Court File No.: _____

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

FACTUM OF THE APPLICANTS
(CCAA Initial Application)
(Returnable May 20, 2020)

May 19, 2020

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PART I - OVERVIEW

1. Green Growth Brands Inc. ("**GGB**" or the "**Company**"), GGB Canada Inc. ("**GGB Canada**"), Green Growth Brands Realty Ltd. ("**GGB Realty**"), and Xanthic Biopharma Limited ("**Xanthic Biopharma**", and collectively, the "**Applicants**") seek creditor protection and other relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), substantially in the form of the draft order attached to the Application Record at Tab 3.

2. The Applicants are part of a corporate group (the "**GGB Group**") that is in the business of growing, processing and selling cannabis primarily in Nevada, Massachusetts and Florida. Until very recently, the GGB Group operated two distinct business lines:

(a) the MSO Business, which is engaged in the cultivation, production and distribution of cannabis products containing more than 0.3% THC through dispensaries operating in multiple states; and

(b) the CBD Business, which was engaged in the production, wholesale and retail of CBD infused products online and through mall-based kiosks. The CBD

Business was indefinitely suspended on March 19, 2020, due to, among other things, the COVID-19 pandemic.

3. GGB has been cash flow negative since its inception and has relied on equity and debt financing for funding. Beginning in early 2019, GGB began experiencing liquidity issues. GGB currently has in excess of $100 million of secured debt. The Applicants are currently reliant upon bridge financing being provided by All Js Greenspace LLC ("**All Js**"), one of GGB's existing secured lenders, and have very limited cash on hand. The Applicants are generally unable to meet their obligations as they become due, including obligations associated with secured debt that matured on March 15, 2020 and May 17, 2020. GGB is in receipt of a notice of default with respect to certain significant unsecured obligations and is also facing several lawsuits in the United States and Canada.

4. The Applicants believe that this CCAA proceeding is in the best interests of all their stakeholders. The relief sought in the Initial Order is reasonably necessary for the Applicants to continue operating the MSO Business in the ordinary course while a sale process is implemented and pursued. All Js has agreed to fund these CCAA proceedings through a debtor-in-possession loan facility (the "**DIP Agreement**"). All Js and the Applicants' debentureholders have also agreed to enter into a stalking-horse agreement **(the "Stalking Horse APA")** and to act as a stalking-horse bidder pursuant to a court-approved sale and investment solicitation process (the **"SISP**").

5. No relief with respect to the Stalking Horse APA or the SISP is being sought as part of this initial application) The Applicants are seeking authority to borrow up to an initial US$1 million under the DIP Agreement during the initial ten day period. If the Initial Order is granted, the Applicants intend to return to this Court within ten days (the "**Comeback**

Hearing") to seek the issuance of an Amended and Restated Initial Order for additional relief.

PART II - THE FACTS

6. The facts with respect to this application are more fully set out in the Affidavit of Raymond Whitaker III sworn May 19, 2020 in support of this CCAA application (the "**Whitaker Affidavit**").

7. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Whitaker Affidavit. All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

A. DESCRIPTION OF THE APPLICANTS

8. GGB is a corporation continued under the *Business Corporations Act* (Ontario) (the "**OBCA**") and is the parent company of the GGB Group. GGB's registered head office is located at 5300 Commerce Court West, 199 Bay Street, Toronto, Ontario M5L 1B9, and its principal place of business is located at 4300 East Fifth Ave. Columbus, Ohio 43219.

Whitaker Affidavit at para 14, Applicants' Application Record, Tab 2.

9. GGB has four full-time employees, including the Interim Chief Executive Officer, in-house counsel, the Chief Financial Officer and a comptroller. Three employees work remotely from Columbus, Ohio, and one works remotely from Canada. GGB maintains banking facilities in Canada and holds a provisional patent in Canada related to powdered, water-soluble cannabis.

Whitaker Affidavit at paras 14 and 16, Applicants' Application Record, Tab 2.

10. GGB's common shares are listed for trading on the CSE under the symbol GGB and on the OTCQB venture market under the symbol GGBXF. GGB currently has 26,562,378 warrants outstanding, which are listed on the CSE under the symbol "GGB.WT".

