

**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
CLEARBEACH RESOURCES INC. AND FORBES RESOURCES CORP.**

Applicants

**FACTUM OF THE APPLICANTS
(Returnable May 20, 2021)**

May 18, 2021

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

Richard Swan (LSO# 32076A)
Email: swanr@bennettjones.com

Raj Sahni (LSO# 42924U)
Email: sahnir@bennettjones.com

Lawyers for the Applicants

FACTUM OF THE APPLICANTS

PART I: OVERVIEW

1. Clearbeach Resources Inc. (“**Clearbeach**”) and Forbes Resources Corp. (“**Forbes**”, and together with Clearbeach, the “**Applicants**”), are seeking to transition their existing proposal proceedings (the “**Proposal Proceedings**”) into a proceeding under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The relief sought will prevent the devastating impact of the Applicants’ deemed bankruptcies under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), permit Clearbeach to better attend to its environmental and stewardship obligations, and provide the stability, time and flexibility necessary for the Applicants’ to canvass their restructuring options.

2. The Applicants are privately-owned, affiliated companies operating in Ontario’s oil and natural gas sector. Due to poor financial performance and liquidity issues caused by commodity prices and significant environmental obligations, the Applicants have been unable to satisfy their ordinary course obligations, including those owed to their senior secured creditor, PACE Savings & Credit Union Limited (“**Pace**”).

3. In response to an application for the appointment of a receiver brought and later abandoned by Pace (the “**Receivership Proceedings**”), the Applicants commenced the Proposal Proceedings. As a result of the Receivership Proceedings, no proposal was filed in the Proposal Proceedings and the time to do so under the BIA has expired. Absent a transition to a CCAA proceeding, each of Clearbeach and Forbes will be deemed bankrupt, to the detriment of their creditors.

4. The Applicants (and certain other persons and entities) have recently completed a settlement with their senior secured lender, Pace, the approval of which is also sought on the return of this matter.

5. Accordingly, the Applicants are seeking:

- (a) an order (the “**Initial Order**”) pursuant to the CCAA which, among other things:
 - (i) declares that the Applicants are entities to which the CCAA applies;
 - (ii) authorizes the continuation under the CCAA of the Proposal Proceedings;
 - (iii) appoints MNP Ltd. (“**MNP**” or the “**Proposed Monitor**”) as an officer of this Court to monitor the assets, business, and affairs of the Applicants (as appointed, the “**Monitor**”);
 - (iv) stays, for an initial period of not more than ten (10) days (the “**Stay of Proceedings**”), all proceedings and remedies taken or that might be taken in respect of the Applicants, the Monitor or the Directors and Officers or affecting the Applicants’ business or the Property (each as defined below), except with the written consent of the Applicant and the Monitor, or with leave of this Court; and
 - (v) grants the Administration Charge and Directors’ Charge (each as defined below) over the Applicants’ current and future assets, undertakings and property of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (collectively, the “**Property**”);

- (vi) approves the First Report of Richter Advisory Group Inc. (“**Richter**”) in its capacity as proposal trustee in the Proposal Proceedings (in such capacity, the “**Proposal Trustee**”) dated December 11, 2020, the Supplement to the First Report of Richter dated December 16, 2020, and the activities of Richter described therein; and
- (b) an order (the “**Settlement Approval Order**”), approving the terms of settlement set out in the Settlement Agreement (the “**Settlement Agreement**”) among the Applicants, Pace, Oil Patch Services Inc. (“**Oil Patch**”), Jarvis Holdings Inc. (“**Jarvis**”), Brookwood Resources Inc., 1782767 Ontario Inc., Peter Budd, Lagasco Inc. (“**Lagasco**”) and Jane Lowrie (collectively, the “**Settlement Parties**”), and sealing the unredacted Settlement Agreement.

PART II: FACTS

6. The facts underlying this application are set out in the affidavit of Jane Lowrie sworn May 17, 2021 (the “**Lowrie Affidavit**”) and the Pre-Filing Report of the Proposed Monitor dated May 18, 2021 (the “**Pre-Filing Report**”).¹ Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Lowrie Affidavit.

