

Estate / Court File No. 31-2643278
Estate / Court File No. 31-2643278

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985,
c. B-3, AS AMENDED**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
MUSKOKA GROWN LIMITED, A CORPORATION INCORPORATED UNDER THE
LAWS OF ONTARIO**

Applicant

FACTUM OF THE APPLICANT
(NOI Process Order)

May 5, 2020

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario
M5X 1A4

Sean Zweig (LSO# 57307I)
Email: zweigs@bennettjones.com

Mike Shakra (LSO# 64604K)
Email: shakram@bennettjones.com

Aiden Nelms (LSO# 74170S)
Email: nelmsa@bennettjones.com

Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the Applicant

FACTUM OF THE APPLICANT

PART I: INTRODUCTION

1. Muskoka Grown Limited ("**Muskoka Grown**" or the "**Applicant**") seeks urgent relief pursuant to an order (the "**NOI Process Order**") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").

2. On May 5, 2020, the Applicant filed a notice of intention to make a proposal (the "**NOI**") pursuant to section 50.4 of the BIA. A. Farber & Partners Inc. is the proposal trustee under the NOI (the "**Proposal Trustee**"). The Applicant is now seeking further relief to supplement the limited relief obtained upon filing the NOI.

3. The Applicant is a cannabis company committed to providing premium craft cannabis products, while building meaningful connections within its community.

4. The Applicant has been cash flow negative since its inception and has relied on trade credit as well as equity and debt financing for funding. Despite implementing changes to try to achieve profitability, the Applicant has been unable to do so and requires additional funding. The Applicant currently has very limited cash on hand (approximately \$1,200) and is generally unable to meet its obligations as they become due, the most pressing of which is a \$97,000 payroll obligation due on May 7, 2020.

5. As a result of discussions entered into with its senior secured lender, Arthur Zwingenberger ("**Zwingenberger**"), the Applicant is seeking relief under the BIA to consensually rehabilitate its business with a view to emerging as a going concern. Given its current financial circumstances,

the Applicant urgently requires interim financing and related relief under the BIA in order to continue operating in the ordinary course of business.

6. The Applicant believes that these NOI proceedings, supplemented by the additional relief described herein, provides the best means of rehabilitating its business with a view to maximizing value for the benefit of all of its stakeholders. The relief sought in the NOI Process Order is necessary for the Applicant to continue operations in the ordinary course, will maintain the stability of its business and operations, and preserve the value of the Applicant's business, while a viable proposal is developed.

PART II: FACTS

7. The facts underlying this Application are more fully set out in the affidavit of David Ascott, sworn May 5, 2020 (the "**Ascott Affidavit**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Ascott Affidavit.

B. The Applicant

8. The Applicant is a privately held corporation that was incorporated under the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16 under the name Muskoka Medical Marijuana Company Limited ("**Muskoka Medical Limited**"). In November 2017, Muskoka Medical Limited filed Articles of Amendment and changed its name to Muskoka Grown Limited.²

¹ Affidavit of David Ascott sworn May 5, 2020 [Ascott Affidavit].

² *Ibid* at para 7.

9. Muskoka Grown is headquartered in Bracebridge, Ontario and has a single subsidiary, 2634436 Ontario Inc. ("**263 Ontario**"). 263 Ontario is a shell corporation with no assets, activities or liabilities and is not included in these NOI proceedings.³

10. Muskoka Grown holds one licence issued by Health Canada (the "**Cannabis Licence**") which is required to grow, process and sell cannabis in Canada for the medical and recreational/adult-use markets.⁴

C. Business and Operations

11. The cannabis industry in Canada is highly regulated, with the *Cannabis Act* imposing numerous requirements related to the possession, cultivation, production, distribution, sale, research, testing, import and export and promotion of cannabis. Muskoka Grown received its licence from Health Canada in 2019 to cultivate and process cannabis for recreational markets and to sell cannabis plant seeds, cannabis plants, dried cannabis and fresh cannabis to provincially/territorially authorized distributors and retailers.⁵

12. Muskoka Grown is currently a party to agreements with various provincial agencies and wholesale partners in Canada for the supply of cannabis product, including (i) an agreement with the Ontario Cannabis Store and (ii) the Province of Saskatchewan. Muskoka Grown is also currently in the process of negotiating agreements with the Provinces of Alberta and Manitoba.⁶

13. Muskoka Grown is subject to a comprehensive and rigorous regulatory regime as set out in the *Cannabis Act* and the regulations thereunder. This regime requires ongoing compliance with

³ *Ibid* at para 14.

⁴ *Ibid* at para 23.

⁵ *Ibid* at paras 19, 24.