Whitaker Affidavit at paras 5 and 15, Applicants' Application Record, Tab 2

11. GGB has three direct, wholly owned subsidiaries in Canada that are also Applicants in this CCAA proceeding:

(a) GGB Canada, an entity incorporated under the OBCA with no assets or employees;

(b) GGB Realty, an entity incorporated under the OBCA that was incorporated in anticipation of the GGB Group expanding its presence in Canada, though said expansion never materialized. GGB Realty has no assets or employees; and

(c) Xanthic Biopharma, an entity incorporated under the OBCA with no assets or employees.

Whitaker Affidavit at paras 17-19, Applicants' Application Record, Tab 2.

B. BUSINESS OF THE APPLICANTS

12. As mentioned above, the Applicants have two business lines: the MSO Business and the CBD Business.

13. The MSO Business has operations in Nevada, Massachusetts, and Florida. In each of these states, the GGB Group, through its subsidiaries, holds licences that permit specified cannabis-related activities including cultivating, producing, distributing and dispensing cannabis for medical and adult use. The GGB Group's business operations are largest in Nevada, where it operates a retail network and multiple cultivation facilities, and employs

126 people. The GGB Group does not yet produce cannabis products in Massachusetts, and is evaluating whether to pursue a cultivation and processing location on land owned in that state. The GGB Group is continuing to develop its retail and cultivation network in Florida.

Whitaker Affidavit at paras 24-30, Applicants' Application Record, Tab 2.

14. The GGB Group has approximately 172 employees in the United States in connection with the MSO Business.

Whitaker Affidavit at para 68, Applicants' Application Record, Tab 2.

15. The CBD Business was indefinitely suspended following the onset of the COVID-19 pandemic, and the CBD Subsidiaries are currently in receivership in the United States.

Whitaker Affidavit at para 82, Applicants' Application Record, Tab 2.

C. FINANCIAL CHALLENGES AND RESPONSES

i. Strategic Review Process and Sale Efforts for CBD Business

16. GGB has been cash flow negative since its inception. Over the past year, GGB made concerted efforts to monetize assets and focus its operations in an effort to manage its negative cash flow. In February 2020, this resulted in the GGB Group commencing a stalking horse-style sales process for the CBD Business. GGB actively solicited offers for the CBD Business as part of this sales process, but it was unable to consummate a transaction with either the stalking horse bidder or any other potential purchasers due to, among other factors, the onset of the COVID-19 pandemic which caused GGB to close all of its CBD retail locations.

Whitaker Affidavit at paras 76-81, Applicants' Application Record, Tab 2.

17. On April 3, 2020, the Special Committee determined that it was in the best interests of the Company and its stakeholders for the CBD Subsidiaries to be placed into receivership by order of the Ohio Court.

Whitaker Affidavit at para 81, Applicants' Application Record, Tab 2.

ii. Defaults under Loan Obligations

18. On March 15, 2020, the GAOC Note, in the principal amount of $39 million, matured. GGB was unable to satisfy its obligations associated with the maturity of the GAOC Note. GGB was and remains in default under the terms of the GAOC Note.

Whitaker Affidavit at paras 10 and 35, Applicants' Application Record, Tab 2.

19. On May 17, 2020, the May Debentures, in the aggregate principal amount of US$45.5 million, matured. GGB was unable to satisfy the obligations owing upon the maturity of the May Debentures and is now in default under the terms of the May Debentures.

Whitaker Affidavit at paras 10 and 39, Applicants' Application Record, Tab 2.

20. On April 6, 2020, GGB received notices of default under the Moxie Termination Note and the Moxie Guarantee, claiming that the amounts owing thereunder in excess of US$9 million were due and payable. Similarly, on May 15, 2020, GGB and certain subsidiaries received notices of default under the Spring Oaks Notes and the GGB Florida security agreement, claiming that the amounts owing thereunder, in the aggregate principal amount of US$17.2 million, were due and payable. GGB is unable to rectify any of these defaults.

Whitaker Affidavit at paras 10, 61 and 63-65, Applicants' Application Record, Tab 2.

iii. Litigation

21. In addition to the above-noted factors contributing to GGB's financial distress, the GGB Group is subject to litigation in the United States and Canada. The United States

actions, of which there are four, including an action related to the defaults under the Moxie Guarantee and Moxie Termination Note, claim damages totalling approximately US$11.7 million and other relief against GGB. GGB is also a defendant in an Ontario action in which the plaintiff is seeking damages of $5 million for the alleged breach of a consulting contract.