A. The Applicants’ Corporate Structure

7. The Applicants are privately-owned affiliated companies incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the “**OBCA**”). Both Forbes and Clearbeach are

¹ Affidavit of Jane Lowrie sworn May 17, 2021 [Lowrie Affidavit], Application Record of Clearbeach Resources Inc. and Forbes Resources Corp. dated May 18, 2021 at Tab 2 [Application Record]; Pre-Filing Report of MNP Ltd. dated May 18, 2021 [Pre-Filing Report].

controlled by Jane Lowrie. Clearbeach is a wholly-owned subsidiary of Brookwood Resources Inc., of which Jane Lowrie is the sole shareholder, and Jane Lowrie is the sole shareholder of Forbes.²

B. The Applicants' Business

8. Clearbeach is the operating company through which an Ontario oil and gas extraction business is conducted. Clearbeach is involved in the exploration, development and production of oil and gas deposits in Ontario.³ Clearbeach currently owns approximately 402 oil and natural gas disposal and injection wells in Southwestern Ontario, among other related production facilities.⁴ These wells allow Clearbeach to produce 257 “barrels of oil equivalent” per day, consisting of approximately 1,000 cubic feet of natural gas and 90 barrels of oil.⁵

9. Clearbeach does not currently have any employees. Rather, it has contractual arrangements with Lagasco and Eastern Oilfield Services Ltd. (“**Eastern**”), pursuant to which personnel and services are provided to Clearbeach in connection with the management, operation and maintenance of Clearbeach’s oil and gas wells and associated infrastructure.⁶

10. The oil and gas wells owned by Clearbeach are predominantly located on private farmland. As compensation for having oil and gas wells situated on their property, individual landowners are paid on a monthly basis a royalty on gross production (generally 12.5%) (the “**Royalty Payments**”) and are also compensated for crop losses due to surface facilities.⁷ In order to keep

² Lowrie Affidavit at para 5, Application Record at Tab 2; Pre-Filing Report, *supra* note 1 at paras 14, 18.

³ *Ibid*, at para 7, Application Record at Tab 2.

⁴ *Ibid*, at para 9, Application Record at Tab 2.

⁵ *Ibid*, Application Record at Tab 2.

⁶ *Ibid*, at para 10, Application Record at Tab 2.

⁷ *Ibid*, at para 11, Application Record at Tab 2.

its petroleum and natural gas leases in good standing and continue production from each of its oil and gas wells and associated facilities, Clearbeach is required to make the Royalty Payments and surface payments.⁸

11. Due to poor financial performance and liquidity issues caused by challenged commodity prices and its significant environmental obligations, Clearbeach has been unable to satisfy the Royalty Payments, pay municipal taxes, service its debt to Pace, or meet certain of its other ordinary course obligations.⁹

C. Background to these Proceedings

1. Clearbeach's Indebtedness to Pace

12. Clearbeach is indebted to Pace, both directly as a borrower and indirectly as a guarantor, under various loan agreements.¹⁰ Clearbeach's obligations to Pace are secured pursuant to a Business Loan General Security Agreement dated August 7, 2014, a Fixed and Floating Charge Demand Debenture in the amount of \$8 million, and various loan agreements with Clearbeach's predecessor companies, ON-Energy Corp. and Liberty Oil & Gas Ltd. (collectively, the "Clearbeach/Pace Security").¹¹

13. On July 13, 2020, Pace sent a demand letter and a notice of intention to enforce security under subsection 244(1) of the BIA, advising that it was making formal demand for immediate

⁸ *Ibid*, at para 11, Application Record at Tab 2.

⁹ *Ibid*, at para 12, Application Record at Tab 2.

¹⁰ *Ibid*, at paras 13-14, Application Record at Tab 2.