⁶ *Ibid* at para 22.

a variety of operational requirements, including that directors, officers and certain management personnel hold security clearances.⁷

14. Muskoka Grown currently employs approximately 47 full-time employees. There are no registered pension plans for the employees and they are non-unionized. Muskoka Grown, through its benefits provider Green Shield Canada, offers health and dental benefits for all of its employees.⁸ No relief sought herein purports to impact these plans or benefits.⁹

D. Assets and Liabilities

15. As of the date of the Ascott Affidavit, the Applicant had approximately \$1,200 cash on hand.¹⁰

16. As at March 31, 2020, the Applicant had assets with an unaudited book value of approximately \$31,813,235, the majority of which is comprised of property, plant and equipment.¹¹

17. As at March 31, 2020, the liabilities of the Applicant had an unaudited book value of approximately \$15,105,643.¹² The Applicant's primary liabilities are discussed below.

1. The Arthur Zwingenberger Loan

18. The Applicant is the borrower under a loan agreement with Zwingenberger, first entered into on March 20, 2019 (the "**Zwingenberger Loan Agreement**"), amended and restated on April

⁷ *Ibid* at para 24.

⁸ *Ibid* at paras 25-26.

⁹ *Ibid* at para 26.

¹⁰ *Ibid* at para 36.

¹¹ *Ibid* at para 38.

¹² *Ibid* at para 39.

17, 2019 (the "**Amended Zwingenberger Loan Agreement**"), and further amended by an amendment to the Amended Zwingenberger Loan Agreement on January 9, 2020 (the "**Loan Amending Agreement**").¹³

19. Pursuant to the Zwingenberger Loan Agreement, Muskoka Grown borrowed approximately \$6,731,000 (the "**First Tranche**"). The First Tranche carries an interest rate of 12.0% per annum calculated and compounded monthly. Muskoka Grown's obligations under the Zwingenberger Loan Agreement are guaranteed pursuant to guarantees provided by Grand Gable Holdings Inc., 263 Ontario and David Grand (collectively, the "**Zwingenberger Guarantors**"). As general and continued security for the obligations under the Zwingenberger Loan Agreement, Muskoka Grown and the Zwingenberger Guarantors granted Zwingenberger various first lien security.¹⁴

20. The Amended Zwingenberger Loan Agreement provided for additional financing in the amount of \$3,269,000 by way of a non-revolving loan (the "**Second Tranche**"). The Amended Zwingenberger Loan Agreement increased Zwingenberger's total commitment to \$10,000,000.¹⁵

21. Among other things, the Loan Amending Agreement: converted \$5,000,000 of the Zwingenberger Loan into common shares in the capital of Muskoka Grown; consolidated the First Tranche and the Second Tranche into a single principal balance of \$5,000,000 (the "**Consolidated Zwingenberger Loan**"); and revised the interest rate of the Consolidated Zwingenberger Loan to

¹³ *Ibid* at paras 41-44.

¹⁴ *Ibid* at paras 41-42.

¹⁵ *Ibid* at para 43.

the rate published by the Royal Bank of Canada as "Royal Bank Prime" plus 2.49% per annum calculated and compounded monthly.¹⁶

22. As of the date of the Ascott Affidavit, \$5,201,843 is owing to Zwingenberger.¹⁷

2. The Vendor-Take-Back Mortgage

23. The Applicant entered into a vendor-take-back mortgage agreement with 1035065 Ontario Ltd. (the "**VTB Mortgagee**") as partial consideration for the purchase price of certain real property on which Muskoka Grown's primary production facility is situated.¹⁸

24. As of the date of the Ascott Affidavit, \$197,349 is owing to the VTB Mortgagee.¹⁹

3. Nitrofin Inc.

25. On February 3, 2020, Muskoka Grown entered into an Equipment Lease Agreement (the "**Nitrofin Agreement**") with Nitrofin Inc. ("**Nitrofin**"). Pursuant to the Nitrofin Agreement, Nitrofin agreed to lease Muskoka Grown (i) a chart doser, (ii) high volume seamer, and (iii) a semi-automatic child resistant lid capper (collectively, the "**Equipment**") for the sole purpose of packaging cultivated cannabis product.²⁰

26. Under the Nitrofin Agreement, Muskoka Grown is not obligated to pay Nitrofin any lease payments for the Equipment but must comply with certain manufacturing requirements. The Nitrofin Agreement expired on May 4, 2020.²¹

¹⁶ *Ibid* at para 44.

¹⁷ *Ibid* at para 46.

¹⁸ *Ibid* at para 40.

¹⁹ *Ibid*.

²⁰ *Ibid* at paras 48-49.

²¹ *Ibid*.

27. The Applicant is not aware of any amount owing to Nitrofin.²²

4. Muskoka Community Future Development Corporation Agreement

28. On September 9, 2017, Muskoka Grown entered into a loan agreement (the "**Muskoka Development Loan Agreement**") with Muskoka Community Futures Development Corporation ("**Muskoka Development**") pursuant to which it borrowed \$500,000 (the "**Muskoka Development Loan**") with a term of 12 months and an amortization period of 180 months. The Muskoka Development Loan carried an interest rate of 8.0% until the Cannabis Licence was confirmed at which point the interest rate was reduced to 6.0%.²³

29. As general and continued security for the obligations under the Muskoka Development Loan Agreement, certain security, including a collateral mortgage in the amount of \$500,000, was granted to Muskoka Development by Muskoka Grown and certain other guarantors under the Muskoka Development Loan Agreement. The collateral mortgage has since been discharged.²⁴

30. As of the date of the Ascott Affidavit, \$466,206 is owing to Muskoka Development.²⁵

5. Royal Bank of Canada

31. On June 20, 2019, Muskoka Grown, with the consent of Zwingenberger, entered into a credit agreement (the "**RBC Credit Agreement**") with the Royal Bank of Canada ("**RBC**") for, among other things, a \$2,000,000 revolving demand facility.²⁶

²² *Ibid* at para 50.