Whitaker Affidavit at paras 73-74, Applicants' Application Record, Tab 2.

iv. Urgent Need for Relief

22. To temporarily address GGB's severe liquidity crisis, GGB obtained urgent financing from All Js in February, March and April 2020 in the aggregate amount of US$3.44 million. GGB obtained further financing from All Js on May 4, 2020 and May 12, 2020 by issuing two unsecured promissory notes in the combined amount of US$800,000. These funds were used to, among other things, meet payroll obligations and to pay certain suppliers.

Whitaker Affidavit at paras 54, 66 and 85, Applicants' Application Record, Tab 2.

23. GGB is now at the point where it has exhausted its ability to raise additional financing. GGB is unable to meet its on-going obligations and urgently requires additional funding to maintain its operations.

PART III - ISSUES

24. The issues before this Court, as addressed below, are whether:

(a) the Applicants meet the criteria for, and should be granted, protection under the CCAA;

(b) the proposed monitor, Ernst & Young Inc. ("**EY")** should be appointed as the monitor in these proceedings (in such capacity, the "**Monitor**");

(c) the DIP Agreement should be approved; and

(d) this Court should exercise its discretion to grant the Administration Charge, the Directors' Charge and the DIP Lender's Charge.

PART IV - THE LAW

A. THIS COURT SHOULD GRANT PROTECTION TO THE APPLICANTS UNDER THE CCAA

i. The Applicants are either "Debtor Companies" or "Affiliated Debtor Companies" to which the CCAA applies

25. The CCAA applies to a "debtor company" or "affiliated debtor companies" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[1]

> CCAA at s. 2(1) "debtor company" and 3(1).

a) Each of the Applicants is a "Company"

26. The CCAA defines "company" as, amongst other things,

> […] any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated […]
>
> CCAA s. 2(1), "company".

27. The Applicants are corporations incorporated under the laws of the Province of Ontario. As such, each of the Applicants meets the CCAA definition of "company" and are therefore eligible for CCAA protection.

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[1] RSC 1985, c. B-3 [**BIA**].

Whitaker Affidavit, paras 5, 14 and 17-18, Application Record, Tab 2.

b) The Applicants are "Debtor Companies" under the CCAA

28. The CCAA defines a "debtor company" as, *inter alia*, a company that is "insolvent".

CCAA s. 2(1) "debtor company", "company" and CCAA s. 3(1).

29. CCAA jurisprudence provides that when assessing the insolvency of a corporate group, the Court should focus on the insolvency of the group as a whole rather than the financial health of each individual aspect of the corporate group.

First Leaside Wealth Management Inc., Re, 2012 ONSC 1299 at paras 29-30 (CanLII).

See also *San Francisco Gifts Ltd, Re*, 2004 ABQB 705 at para 4 (CanLII).

30. The term "insolvent" is not defined under the CCAA; however, it is well-established that in a CCAA application this term can be interpreted by reference to "insolvent person" in s. 2(1) of the BIA. The definition of "insolvent person" in the BIA is:

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

BIA, s. 2(1), "insolvent person".

Stelco Inc, Re, 2004 CanLII 24933 (Sup Ct [Comm List]) [***Stelco***], paras 21-22 (CanLII).

31. The GGB Group has secured liabilities totalling more than $100 million, which include the GAOC Note (in the principal amount of $39 million), the May Debentures (in the aggregate principal amount of US$45.5 million), the Backstop Debentures (in the aggregate principal amount of US$23.7 million) and the All Js Secured Notes (in the aggregate principal amount of US$800,000). As noted above, the GAOC Note matured on March 15, 2020 and the May Debentures matured on May 17, 2020. The GGB Group is unable to meet its obligations related to these maturities and, as such, is currently in default.

> Whitaker Affidavit at paras 10, 35, 49 and 54, Applicants' Application Record, Tab 2.

32. The GGB Group has significant unsecured debt obligations and has received notices of default with respect to the Moxie Termination Note, the Moxie Guarantee and the Spring Oaks Notes. The GGB Group is unable to rectify these notices of default.

> Whitaker Affidavit at paras 56-67 and 70-72, Applicants' Application Record, Tab 2.

33. The Applicants are cash flow negative and have no foreseeable sources of liquidity to satisfy their obligations. As such, the Applicants satisfy part (a) of the BIA's definition of "insolvent person" as they are unable to meet their obligations as they come due.