¹¹ *Ibid*, at para 16, Application Record at Tab 2.

payment of \$8,951,401.79, together with accruing interest and any and all costs and expenses incurred by Pace (collectively, the “**Clearbeach Indebtedness**”).¹²

2. Forbes’ Indebtedness to Pace

14. Forbes is indebted to Pace under a Variable Rate Business Loan Agreement dated April 13, 2018 (the “**Forbes Loan**”).¹³ The Forbes Loan is secured by a general security agreement of the same date (together with the Clearbeach/Pace security, the “**Pace Security**”).¹⁴

15. On July 13, 2020, Pace sent Forbes a demand letter and a notice of intention to enforce security under subsection 244(1) of the BIA, advising that it was making formal demand for payment of \$503,151.84, together with accruing interest and any and all costs and expenses incurred by Pace (together with the Clearbeach Indebtedness, the “**Pace Indebtedness**”).¹⁵

3. The Receivership Proceedings and the Proposal Proceedings

16. In response to the Receivership Proceedings originally returnable on July 28, 2020, the Applicants commenced the Proposal Proceedings.¹⁶ The objective of the Proposal Proceedings was to provide the Applicants with the time and stability necessary to consider and develop their restructuring options, including a court-supervised process for the sale of their business.¹⁷

17. Pace initially opposed a sale process in the Proposal Proceedings, and on August 7, 2020, it sought an order terminating the Proposal Proceedings and appointing BDO Canada Limited

¹² *Ibid*, at paras 17-18, Application Record at Tab 2.

¹³ *Ibid*, at para 19, Application Record at Tab 2.

¹⁴ *Ibid*, at para 20, Application Record at Tab 2.

¹⁵ *Ibid*, at paras 21-22, Application Record at Tab 2.

¹⁶ *Ibid*, at para 25, Application Record at Tab 2.

¹⁷ *Ibid*, at para 26, Application Record at Tab 2.

(“**BDO**”) as receiver.¹⁸ Pursuant to an order dated August 20, 2020 (the “**August 20 Order**”) and an accompanying endorsement of the Honourable Madam Justice Dietrich made on consent, this Court consolidated the Proposal Proceedings and the Receivership Proceedings and granted a temporary stay of the Proposal Proceedings.¹⁹

18. The stay of the Proposal Proceedings under the August 20 Order was intended to provide the Debtors and Pace with an opportunity to discuss an appropriate path forward while maintaining the *status quo*. These discussions included, among other things, the potential satisfaction of Clearbeach’s significant environmental obligations imposed under the *Oil, Gas and Salt Resources Act*, R.S.O. 1990, c. P. 12, as amended (the “**OGSRA**”), O. Reg. 245/97 thereunder and the *OGSRA Provincial Operating Standards Version 2.0* (the “**Operating Standards**”) and enforced by the Ministry of Natural Resources and Forestry (“**MNRF**”).²⁰

19. Due to Clearbeach’s environmental obligations and the limited realizable value of the Applicants’ assets, Pace ultimately determined it would not have BDO take possession of the Applicants’ property.²¹ Pace issued a Notice of Abandonment on September 23, 2020 stating that it was abandoning the Receivership Proceedings in their entirety.²² Since that time, Clearbeach, Forbes and Pace have agreed to, sought and obtained nine brief stays of the Proposal Proceedings to prevent the Applicants’ immediate deemed bankruptcies and allow for, among other things, continued discussions between the parties.²³

¹⁸ *Ibid*, at para 28, Application Record at Tab 2.

¹⁹ *Ibid*, at para 29, Application Record at Tab 2.

²⁰ *Ibid*, at para 31, Application Record at Tab 2.

²¹ *Ibid*, at para 32, Application Record at Tab 2.

²² *Ibid*, Application Record at Tab 2.

²³ *Ibid*, at para 33, Application Record at Tab 2.

D. The Financial Position of the Applicants

1. Assets and Liabilities

20. As at March 31, 2021, Clearbeach had total assets with a book value of approximately \$9.8 million, and total liabilities with a book value of approximately \$21.7 million.²⁴ Its main liabilities are discussed below.

2. Secured Obligations

21. As set out above, the Applicants' primary funded debt obligations consist of amounts owing under various loans advanced by Pace. In addition to the Pace Indebtedness, Clearbeach is also indebted to Crich Holdings and Buildings Limited ("Crich") in the amount of approximately \$8.6 million and Canadian Imperial Bank of Commerce ("CIBC") in the amount of approximately \$66,000.²⁵ The Crich indebtedness is in respect of loans and preferred shares supported by a gross overriding royalty and general security agreement in favour of Crich.²⁶ The CIBC indebtedness is in connection with a mortgage on real property owned by Clearbeach, which is located in Clearville, Ontario.²⁷

3. Environmental Obligations

22. As an explorer, developer and producer of oil and gas deposits in Ontario, Clearbeach is subject to a comprehensive scheme of environmental obligations under the OGSRA, the Operating

²⁴ *Ibid*, at paras 36-37, Application Record at Tab 2.