²³ *Ibid* at para 51.

²⁴ *Ibid* at paras 53-53.

²⁵ *Ibid* at para 55.

²⁶ *Ibid* at para 56.

32. As general and continued security for the obligations under the RBC Credit Agreement, the security granted to RBC includes: (i) a general security agreement made as of May 29, 2019 (the "**RBC GSA**"), granting RBC a security interest in all of the personal property of Muskoka Grown; and (ii) a guarantee and postponement of claim in the amount of \$2,000,000 signed by Zwingenberger in August 2019 and supported by a cash collateral agreement that assigns term deposits and/or guaranteed investment certificates in the amount of \$2,000,000.²⁷

33. Zwingenberger intends to take an assignment of the \$2,000,000 RBC debt in exchange for the \$2,000,000 Zwingenberger has already put up as cash collateral. The remaining amount owing to RBC (which is approximately \$86,000) will be repaid to RBC through the initial advance under the proposed DIP Loan (as defined below).²⁸

6. Convertible Debentures

34. As of March 1, 2020, Muskoka Grown issued two debentures due on March 1, 2023 pursuant to an indenture (the "**Indenture**"). The first debenture, issued by Muskoka Grown to each registered debenture-holder under the Indenture, was for \$3,040,100 second-lien convertible debentures bearing an interest rate of 8% per annum with a strike price of \$1.62 per common share of Muskoka Grown. The second debenture was also issued pursuant to the Indenture by Muskoka Grown to each registered debenture-holder under the Indenture. No security registrations have been made in respect of either of the debentures.²⁹

²⁷ *Ibid* at para 57.

²⁸ *Ibid* at para 58.

²⁹ *Ibid* at para 59.

7. Unsecured Indebtedness

35. The Applicant has a number of unsecured creditors more fully discussed in the Ascott Affidavit and the First Report of the Proposal Trustee dated May 5, 2020 (the "**First Report**"). Among them are certain employees, third party suppliers, and landlords. The aggregate total of the Applicant's unsecured debt is approximately \$7,000,000.³⁰

36. Employee liabilities include gross payroll of approximately \$97,000 biweekly, inclusive of government remittances. The Applicant is currently in arrears in the amount of approximately \$37,000 as certain salaried employees opted to defer their pay in the last pay cycle. Given the Applicant's current liquidity issues, the payroll due on May 7, 2020, will not be made unless the NOI Process Order is granted.³¹

37. The Applicant is indebted to a variety of third party suppliers that provide services and products in connection with operating a business in the cannabis industry.³²

38. As of the date of the Ascott Affidavit, rent owing to landlords was collectively in arrears in the aggregate amount of approximately \$5,085.³³

E. Issues Leading to the NOI

39. The Applicant has been cash flow negative since its inception and has relied on equity and debt financing for funding. To achieve profitability, the Applicant has implemented a number of changes to its business, including to the size of its workforce and quantity and quality of cannabis

³⁰ *Ibid* at paras 60-61; First Report of the Proposal Trustee dated May 5, 2020 at para 25 [First Report].

³¹ *Ibid* at para 60.

³² *Ibid* at para 61.

³³ *Ibid*.

produced per month. Despite these significant changes, the Applicant has been unable to achieve profitability and has experienced significant losses in the fiscal years ending September 30, 2019 and September 30, 2018. For the interim fiscal period ending March 31, 2020, the Applicant experienced a loss of \$1,791,366. The Applicant's losses are unsustainable and have exhausted its liquidity. The Applicant now requires additional funding and the stability afforded by these NOI Proceedings to restructure its business.³⁴

40. The urgency of this motion is a result of the Applicant's current liquidity crisis. With only \$1,200 cash on hand, the Applicant cannot make its payroll and remittance obligations in the amount of \$97,000 due on May 7, 2020.³⁵ Moreover, the Applicant is unable to fund its general overhead expenses and the testing required to sell its dried cannabis inventory. Absent the relief described below, the Applicant will be unable to meet that obligation and will be forced to immediately cease its business operations.

F. Proposed DIP Loan

41. Pursuant to an Interim Financing Term Sheet (the "**DIP Term Sheet**") between Zwingenberger, as lender (in such capacity, the "**DIP Lender**"), and Muskoka Grown, as borrower (in such capacity, the "**Borrower**"), Zwingenberger has agreed to provide a super-priority, debtor-in-possession interim, revolving credit facility up to a maximum principal amount of \$4,000,000 (the "**DIP Loan**"). The interest rate applicable to advances under the DIP Loan is 10.00% per annum accruing daily and payable monthly in arrears. An upfront fee in the amount of \$80,000

³⁴ *Ibid* at para 9; First Report, *supra* note 30 at paras 26-30.