> Whitaker Affidavit, para 9, Application Record, Tab 2.

c) The Applicants have over $5 million in liabilities

34. As detailed above, the GGB Group's aggregate outstanding liabilities are well in excess of $5 million. As such, the Applicants' debt exceeds the $5 million threshold for protection under the CCAA.

> Whitaker Affidavit, para 34, Application Record, Tab 2.

35. For all of the foregoing reasons, the Applicants are debtor companies to which the CCAA applies. The Applicants are therefore eligible for protection under the CCAA.

ii. An Order Granting a Stay of Proceedings is Appropriate

36. Pursuant to section 11.02(1) of the CCAA, a Court may make an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

CCAA s. 11.02.

37. Exercising discretionary authority to grant a stay pursuant to the CCAA must be informed by the purpose behind the CCAA, which should be liberally interpreted. The purpose of the CCAA is to, amongst other things, maintain the *status quo* for the debtor company for a period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its creditors.

Ted Leroy Trucking [Century Services] Ltd, Re, 2010 SCC 60 at para 60 (CanLII).

Stelco Inc, Re, at paras 15-17 (CanLII).

38. It is just and appropriate for this Court to grant a stay of proceedings in respect of the Applicants, who have acted with due diligence and in good faith. The Applicants require a stay of proceedings to provide them with "breathing room" to pursue the SISP. In the absence of a stay of proceedings, the Applicants may face enforcement actions by, among others, GAOC, the holders of the May Debentures, the litigation plaintiffs and certain contractual counterparties. It would be detrimental to the Applicants' business and stakeholders if proceedings were commenced or continued or rights and remedies were executed against them.

Whitaker Affidavit, para 88, Application Record, Tab 2.

B. EY SHOULD BE APPOINTED AS MONITOR

39. Upon the granting of an Initial Order, s. 11.7 of the CCAA requires that at the same time the Court appoint a person to monitor the business and financial affairs of the company. EY is a trustee within the meaning of s. 2(1) of the BIA and is not subject to any of the restrictions as to who may be appointed as monitor as per s. 11.7(2) of the CCAA. EY has a significant amount of experience acting as a court-appointed Monitor in CCAA proceedings. EY has consented to acting as the Monitor in these CCAA proceedings, and should be appointed.

CCAA at s. 11.7(1) and (2).

BIA at s. 2, "trustee".

C. THE LIMITED DIP FINANCING SHOULD BE APPROVED

40. The Applicants require immediate DIP financing to cover, among other things, post-filing operating expenses and restructuring costs during the initial CCAA stay period.

41. All Js has agreed to provide the Applicants with interim financing. Pursuant to the DIP Agreement, GGB is the borrower and certain of its subsidiaries (including the Applicants other than GGB Realty) are guarantors. The DIP facility provides total funding in the amount of US$7.2 million (with an initial advance of up to US$ 1 million), which is secured by the DIP Lender's Charge in the amount of US$1 million and direct security at the subsidiary level. The proposed ranking of the DIP Lender's Charge is behind the Administration Charge, the Directors' Charge and the GAOC Note, and security at the operating subsidiary level.

Whitaker Affidavit at paras 93 and 103, Applicant's Motion Record, Tab 2.

42. Section 11.2 of the CCAA gives the Court the express statutory authority to grant a DIP financing charge. Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> **Factors to be considered**
> 11.2 (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.

CCAA, s. 11.2(4).

43. Section 11.2(5) requires that this Court be satisfied, after considering all of the facts and circumstances in the case before it, that the interim financing sought to be approved is "reasonably necessary" for continued operations in such circumstances.

CCAA, s. 11.2(5).

44. What is "reasonably necessary" in each case is inevitably a question of fact based on the circumstances before the Court. In *Re James E. Wagner Cultivation Corporation,* the Court approved interim financing on an initial application after reviewing the cash flow forecast

and determining that the "…DIP financing is reasonably necessary to keep the applicants operating in the normal course for 10 days."

> *Re James E. Wagner Cultivation Corporation* (1 April 2020), Toronto CV-20-00639000-00CL (ONSC) (handwritten endorsement) at para 12 (Monitor's Website).

45. In the present matter, the Applicants urgently require the proposed interim financing in order to continue operating as a going concern. All Js requires the DIP Lender's Charge as a condition to providing the DIP facility. The DIP Lender's Charge is restricted to what is necessary during the ten day period and does not secure an obligation that existed before the granting of the Initial Order. The proposed Monitor is supportive of the limited approval of the DIP Agreement and the DIP Lender's Charge.