²⁵ *Ibid*, at para 38, Application Record at Tab 2.

²⁶ *Ibid*, Application Record at Tab 2.

²⁷ *Ibid*, Application Record at Tab 2.

Standards and O. Reg. 245/97. These obligations are monitored and enforced by the MNRF and include plugging and end of life obligations.²⁸

23. On October 14, 2020 and December 16, 2020, the MNRF issued Inspector's Order I41-20-12920-001 and Inspector's Order I35-20-12935-001 under the OGSRA, respectively (together, the "**Inspector's Orders**").²⁹ The Inspector's Orders are in respect of forty-one wells licenced in the names of Clearbeach Resources Inc., ON-Energy Corp. and Liberty Oil & Gas Ltd., and under the control and management of Clearbeach.³⁰ In addition to the Inspector's Orders, Clearbeach has several deficiency lists with the MNRF due to certain of its inactive wells and other compliance issues.³¹

24. The estimated cost to Clearbeach of complying with the Inspector's Orders and the MNRF's current deficiency lists is approximately \$433,000.³² Clearbeach estimates a total future asset retirement obligation of approximately \$12.2 million and intends to plug and remediate wells on an ongoing basis as part of its regular operations once such wells are at the end of their economic life or as required under the OGSRA or the Operating Standards.³³

4. Royalty Payments and Municipal Tax Obligations

25. Clearbeach has unsecured obligations in the amount of approximately \$2.2 million relating to municipal taxes (\$2 million) and the Royalty Payments (\$200,000).³⁴ Recently, Clearbeach has had insufficient funds to make some of the Royalty Payments, resulting in a breach of certain of

²⁸ *Ibid*, at para 40, Application Record at Tab 2.

²⁹ *Ibid*, at para 42, Application Record at Tab 2.

³⁰ *Ibid*, Application Record at Tab 2.

³¹ *Ibid*, Application Record at Tab 2.

³² *Ibid*, at para 43, Application Record at Tab 2.

³³ *Ibid*, Application Record at Tab 2.

³⁴ *Ibid*, at para 44, Application Record at Tab 2.

Clearbeach's lease agreements.³⁵ In response, several landowners have sent letters of default under the leases and are threatening to deny Clearbeach access to certain properties.³⁶ Certain municipalities have also threatened enforcement actions for unpaid taxes.³⁷

E. Continuation of the Proposal Proceedings under the CCAA

26. Absent the court-ordered stay of the Proposal Proceedings, the Applicants would each be deemed bankrupt under the BIA. Given the limited realizable value of the Applicants' assets and Clearbeach's significant environmental and stewardship obligations, deemed bankruptcies in the Proposal Proceedings would be detrimental to the Applicants' stakeholders.

27. To permit the Applicants' business to continue operating as a going-concern and allow Clearbeach to meet its ongoing environmental and stewardship obligations while their restructuring options are considered, the Applicants seek the breathing space, flexibility and stability afforded by the CCAA. To this end, the Initial Order contemplates the continuation of the Proposal Proceedings under the CCAA. A continuation of the Proposal Proceedings under the CCAA will allow the Applicants to establish a plan for their restructuring that will ensure a going-concern result and the satisfaction of Clearbeach's environmental and stewardship obligations.

F. The Settlement Agreement

28. In the course of the Proposal Proceedings, Pace, Clearbeach and Forbes have engaged in discussions regarding, among other things, the Pace Indebtedness, the Pace Security and certain guarantees granted in connection thereto as well as:

³⁵ *Ibid*, Application Record at Tab 2.

³⁶ *Ibid*, Application Record at Tab 2.

³⁷ *Ibid*, Application Record at Tab 2.