³⁵ Ascott Affidavit, *ibid* at para 11, 60.

(2% of the maximum credit amount) is payable by the Borrower to the DIP Lender in connection with the establishment of the DIP Loan and shall be held back from the initial interim advance.³⁶

42. The proceeds of the DIP Loan will be used for the following purposes: (i) to fund reasonable professional fees; (ii) to fund the payment of interest and other amounts payable under the DIP Loan; and (iii) to finance operating expenses and restructuring costs in these proceedings, and for the Borrower's general corporate purposes.³⁷ The proposed DIP Loan is subject to customary conditions precedent, covenants and representations and warranties.³⁸

43. Pursuant to the DIP Term Sheet, the proposed DIP Loan is conditional on the granting of a super-priority lien over all present and future assets of the Borrower (the "**DIP Lender's Charge**"), subordinate only to certain permitted priority liens including, among others, the Administration Charge and the Directors' Charge (each as defined below).³⁹

PART III: ISSUES

44. The issues to be considered on this motion are whether:

- (a) the Court should approve the DIP Loan and DIP Lender's Charge;
- (b) the Administration Charge should be granted;
- (c) the Directors' Charge should be granted; and

³⁶ *Ibid* at para 62.

³⁷ *Ibid* at para 63.

³⁸ *Ibid* at para 64.

³⁹ *Ibid* at paras 62-64.

- (d) the Court should grant an extension of the stay of proceedings and the time for the Applicant to file a proposal (the "**Stay Extension**").

PART IV: LAW AND ARGUMENT

A. The DIP Loan and DIP Lender's Charge Should be Granted

45. Subsection 50.6(1) of the BIA expressly provides this Court with the statutory jurisdiction to order a charge to secure interim financing advanced to a debtor "on notice to the secured creditors who are likely to be affected by the charge [...] in an amount that the court considers appropriate".⁴⁰ Such a charge may, pursuant to subsection 50.6(3), "rank in priority over the claim of any secured creditor".⁴¹ In the NOI Process Order, the Applicant is seeking the DIP Loan secured by the DIP Lender's Charge in the maximum amount of \$4,000,000 that will rank subordinate to the Administration Charge and the Directors' Charge.⁴²

46. In addition to the above, section 50.6 of the BIA requires this Court to consider whether the DIP Loan and DIP Lender's Charge secure a pre-existing obligation. If satisfied that no such obligation is being secured, the Court must then consider whether the DIP Loan and DIP Lender's Charge ought to be granted in view of the considerations enumerated in subsection 50.6(5) of the BIA. The Applicant submits that in view of the case law bearing on interim financing and the considerations in subsection 50.6(5), the DIP Loan and DIP Lender's Charge do not secure a pre-existing obligation and ought to be granted.

⁴⁰ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 s 50.6(1) [BIA].

⁴¹ *Ibid* s 50.6(1), s 50.6(3).

⁴² Draft NOI Process Order, dated May 6, 2020 at para 14 [NOI Order].

The DIP Loan and DIP Lender's Charge Do Not Secure a Pre-Existing Obligation

47. In *Re Toys "R" US (Canada) Ltd ("Toys")*, the applicants sought authorization to use certain proceeds from a debtor-in-possession facility, which was to be secured by a court-ordered charge, to repay their pre-filing secured lenders. Interpreting section 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the equivalent of subsection 50.6(1) of the BIA, Myers J. held that:

[section 11.2] also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.⁴³

48. Myers J.'s reasons apply equally here.⁴⁴

49. The DIP Lender's Charge only secures the fresh advance provided by the DIP Lender under the DIP Loan. While a small portion of the initial advance of the DIP Loan, as described above, will satisfy the outstanding amount of \$86,000 owing to RBC, these funds merely replace RBC's first-ranking security supported by the cash collateral provided by Zwingenberger.⁴⁵ Accordingly, the DIP Loan and DIP Lender's Charge, as in *Toys*, are not being used to improve the security of RBC's pre-filing indebtedness and therefore do not offend the requirements of subsection 50.6(1) of the BIA.

⁴³ [Re Toys "R" US \(Canada\) Ltd, 2017 ONSC 5571](#) at para 10.

⁴⁴ A similar DIP loan was also approved in the CCAA proceedings [In The Matter of Clover Leaf Holdings Company, \(November 25, 2019\) Toronto, CV-19-631523-00CL](#) (Amended and Restated Initial Order).

⁴⁵ Ascott Affidavit, *supra* note 1 at paras 56-58, 62-64; First Report, *supra* note 30 at paras 16-18.