> Whitaker Affidavit at paras 88, 103-104 and 107, Applicant's Motion Record, Tab 2.

46. The Applicants are seeking the inclusion of a provisional execution provision in the proposed Initial Order to protect the DIP Lender for all advances actually made to the Applicants. In the absence of such a provision, the DIP Lender sought to include provisions permitting the DIP Lender to not advance in the face of certain potential legal challenges that might adversely affect the DIP Lender or the priority of the DIP Lender's Charge. The GGB Group requires immediate funding on an urgent basis. Further, the DIP Agreement provides for weekly advances to permit the GGB Group to continue operating. Any interruption in such advances could have a material adverse effect on the Applicants and their stakeholders. Provision execution provisions are not infrequent in CCAA orders and, in the present circumstances, are reasonable.

> *Re Crystallex International Corp.* (20 December 2017), Toronto CV-11-9532-00CL (ONSC) (order) at para 24 (Monitor's Website).

Re Essar Steel Algoma, 2017 ONSC 4652 at para 6 of the attached order (CanLII).

47. The proposed Initial Order further provides that GGB, as a reporting issuer for the purposes of securities law, is not required to comply with s. 5.6 of Multilateral Instrument 61-101 ("**MI 61-101**"). Section 5.6 of MI 61-101 provides that "related party transactions", which could be interpreted to include the DIP Agreement, are subject to enhanced disclosure and voting protections for minority shareholders. An exemption to s. 5.6 is available if the related party transaction is subject to court approval or a court order effected under bankruptcy or insolvency law, as is the case here.

Multilateral Instrument 61-101: *Protection of Minority Security Holders in Special Transactions*, OSC (unofficial consolidation dated May 9, 2016) at s. 5.6 and 5.7(d) (OSC).

48. Based on the foregoing, the requested relief in respect to the DIP Agreement and the DIP Lender's Charge is reasonably necessary and appropriate in the circumstances.

D. THE PRIORITY CHARGES SHOULD BE GRANTED

i. The Administration Charge

49. The Applicants seek a charge on their assets, property and undertakings (the "**Property**") in the maximum amount of $1 million to secure the fees and disbursements incurred in connection with services rendered to the Applicants in connection with these CCAA proceedings by counsel to the Applicants, the Monitor and the Monitor's counsel (the "**Administration Charge**") during the initial stay period.

Whitaker Affidavit, para 95, Application Record, Tab 2.

50. In an effort to comply with the new s. 11.001 of the CCAA, the requested Administration Charge is limited to what is reasonably necessary for the continued

operation of the Applicants during the initial stay period. The Applicants will revisit the quantum of the Administration Charge as part of an Amended and Restated Initial Order at the Comeback Hearing.

Whitaker Affidavit, para 96, Application Record, Tab 2.

51. The Applicants have worked with EY to estimate the proposed quantum of the Administration Charge and believe it to be reasonable and appropriate in view of the complexities of its anticipated CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge.

Whitaker Affidavit, para 96, Application Record, Tab 2.

52. Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge:

> **11.52(1) Court may order security or charge to cover certain costs** — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> **11.52(2) Priority** — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, s. 11.52.

53. In *Canwest Publishing*, Pepall J. identified six non-exhaustive factors that the Court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

> *Canwest Publishing Inc, Re*, 2010 ONSC 222 [***Canwest Publishing***] at para 54 (CanLII).

54. Justice Pepall also indicated that the quantum of an administration charge is dependent on the facts, such as the magnitude and complexity of the restructuring.

> *Canwest Publishing* at para 55 (CanLII).

55. In the present matter, the following factors support the granting of the Administration Charge as requested:

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge because, among other things, the Applicants operate a business in a foreign country subject to significant regulatory obligations;

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings;

(c) there is no anticipated unwarranted duplication of roles;

(d) the Administration Charge will rank in priority to the Directors' Charge and any existing secured creditors, all of whom were provided with notice that the Applicants were commencing this Application for creditor protection pursuant to the CCAA; and

(e) EY supports the Administration Charge and its proposed quantum.

Whitaker Affidavit, paras 95-97 and 106, Application Record, Tab 2.

ii. The Directors' Charge

56. The Applicants seek a charge over the Property in favour of their former and current directors in the amount of $25,000 (the "**Directors' Charge**") in order to protect their directors and officers from the risk of significant personal exposure. The Directors' Charge is proposed to rank immediately behind the Administration Charge but in priority to all other Encumbrances held by persons given notice of this application.