- (a) the Receivership Proceedings and the Proposal Proceedings;
- (b) an action commenced by Lagasco and Forbes against Pace in the Ontario Superior Court of Justice under Court File No.: CV-20-00645472-0000 on August 11, 2020 (the “**Lagasco Claim**”); and
- (c) an action Pace commenced against Jane Lowrie through the amendment of a Statement of Claim under Court File No.: CV-19-00616388-00CL on February 10, 2021 (the “**Pace/Lowrie Claim**”).³⁸

29. These discussions have culminated in the Settlement Agreement. The Settlement Agreement is intended to provide a mutually beneficial, cost-effective, full and final settlement of all claims set out in the Lagasco Claim and the Pace/Lowrie Claim and any claims arising out of or in connection therewith.³⁹ Further, the Settlement Agreement is intended to resolve all of the known and unknown facts and issues in dispute among the Settlement Parties in respect of all of the known and unknown claims that have been or could be commenced or asserted relating to or arising from the Pace Indebtedness, the Pace Security, the Lagasco Claim, the Pace/Lowrie Claim, the Receivership Application, and the Proposal Proceedings.⁴⁰

30. The Settlement Agreement is discussed in detail in the Lowrie Affidavit. Its principal terms are as follows:

- (a) the implementation of the Settlement Agreement is conditional upon the granting of the Settlement Approval Order;

³⁸ *Ibid*, at para 63, Application Record at Tab 2.

³⁹ *Ibid*, at para 64, Application Record at Tab 2.

⁴⁰ *Ibid*, Application Record at Tab 2.

- (b) Oil Patch or another entity that may be designated by Jane Lowrie (the “**Purchaser**”), shall pay or cause to be paid to Pace the Purchase Price (as defined in the Settlement Agreement) for the purchase of the Pace Indebtedness and the Pace Security, which shall be assigned by Pace to the Purchaser pursuant to an assignment and assumption agreement;
- (c) Pace shall be entitled to retain the estimated aggregate amount of all deposits received and held to date in the accounts of Clearbeach with Pace, free of any claims from Clearbeach or any other party;
- (d) Pace shall transfer all of its right, title and interest in and to any and all shares held by Pace in Tribute Resources Inc. to Clearbeach;
- (e) Pace shall deliver to Clearbeach, Forbes, Lagasco and Jane Lowrie, and any affiliates or predecessors of such parties (collectively, the “**Pace Released Parties**”), a release of any and all claims that Pace may have against the Pace Released Parties save and except for certain claims excluded under the Settlement Agreement;
- (f) the Pace Released Parties shall provide to Pace a release of any and all claims that any of them may have against Pace;
- (g) Pace shall provide a consent to the dismissal of the Pace/Lowrie Claim; and

- (h) Lagasco and Forbes shall provide a consent to the discontinuance of the Lagasco Claim.⁴¹

PART III: ISSUES

- 31. The issues to be considered on this application are whether this Court should:
 - (a) continue the BIA Proposal Proceedings under the CCAA;
 - (b) grant the Stay of Proceedings;
 - (c) grant the Administration Charge;
 - (d) grant the Directors' Charge; and
 - (e) approve the Settlement Agreement and seal the unredacted Settlement Agreement.

PART IV: LAW AND ARGUMENT

A. The Proposal Proceedings should be continued under the CCAA

32. Section 11.6 of the CCAA authorizes this Court to take up and continue proposal proceedings commenced under Part III of the BIA where no proposal has been filed thereunder.

33. In *(Re) Clothing for Modern Times Ltd.*, this Court held that when approving the continuance of BIA proposal proceedings under the CCAA, courts should consider whether:

⁴¹ *Ibid*, at para 65, Application Record at Tab 2.

- (a) the moving parties have satisfied the sole statutory condition in section 11.6 of the CCAA, being that they have not filed a proposal under the BIA;
- (b) the proposed continuation is consistent with the purposes of the CCAA; and
- (c) the moving parties have provided the court with the information that would otherwise form part of an initial CCAA application pursuant to subsection 10(2) of the CCAA.⁴²

34. As with any application under the CCAA, the moving parties must also demonstrate that they are “debtor companies” to which the CCAA applies. Each of these criteria are satisfied here.