Granting the DIP Loan and DIP Lender's Charge is Supported by Subsection 50.6(5)

50. When determining whether to grant a charge securing interim financing, subsection 50.6(5) of the BIA requires the Court to consider, among other things:

- (a) the period during which the debtor is expected to be subject to proceedings under [the BIA];
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.⁴⁶

51. While a charge securing interim financing will invariably "impact all creditors' positions to some degree",⁴⁷ courts have granted such charges in circumstances where:

- (a) declining to approve interim financing and a corresponding charge would result in the immediate cessation of the debtor's business;
- (b) the interim financing and attendant charge were supported by the proposal trustee; and

⁴⁶ BIA, *supra* note 40 s 50.6(5); [Eureka 93 Inc et al \(Re\), 2020 ONSC 1482](#) at para 16 [*Eureka*].

⁴⁷ [P.J. Wallbank Manufacturing Co. Re, 2011 ONSC 7641](#) at para 24 [*Wallbank*]; [Mustang GP Ltd. Re, 2015 ONSC 6562](#) at para 29 [*Mustang*]; [OVG Inc. Re, 2013 ONSC 1794](#) at para 34.

- (c) the interim financing provided "at least the prospect of increased value and a successful proposal".⁴⁸

52. The circumstances in which courts have granted interim financing and a charge securing borrowings thereunder reflect the remedial purposes of the BIA's proposal provisions. The BIA's proposal provisions aim to "avoid the social and economic losses resulting from liquidation of an insolvent company" and "create conditions for preserving the *status quo*" so that an insolvent company will have "an opportunity to put forward a plan".⁴⁹

53. Applied here, the statutory considerations enumerated in subsection 50.6(5) of the BIA, the remedial purpose of the BIA's proposal provisions, and the instruction provided by courts in interpreting them, support the granting of the DIP Loan and DIP Lender's Charge. Namely:

- (a) The Applicant is facing a liquidity crisis with payroll obligations of \$97,000 due May 7, 2020. The only way in which these obligations can be met is through the proposed DIP Loan.
- (b) The Cash Flow Statement illustrates that the DIP Loan is urgently needed to provide the Applicant with the requisite liquidity for its continued business operations in the ordinary course. Without the DIP Loan, Muskoka Grown faces an immediate cessation of its going concern operations and the potential loss of the Cannabis Licence.

⁴⁸ [Mustang](#), *ibid* at para 28; [Wallbank](#), *ibid* at para 24; [Eureka](#), *supra* note 46 at para 24.

⁴⁹ [NS United Kaiun Kaisha, Ltd v Gogent Fibre Inc, 2015 ONSC 5139](#) at para 8 [*Cogent*]; [Clothing for Modern times Ltd, Re, 2011 ONSC 7522](#) at para 11 citing [Ted Leroy Trucking Ltd, Re, 2010 SCC 60](#).

- (c) Zwingenberger requires the DIP Lender's Charge as a condition of providing the DIP Loan. Despite the Applicant's discussions with other lenders to obtain financing, the DIP Term Sheet is the only commitment received to date.
- (d) Absent the DIP Loan and DIP Lender's Charge, the Applicant's business operations will cease and its assets will be liquidated – there will be no chance for a viable proposal to be put forward. Accordingly, the DIP Loan will provide the Applicant with the breathing space necessary to develop a plan for its restructuring and put forward a viable proposal to its creditors.
- (e) The DIP Loan will preserve the value and going concern operations of the Applicant's business, which is in the best interests of the Applicant and its stakeholders.
- (f) The Applicant has substantial and valuable assets that should be preserved for the benefit of its stakeholders, including the Cannabis Licence and an operational 65,000 sq. ft. purpose built cannabis cultivation and processing facility.
- (g) The Cash Flow Statement demonstrates that, with the benefit of the DIP Loan, the Applicant is forecast to have sufficient liquidity to fund its obligations and the costs of these NOI Proceedings. In that time, the Applicant's directors and officers, in consultation with the Proposal Trustee, will manage the business and financial affairs of Muskoka Grown in the ordinary course.

- (h) The Proposal Trustee is supportive of the DIP Loan and the DIP Lender's Charge and does not believe that creditors will be prejudiced as a result of its approval.⁵⁰

54. The Applicant submits that the approval of the proposed DIP Loan and DIP Lender's Charge is consistent with the terms of the BIA, will enhance the prospect of a viable proposal being made, and is necessary to prevent the immediate cessation of Muskoka Grown's business and thereby prevent the "devastating social and economic effects of bankruptcy".⁵¹ In these circumstances, any prejudice caused by the DIP Loan and DIP Lender's Charge is outweighed by the benefits afforded to all stakeholders by the continued operation of the Applicant's business.

B. The Administration Charge Should Be Granted

55. The Applicant is seeking a charge in the amount of \$300,000 to secure the professional fees and disbursements of the Proposal Trustee, along with its counsel and the Applicant's counsel (the "**Administration Charge**").⁵²

56. Section 64.2 of the BIA expressly authorizes the Court to grant a super-priority charge on a debtor's property to secure professional fees.⁵³ In particular, subsection 64.2(1) of the BIA provides that:

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 [...] is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

⁵⁰ Ascott Affidavit, *supra* note 1 at paras 62-64, 76-79, 80, 82-83; First Report, *supra* note 30 at paras 36-40, 48-52, 57.