Whitaker Affidavit, para 101, Application Record, Tab 2.

57. The Applicants require the continued participation of their directors, officers and employees to ensure the ongoing stability of the Applicants' business during the CCAA proceedings; however, the Applicants' directors and officers (the "**D&Os**") have indicated that, due to the potential personal exposure associated with the Applicants' aforementioned liabilities, they cannot continue their service with the Applicants unless the Initial Order grants the Directors' Charge.

Whitaker Affidavit, para 99, Application Record, Tab 2.

58. The Applicants maintain directors' and officers' liability insurance (the "**D&O Insurance**") for the D&Os. The current D&O Insurance policies provide a total of US$5

million in coverage. GGB has also granted contractual indemnities in favour of its D&Os, but it does not have sufficient funds to satisfy those indemnities should the D&Os be found responsible for the full amount of the potential liabilities they may be exposed to.

Whitaker Affidavit, para 100, Application Record, Tab 2.

59. Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it:

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

CCAA, s. 11.51.

60. In *Jaguar Mining Inc*, Morawetz R.S.J. (as he then was) stated that, in order to grant a charge in favour of the D&Os, the Court must be satisfied of the following factors:

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

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

Jaguar Mining Inc, Re, 2014 ONSC 494 at para 45 [***Jaguar Mining Inc***] (CanLII).

61. With respect to the Applicants, the Directors' Charge is reasonable in the circumstances because:

(a) the Applicants have given notice to the secured creditors likely to be affected by the Directors' Charge;

(b) EY is of the view that the Directors' Charge is reasonable and appropriate in the circumstances;

(c) the Applicants will require the active and committed involvement of the directors and officers, whose continued participation is necessary for an effective restructuring; and

(d) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct.

Whitaker Affidavit, paras 98-94, Application Record, Tab 2.

E. THE RELIEF SOUGHT IS REASONABLY NECESSARY

62. Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.

> CCAA, s. 11.001, 11.02(1) and (3).

63. The stated purpose of s. 11.001 is to make "the insolvency process fairer, more transparent and more accessible" and "avoid the immediate liquidation of an insolvent company." Section 11.001 of the CCAA is consistent with the spirit of the CCAA as remedial legislation intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy.

> Government of Canada (Press Release), "Insolvency reforms to come into force" (4 September 2019), online: <https://www.canada.ca/en/innovation-science-economic-development/news/2019/09/insolvency-reforms-to-come-into-force.html> or <perma.cc/8SLT-ZADL>.

64. The Applicants have limited the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of their business. After using the initial stay period to stabilize their business, the Applicants intend to return to this Court to request further relief. Accordingly, the Applicants submit that the relief sought on this initial application is in accordance with s. 11.001 of the CCAA and should be granted.

PART V - ORDER SOUGHT

65. For the foregoing reasons, the Applicants respectfully request that this Court grant an Order substantially in the form of the draft Initial Order attached at Tab 3 to the Applicants' motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2020.

Stikeman Elliott

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Canwest Publishing Inc, Re*, 2010 ONSC 222 (CanLII).
2. *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (CanLII)
3. *Jaguar Mining Inc, Re*, 2014 ONSC 494 (CanLII)
4. *Re Crystallex International Corp.* (20 December 2017), Toronto CV-11-9532-00CL (ONSC) (order) (Monitor's Website)
5. *Re Essar Steel Algoma*, 2017 ONSC 4652 (CanLII)
6. *Re James E. Wagner Cultivation Corporation* (1 April 2020), Toronto CV-20-00639000-00CL (ONSC) (handwritten endorsement) (Monitor's Website)
7. *San Francisco Gifts Ltd, Re*, 2004 ABQB 705 (CanLII)
8. *Stelco Inc, Re*, 2004 CanLII 24933 (Sup Ct [Comm List]) (CanLII)
9. *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60 (CanLII)

Other Authorities

10. Government of Canada (Press Release), "Insolvency reforms to come into force" (4 September 2019), online: <https://www.canada.ca/en/innovation-science-economic-development/news/2019/09/insolvency-reforms-to-come-into-force.html> or <perma.cc/8SLT-ZADL>

SCHEDULE "B"
RELEVANT STATUTES

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

Definitions

2 (1) In this Act, […]

> **company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; (compagnie) […]
>
> **debtor company** means any company that
>
> > (a) is bankrupt or insolvent,
> >
> > (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
> >
> > (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
> >
> > (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

[…]

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

[…]

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[…]

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.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[…]

Stays, etc. — initial application

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

11.02 (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.

