount to more than \$5,000,000.⁴¹ The CCAA defines a debtor company as a company that is bankrupt or insolvent, has committed an act of bankruptcy under the *Bankruptcy and Insolvency Act* ("BIA"),⁴² has made an assignment or a bankruptcy order has been made under the BIA or is being wound up under the *Winding-up and Restructuring Act*.⁴³

³⁷ Monitor's Second Report at para 61(c).

³⁸ Third Schwede Affidavit at para 32.

³⁹ CCAA at [ss 11](#) and [36 \(3\)](#).

⁴⁰ *Harte Gold* at [para 64](#).

⁴¹ CCAA at s 3(1).

⁴² [R.S.C. 1985, c B-3 \[BIA\]](#).

⁴³ [R.S.C. 1985, c W-11](#).

26. Though the term ‘insolvent’ is not defined in the CCAA, courts often look to the BIA to define the terms in a CCAA context. In *Stelco Inc. Re*, Justice Farley found it is fairly common practice for applicants, when referring to “insolvency” within the CCAA, to refer to the definition in the BIA. As such, insolvent means a person whose liabilities exceed its assets.⁴⁴

27. Residual Co. is a corporation incorporated under the laws of Ontario for the purpose of implementing the Transactions. Upon the transfer of the Excluded Contracts and Excluded Liabilities to Residual Co., Residual Co. will be balance sheet insolvent with claims against it in excess of \$5,000,000. The Applicants request that Residual Co. should therefore be added as an Applicant in these CCAA proceedings and the style of cause should be amended to reflect same.

28. The Monitor recommends that the Court issue the ARVO and grant the relief set forth therein, which includes the addition of Residual Co. as an Applicant in these CCAA proceedings.⁴⁵

C. The Releases Should be Approved.

29. The factors relevant to the approval of releases in CCAA proceedings are as follows: (a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor; (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.⁴⁶ It is not necessary for each of these factors to apply in order for the proposed releases to be granted.⁴⁷

30. The same test governs third-party releases within court-sanctioned restructuring transactions,

⁴⁴ [Stelco Inc., Re](#), 48 C.B.R. (4th) 299 at para 22.

⁴⁵ Monitor’s Second Report at para 61.

⁴⁶ [Lydian International Limited \(Re\)](#), 2020 ONSC 4006 at para 54.

⁴⁷ [Re Green Relief Inc.](#), 2020 ONSC 6837 at para 28 [*Green Relief*].

including reverse vesting orders. 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.”⁴⁸

31. The claims to be released under the Releases are limited in scope and apply only to the directors, officers, legal counsel and advisors of the Applicants, Residual Co., the Monitor, BJK and the Purchaser.⁴⁹ The released parties have made significant contributions to the CCAA proceedings and the results sought to be achieved therein, including: (i) developing and conducting the SISF; (ii) negotiating the Initial Stalking Horse Agreement and the Amended and Restated Stalking Horse Agreement; (iii) assisting the Purchaser with its due diligence and preparation for closing of the Transactions; (iv) maintaining and supporting the operations of the Applicants, and (v), in the case of BJK, providing DIP financing throughout the duration of the CCAA proceedings. Moreover, the continued involvement of the released parties is critical to the successful implementation of the Transactions.⁵⁰

32. The Releases are rationally connected to the proposed restructuring and the Transactions. The claims to be released are limited and directly connected to the CCAA proceedings, the Amended and Restated Stalking Horse Agreement, the consummation of the Transactions, and any closing agreement or transaction involving the Purchased Entities.⁵¹

33. The Releases in favour of the directors, officers, legal counsel and advisors of the Applicants, Residual Co. and the Monitor do not release or discharge any claim that is not permitted to be released

⁴⁸ *Blackrock Metals* at [para 128](#); *CannaPiece Group Inc. v. Marzilli*, 2023 ONSC 3291 at [para 22](#); *Just Energy* at [para 67](#); *Green Relief* at [paras 23-29](#).

⁴⁹ Third Schwede Affidavit at para 35.

⁵⁰ Third Schwede Affidavit at paras 38-39.

⁵¹ Third Schwede Affidavit at para 36.

pursuant to section 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct.⁵²

34. While the claims to be released under the Releases do include matters relating to the Purchased Entities' cannabis excise license (including arrears of excise duties and taxes) and/or GST/HST arrears owing by any of the Purchased Entities for the period prior to the Initial Order, those Releases were specifically disclosed to the Canada Revenue Agency ("CRA") in advance of the subject motion and discussed with the CRA's representatives on more than one occasion. Through the course of such discussions, the CRA indicated and then confirmed that it does not expect to oppose the Releases sought in respect of excise duty arrears and GST/HST arrears owing by any of the Applicants for the period prior to the commencement of the CCAA proceedings.⁵³ A release of claims in connection with matters relating to the cannabis excise licenses for the period prior to the commencement of the CCAA proceedings was recently granted by Justice Conway of this Court in the CCAA proceedings of Aleafia Health Inc. et al. ("*Aleafia*").⁵⁴ The release sought in this case, with respect to matters relating to the Purchased Entities' cannabis excise licenses, is identical to the language used in the reverse vesting order granted in Aleafia.

35. The Releases were disclosed to the Service List in (a) the First Report of the Monitor (which attached the form of ARVO as Appendix "E"), served on April 10, 2024, (b) the notice of motion and the affidavit of the Applicants filed in support of this motion, served on June 18, 2024, and (c) the Monitor's Second Report, served on June 21, 2024.⁵⁵ If granted, the Releases will allow for the Released Parties to focus on closing the Transactions and allow for the completion, in a cost-effective

⁵² Third Schwede Affidavit at para 37.