⁵¹ *Mustang*, *supra* note 47 at para 30 citing *Comstock Canada Ltd, Re*, 2013 ONSC 4756.

⁵² Ascott Affidavit, *supra* note 1 at para 68.

⁵³ BIA, *supra* note 40 s 64.2(1), s 64.2(2); [Colossus Minerals Inc. Re. 2014 ONSC 514](#) at para 12 [Colossus].

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.⁵⁴

57. Pursuant to subsection 64.2(2), the Court "may order that the security or charge rank in priority over the claim of any secured creditor".⁵⁵

58. Such administration charges are routinely granted where, as here:

- (a) the debtor has limited means to obtain professional assistance;
- (b) the involvement of professional advisors is critical to a successful proceeding under the BIA; and
- (c) the quantum of the proposed charge is appropriate in light of the complexity of the debtor's business.⁵⁶

59. The Applicant submits that it is appropriate for this Court to exercise its jurisdiction to grant the Administration Charge given that:

- (a) Muskoka Grown's business is complex and in a highly regulated industry, and is therefore subject to a myriad of statutory and regulatory restrictions and requirements;

⁵⁴ BIA, *ibid* s 64.2(1).

⁵⁵ *Ibid* s 64.2(2).

⁵⁶ *Mustang*, *supra* note 47 at para 33; *Colossus*, *supra* note 53 at paras 13-14; [Danier Leather Inc. Re. 2016 ONSC 1044](#) at para 57 [*Danier*].

- (b) Muskoka Grown's liquidity crisis has left it without any means to secure the assistance of professional advisors;
- (c) the involvement of the beneficiaries of the Administration Charge, each of which has a critical role, is essential to the success of these NOI Proceedings;
- (d) the roles of the beneficiaries of the Administration Charge are not duplicative;
- (e) the quantum of the proposed Administration Charge is commensurate with the complexity of Muskoka Grown's business;
- (f) the Proposal Trustee supports the granting of the Administration Charge and its quantum; and
- (g) Zwingenberger is supportive of the Administration Charge.⁵⁷

C. The Directors' Charge Should be Granted

60. The Applicant is seeking a charge in the amount of \$200,000 to secure the indemnity of its directors and officers for liabilities they may incur during these NOI Proceedings (the "**Directors' Charge**"). Under the NOI Process Order, the Directors' Charge is to be in priority to the DIP Lender's Charge but subordinate to the Administration Charge.⁵⁸

61. The Court's authority to grant the Directors' Charge on a priority basis is codified in section 64.1 of the BIA. Specifically, subsection 64.1(1) of the BIA provides that:

[o]n application by a person in respect of whom a notice of intention is filed under section 50.4 [...] and on notice to the secured creditors who are likely to be affected

⁵⁷ Ascott Affidavit, *supra* note 1 at paras 19, 24, 68-70; First Report *supra* note 30 at paras 41-43, 57.

⁵⁸ NOI Order *supra* note 42 at paras 14, 16.

by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention.⁵⁹

62. Pursuant to subsection 64.1(2), the charge may "rank in priority over the claim of any secured creditor".⁶⁰

63. In *Danier Leather Inc., Re, Mustang GP Ltd., Re, and Colossus Minerals Inc., Re ("Colossus")*, this Court approved a director's and officer's charge where:

- (a) the existing insurance coverage may have been insufficient to cover all potential claims;
- (b) the continued involvement of the debtor's directors and officers was essential to a successful proceeding under the BIA;
- (c) the debtor's directors and officers may not have been willing to continue to provide their services absent the protection of a court-ordered charge; and
- (d) the proposal trustee was supportive of the proposed charge.⁶¹

64. These circumstances apply equally here.

65. The Applicant's existing directors and officers' liability insurance (the "**D&O Insurance**") may not provide sufficient coverage against the potential liabilities that Muskoka Grown's directors and officers could incur during these NOI Proceedings. Further, the D&O Insurance is

⁵⁹ BIA, *supra* note 40 s 64.1(1).

⁶⁰ *Ibid* s 64.1(2).

⁶¹ *Danier*, *supra* note 56 at para 65-71; *Mustang*, *supra* note 47 at para 35; *Colossus*, *supra* note 53 at paras 17-21.

set to expire on May 10, 2020 and due to the Applicant's liquidity crisis, it is unlikely that it will find a suitable replacement policy.⁶²

66. Directors and officers can be held liable for certain obligations of a company owing to employees and government entities, which may include unpaid accrued wages and unpaid accrued vacation pay, together with unremitted excise, sales, goods and services, and harmonized sales taxes. The quantum of the Directors' Charge reflects a conservative estimate of three weeks' gross employee wages and vacation pay including source deductions and sales tax.