[...]

Interim financing

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

Priority — secured creditors

11.2 (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

11.2 (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

11.2 (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

11.2 (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.

[…]

Security or charge relating to director's indemnification

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

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

[…]

Court may order security or charge to cover certain costs

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

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

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

Priority

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

[…]

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.

Restrictions on who may be monitor

11.7 (2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Quebec that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

…

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

Definitions

2 In this Act, […]

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

…

Multilateral Instrument 61-101: ***Protection of Minority Security Holders in Special Transactions***

PART 1 DEFINITIONS AND INTERPRETATION

"**related party**" of an entity means a person, other than a person that is solely a bona fide lender, that, at the relevant time and after reasonable inquiry, is known by the entity or a director or senior officer of the entity to be

> (a) a control person of the entity,
>
> (b) a person of which a person referred to in paragraph (a) is a control person,
>
> (c) a person of which the entity is a control person,
>
> (d) a person that has
>
> > (i) beneficial ownership of, or control or direction over, directly or indirectly, or
> >
> > (ii) a combination of beneficial ownership of, and control or direction over, directly or indirectly, securities of the entity carrying more than 10% of the voting rights attached to all the entity's outstanding voting securities,

(e) a director or senior officer of

(i) the entity, or

(ii) a person described in any other paragraph of this definition,

(f) a person that manages or directs, to any substantial degree, the affairs or operations of the entity under an agreement, arrangement or understanding between the person and the entity, including the general partner of an entity that is a limited partnership, but excluding a person acting under bankruptcy or insolvency law,

(g) a person of which persons described in any paragraph of this definition beneficially own, in the aggregate, more than 50 per cent of the securities of any outstanding class of equity securities, or

(h) an affiliated entity of any person described in any other paragraph of this definition;

"**related party transaction**" means, for an issuer, a transaction between the issuer and a person that is a related party of the issuer at the time the transaction is agreed to, whether or not there are also other parties to the transaction, as a consequence of which, either through the transaction itself or together with connected transactions, the issuer directly or indirectly

(a) purchases or acquires an asset from the related party for valuable consideration,

(b) purchases or acquires, as a joint actor with the related party, an asset from a third party if the proportion of the asset acquired by the issuer is less than the proportion of the consideration paid by the issuer,

(c) sells, transfers or disposes of an asset to the related party,

(d) sells, transfers or disposes of, as a joint actor with the related party, an asset to a third party if the proportion of the consideration received by the issuer is less than the proportion of the asset sold, transferred or disposed of by the issuer,

(e) leases property to or from the related party,

(f) acquires the related party, or combines with the related party, through an amalgamation, arrangement or otherwise, whether alone or with joint actors,

(g) issues a security to the related party or subscribes for a security of the related party,

(h) amends the terms of a security of the issuer if the security is beneficially owned, or is one over which control or direction is exercised, by the related party, or agrees to the amendment of the terms of a security of the related party if the security is beneficially owned by the issuer or is one over which the issuer exercises control or direction,

(i) assumes or otherwise becomes subject to a liability of the related party,

(j) borrows money from or lends money to the related party, or enters into a credit facility with the related party,

(k) releases, cancels or forgives a debt or liability owed by the related party,

(l) materially amends the terms of an outstanding debt or liability owed by or to the related party, or the terms of an outstanding credit facility with the related party, or

(m) provides a guarantee or collateral security for a debt or liability of the related party, or materially amends the terms of the guarantee or security;

[…]

PART 5 RELATED PARTY TRANSACTIONS

5.6 Minority Approval – An issuer shall not carry out a related party transaction unless the issuer has obtained minority approval for the transaction under Part 8.

5.7 Exemptions from Minority Approval Requirement

[…]

(d) Bankruptcy, Insolvency, Court Order – the circumstances described in subparagraph (f)(i) of section 5.5, if the court is advised of the requirements of this Instrument regarding minority approval for related party transactions, and of the provisions of this paragraph, and the court does not require compliance with section 5.6 […]

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Court File No.: _____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

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(CCAA Initial Application)

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