⁵³ Third Schwede Affidavit at para 42; Monitor's Second Report at para 43.

⁵⁴ See [Approval and Vesting Order, in the Matter of Aleafia Health Inc et al., dated October 30, 2023](#), Toronto, Court File No. CV-23-00703350-00CL.

⁵⁵ [Motion Record, returnable June 26, 2024, in the Matter of Heritage Cannabis Holdings Corp. et al.](#), Toronto, Court File No. CV-24-00717664-00CL; Third Schwede Affidavit at para 41; Monitor's Second Report at paras 42-43.

and efficient way, of the administration of the estate.⁵⁶

36. The Releases are being requested with the support of the Monitor. In the Monitor's view, the Releases are reasonable, not overly broad, and appropriate in the circumstances.⁵⁷

D. The Monitor's Powers Should be Expanded.

37. Section 23 of the CCAA sets out a non-exhaustive list of duties and functions of a court-appointed monitor under the CCAA, which may be expanded through the Court's broad discretion under section 23(1)(k).⁵⁸ Should this Court approve the Transactions, the Applicants' management and employees will transition out of the CCAA Proceedings immediately upon closing, leaving no directing mind to wind-down these CCAA proceedings. This absence of management creates a fact scenario where enhanced monitor powers are necessary and appropriate.

38. The Applicants seek enhanced powers for the Monitor to allow the Monitor to, among other things: (a) cause the Applicants to take all actions and steps to facilitate the performance of the Applicants' powers and obligations (including under the Amended and Restated Stalking Horse Agreement); (b) act as an authorized representative of the Applicants in dealings with the CRA and other governmental entities; and (c) assign, or cause to be assigned, any of the Applicants into bankruptcy.⁵⁹

39. Courts have granted similar enhanced powers to a monitor in CCAA proceedings where a reverse vesting order has been granted.⁶⁰

⁵⁶ Third Schwede Affidavit at para 40.

⁵⁷ Monitor's Second Report at para 47.

⁵⁸ CCAA at [s 23](#).

⁵⁹ Third Schwede Affidavit at para 58; Monitor's Second Report at para 55.

⁶⁰ *Just Energy* at [paras 2, 24](#) and [101](#); *Harte Gold* at [paras. 91-93](#); [Ancillary Relief Order, in the Matter of Contract Pharmaceuticals et al., dated April 17, 2024](#), Toronto, Court File No. CV-23-00711401-00CL.

40. The proposed expanded powers of the Monitor are reasonable and appropriate. Following closing of the Transactions, the enhanced powers will allow the Monitor to efficiently administer the CCAA proceedings to their completion, and wind-up, liquidate and/or dissolve the Applicants remaining after closing of the Transactions.⁶¹

E. Extension of the Stay Period Should be Granted.

41. The current Stay Period expires on June 30, 2024. The Applicants are seeking to extend the Stay Period to August 30, 2024, which coincides with the “Outside Date” in the Amended and Restated Stalking Horse Agreement.⁶²

42. Under section 11.02 of the CCAA, the Court may grant an extension of the stay period where (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence.⁶³

43. The following factors support extending the Stay Period: (a) the Applicants have acted in good faith and with due diligence in taking steps to facilitate a going-concern sale of their business; (b) it will provide the Applicants with the breathing space and stability needed to allow the Transactions sufficient time to close; (c) the Updated Cash Flow attached to the Monitor’s Second Report indicates that Applicants are forecast to have sufficient liquidity to fund operations through the proposed extension of the Stay Period (provided the requested extension of the DIP Facility maturity date is approved); (d) the Monitor believes that no creditor will be materially prejudiced as a result of the extension; and (e) the Monitor supports the extension of the Stay Period.⁶⁴

⁶¹ Monitor’s Second Report at para 57.

⁶² Third Schwede Affidavit at paras. 44-45; Monitor’s Second Report at para 58.

⁶³ CCAA at [s 11.02\(3\)](#).

⁶⁴ Third Schwede Affidavit at paras 45 and 49; Monitor’s Second Report at para 59.

PART V: RELIEF REQUESTED

44. The Applicants respectfully request the granting of the Orders in the forms of the Approval and Reverse Vesting Order and the Ancillary Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED as of the date first written above.



CHAITONS LLP,

Lawyers for the Applicants

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Re CanWest Publishing Inc.*, 2010 ONSC 2870.](#)
2. [*Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 \(Ont. CA\).](#)
3. [*Harte Gold Corp. \(Re\)*, 2022 ONSC 653.](#)
4. [*Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354.](#)
5. [*Nortel Networks Corporation \(Re\)*, 2009 CanLII 39492 \(ON SC\).](#)
6. [*Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 282.](#)
7. [*Stelco Inc., Re*, 48 C.B.R. \(4th\) 299.](#)
8. [*Lydian International Limited \(Re\)*, 2020 ONSC 4006.](#)
9. [*Re Green Relief Inc.*, 2020 ONSC 6837.](#)
10. [*CannaPiece Group Inc. v. Marzilli*, 2023 ONSC 3291.](#)

SCHEDULE B – STATUTES AND REGULATIONS

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

Section 11

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.

Section 11.02

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (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.

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Section 23

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Section 36

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.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HERITAGE CANNABIS HOLDINGS CORP., 1005477 B.C. LTD., HERITAGE CANNABIS WEST CORPORATION, MAINSTRAIN MARKET LTD., HERITAGE CANNABIS EAST CORPORATION, PUREFARMA SOLUTIONS INC., 333 JARVIS REALTY INC., 5450 REALTY INC., HERITAGE CANNABIS EXCHANGE CORP., AND PREMIUM 5 LTD.

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
(Motion returnable June 26, 2024)**

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