67. In light of the risks attending these NOI Proceedings and the impending expiration of the D&O Insurance, Muskoka Grown's directors and officers have indicated their continued service and involvement in these NOI Proceedings is conditional upon the granting of the Directors' Charge.⁶³ Accordingly, the Directors' Charge is necessary to ensure that the Applicant continues to benefit from the knowledge and expertise of Muskoka Grown's directors and officers – each of which is familiar with the stringent regulatory environment in which the Applicant operates and has the necessary security clearances.⁶⁴

68. The Proposal Trustee is supportive of the Directors' Charge and its quantum.⁶⁵

D. The Court Should Grant the Stay Extension

69. The initial Proposal Period and the corresponding Stay Period expires on June 4, 2020. The Applicant is seeking an extension of time to file a proposal and thus, an extension of the Stay Period until and including July 19, 2020. The Stay Extension will afford Muskoka Grown the

⁶² Ascott Affidavit, *supra* note 1 at paras 70-71.

⁶³ *Ibid* at para 73.

⁶⁴ *Ibid* at para 74.

⁶⁵ *Ibid* at para 75; First Report *supra* note 30 at paras 44-47, 57.

breathing space necessary to pursue a transaction and develop a viable proposal for the benefit of its stakeholders, and will decrease the professional fees that would be expended in seeking a stay extension prior to June 4, 2020.⁶⁶

70. This Court has the authority to grant the Stay Extension under subsection 50.4(9) of the BIA, and may do so immediately after the filing of a notice of intention to make a proposal,⁶⁷ where it is satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.⁶⁸

71. Each of the statutory criteria are satisfied here.

The Applicant has Acted and is Acting in Good Faith and with Due Diligence

72. In the time leading up to and following the commencement of these NOI Proceedings, the Applicant has acted and continues to act in good faith and with due diligence.⁶⁹ To address its liquidity crisis, the Applicant has taken active steps to implement a restructuring that would see its business emerge as a going concern including, among others:

⁶⁶ Ascott Affidavit, *ibid* at para 67; First Report, *ibid* at paras 53-56.

⁶⁷ See for instance [In the Matter of the Notices of Intention to Make a Proposal of 957855 Alberta Ltd. \(April 7, 2020\), Toronto, 31-2636843](#) (Bankruptcy Procedure Order) where the notice of intention to make a proposal was filed on April 6, 2020 and the extension was granted on April 7, 2020; [In the Matter of the Proposal of ViaFoura Inc. \(December 3, 2019\), Toronto, 31-2590812](#) (Interim Facility Approval Order) where the notice of intention to make a proposal was filed on December 1, 2019 and the extension was granted on December 3, 2019.

⁶⁸ BIA, *supra* note 40 s 50.4(9).

⁶⁹ Ascott Affidavit, *supra* note 1 at para 66; First Report, *supra* note 30 at para 54.

- (a) diligently working with its senior secured lender to implement a consensual restructuring;
- (b) arranging for the DIP Loan to ensure that Muskoka Grown has the necessary liquidity to fund these NOI Proceedings, continue its business in the ordinary course, and meet its obligations (including its payroll obligations); and
- (c) consulting with the Proposal Trustee and the Applicant's legal advisors to assist with the analysis of its restructuring options for the benefit of Muskoka Grown's stakeholders, including Muskoka Grown's customers, suppliers, employees, and contracting parties as well as Health Canada; and
- (d) working with the Proposal Trustee and the Applicant's legal advisors to develop a viable plan that involves, among other things, (i) the harvesting, processing, and selling of certain of its existing inventory and new crop, (ii) addressing operational inefficiencies, and (iii) exploring the possibility of selling some of the Applicant's vacant land.⁷⁰

The Applicant is Likely to Make a Viable Proposal if the Extension is Granted

73. In *NS United Kaiun Kaisha, Ltd. v Gogent Fibre Inc.*, Penny J. held that there "is no doubt that the intent of the BIA proposal sections is to give the insolvent person an opportunity to put forward a plan".⁷¹ To this end, the BIA proposal provisions offer insolvent debtors breathing space in the form of a stay of proceedings and extensions thereto such that a viable proposal may be

⁷⁰ Ascott Affidavit, *ibid* at para 12, 83; First Report, *ibid* at paras 34, 54.

⁷¹ *Cogent*, *supra* note 49 at para 8.

developed. The Applicant requires the additional time and breathing space contemplated under the BIA to develop a viable proposal.

74. A viable proposal is one that seems "reasonable on its face to the 'reasonable creditor'".⁷² With the support of its senior secured creditor, the Applicant has commenced these NOI Proceedings for the principal purpose of developing a proposal for its restructuring that will be reasonable and beneficial to its creditors.⁷³ To do so, the Applicant requires additional time to sell certain of its inventory and harvest and prepare its remaining inventory for market before it can assess its business' profitability. As described in detail in the First Report, the Stay Extension will provide the Applicant with the time it requires to harvest and prepare its inventory.⁷⁴

75. Taken together, the Stay Extension will ensure that the Applicant has the chance to develop a proposal that accurately reflects its business' profitability while it continues its operations in the ordinary course, preserving value for its stakeholders.⁷⁵

No Creditor is Likely to be Materially Prejudiced by the Stay Extension

76. The Applicant is not aware of a creditor who would be materially prejudiced if the Stay Extension were granted. Rather, the Applicant's major stakeholders, including its senior secured creditor, are supportive of the Stay Extension.⁷⁶

77. As the Cash Flow Statement makes clear, the Applicant is forecast to have sufficient liquidity to fund its obligations and the costs of these NOI Proceedings through the end of the Stay

⁷² [Baldwin Valley Investors Inc. Re. \[1994\] OJ No. 271](#) at para 4.

⁷³ Ascott Affidavit, *supra* note 1 at paras 13, 83.

⁷⁴ First Report, *supra* note 30 at paras 35, 54-56.

⁷⁵ Ascott Affidavit, *supra* note 1 at para 65-67, 82-83; First Report, *ibid* at paras 54-56.

⁷⁶ Ascott Affidavit, *ibid* at para 66.

Extension. The Applicant's continued operations in that time will preserve value for the benefit of stakeholders rather than prejudice stakeholders.⁷⁷

78. In addition, the Stay Extension will further preserve resources by eliminating the professional fees that would need to be expended to seek a further extension while the Applicant develops a viable proposal.

79. For the foregoing reasons, the Applicant believes the granting of the Stay Extension is in the best interests of the Applicant and its stakeholders, meets the statutory requirements under the BIA, and is appropriate in the circumstances. Zwingenberger and the Proposal Trustee are supportive of the Stay Extension.⁷⁸

PART V: RELIEF REQUESTED

80. The Applicant submits that it meets all of the qualifications required to obtain the relief sought and requests that this Court grant the proposed NOI Process Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 5, 2020.

⁷⁷ Ascott Affidavit, *ibid* at paras 66-67, 82-83; First Report, *supra* note 30 at paras 54, 56.

⁷⁸ *Ibid* at para 83.

SCHEDULE "A"

LIST OF AUTHORITIES

Cases Cited

1. [*Baldwin Valley Investors Inc, Re*, \[1994\] OJ No. 271](#)
2. [*Clothing for Modern times Ltd, Re*, 2011 ONSC 7522](#)
3. [*Colossus Minerals Inc \(Re\)*, 2014 ONSC 514](#)
4. [*Danier Leather Inc \(Re\)*, 2016 ONSC 1044](#)
5. [*Eureka 93 Inc et al \(Re\)*, 2020 ONSC 1482](#)
6. [*In The Matter of Clover Leaf Holdings Company*, \(November 25, 2019\) Toronto, CV-19-631523-00CL \(Amended and Restated Initial Order\)](#)
7. [*In the Matter of the Notices of Intention to Make a Proposal of 957855 Alberta Ltd*, \(April 7, 2020\), Toronto, 31-2636843 \(Bankruptcy Procedure Order\)](#)
8. [*In the Matter of the Proposal of ViaFoura Inc*, \(December 3, 2019\), Toronto, 31-2590812 \(Interim Facility Approval Order\)](#)
9. [*Mustang GP Ltd, Re*, 2015 ONSC 6562](#)
10. [*NS United Kaiun Kaisha, Ltd v Gogent Fibre Inc*, 2015 ONSC 5139](#)
11. [*OVG Inc, Re*, 2013 ONSC 1794](#)
12. [*P.J. Wallbank Manufacturing Co, Re*, 2011 ONSC 7641](#)
13. [*Re Toys "R" US \(Canada\) Ltd*, 2017 ONSC 5571](#)

SCHEDULE "B"

STATUTES RELIED ON

Bankruptcy and Insolvency Act, RSC 1985, c. B-3

Section 50.4

Notice of Intention

(1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "**cash-flow statement**") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

- (4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that
- (a) such release would unduly prejudice the insolvent person; and
 - (b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

- (7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person
- (a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;
 - (b) shall file a report on the state of the insolvent person's business and financial affairs – containing the prescribed information, if any –
 - (i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and
 - (ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and
 - (c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- (c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period

mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Section 50.6

Order – interim financing

(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

- (2) In the case of an individual,
 - (a) they may not make an application under subsection (1) unless they are carrying on a business; and
 - (b) only property acquired for or used in relation to the business may be subject to a security or charge.

Priority

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

Priority – previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (5) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
 - (b) how the debtor's business and financial affairs are to be managed during the proceedings;
 - (c) whether the debtor's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
 - (e) the nature and value of the debtor's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Section 64.1

Security or charge relating to director's indemnification

(1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge - in an amount that the court considers appropriate - in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction - indemnification insurance

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

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer ii in its opinion the obligation or liability was incurred as a result of the director's or

(2) officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 64.2

Court may order security or charge to cover certain costs

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

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

Section 11.2

Interim Financing

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

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED
IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSKOKA GROWN LIMITED,
A CORPORATION INCORPORATED UNDER THE LAWS OF ONTARIO**

Estate / Court File No. 31-2643278

Estate / Court File No. 31-2643278

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

Proceedings commenced in Toronto

FACTUM OF THE APPLICANT
(NOI Process Order)

BENNETT JONES LLP

One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Sean Zweig (LSO# 57307I)
Mike Shakra (LSO# 64604K)
Aiden Nelms (LSO# 74170S)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for the Applicant