1. The Threshold Criteria for Continuing the Proposal Proceedings under the CCAA are Satisfied

35. The Applicants submit that the proposed continuance of the Proposal Proceedings under the CCAA satisfies the criteria in subsection 11.6(a) of the CCAA. Namely:

- (a) ***No Proposal Has Been Filed*** – as set out above, no proposal has been filed in the Proposal Proceedings. Thus, the sole statutory condition under subsection 11.6(a) of the CCAA has been met.
- (b) ***The Proposed Continuance is Consistent with the Purposes of the CCAA*** – the CCAA is intended to permit companies to carry on business and where possible avoid the social and economic costs of liquidation.⁴³ Further, the CCAA is intended

⁴² [\(Re\) Clothing for Modern Times Ltd., 2011 ONSC 7522](#) at para 9, Book of Authorities of the Applicants at Tab 1 [BOA]; [Comstock Canada Ltd. \(Re\), 2013 ONSC 4756](#) at paras 36-42, BOA at Tab 2.

⁴³ [Century Services Inc. v. Canada \(Attorney General\), 2010 SCC 60](#), at para 15 [Century Services], BOA at Tab 3.

to preserve the *status quo* and provide a structured environment in which an insolvent company can continue to carry on business while it develops a plan for its restructuring that will enable it to remain in operation for its benefit and the benefit of its creditors.⁴⁴ The continuation of the Proposal Proceedings under the CCAA is consistent with these purposes. That is, the stability and flexibility afforded by the CCAA will allow the Applicants to avoid the social and economic consequences of bankruptcy and restructure their affairs while continuing to operate in the ordinary course and attending to Clearbeach's environmental and stewardship obligations in the interests of their stakeholders.⁴⁵

- (c) ***The Information Required under Subsection 10(2) of the CCAA has been Filed*** – subsection 10(2) of the CCAA mandates that an initial application be accompanied by (i) a statement indicating, on a weekly basis, the projected cash flow of the debtor company, (ii) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement, and (iii) copies of all financial statements, audited or unaudited, prepared during the year before the application.⁴⁶ The Applicants' internally prepared unaudited balance sheet as at March 31, 2021 has been included as an exhibit to the Lowrie Affidavit. Additionally, the Applicants, with the assistance of the Proposed Monitor, have prepared a cash flow analysis to determine the amount required to finance their ordinary course business operations, assuming the Initial Order is granted, for the 13-week period from May 20, 2021 to August 19, 2021 (the “**Cash**

⁴⁴ [Canadian Airlines Corp. \(Re\) \(2000\), 19 CBR \(4th\) 1](#) at para 12, BOA at Tab 4.

⁴⁵ Lowrie Affidavit, *supra* note 1 at para 47, Application Record at Tab 2.

⁴⁶ [Companies' Creditors Arrangement Act, RSC 1985, c C-36](#), s 10(2) [CCAA].

Flow Forecast”). The Cash Flow Forecast is accompanied by all prescribed representations and is appended to the Pre-Filing Report.⁴⁷

2. The Applicants are Companies to which the CCAA Applies

36. The CCAA applies to a “debtor company” or “affiliated debtor companies” whose liabilities exceed \$5 million.⁴⁸ A “debtor company” is defined under subsection 2(1) of the CCAA as any “company” that is “insolvent” or has committed an act of bankruptcy within the meaning of the BIA. Pursuant to subsection 3(2) of the CCAA, companies are deemed to be affiliated if they are “controlled” by the same person. Subsection 3(3) of the CCAA specifies that a company is controlled by a person if securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person.

37. Subsection 2(1) of the CCAA defines “company”, in relevant part, as “any company [...] incorporated by or under an Act of Parliament or of the legislature of a province”. As both Clearbeach and Forbes were incorporated under the OBCA, each is a “company” under the CCAA.

38. Since the CCAA does not define “insolvent”, courts have taken guidance from the definition of “insolvent person” in subsection 2(1) of the BIA. The BIA defines an “insolvent person” disjunctively as a person:

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

⁴⁷ Lowrie Affidavit, *supra* note 1 at para 61, Application Record at Tab 2; Pre-Filing Report, *supra* note 1 at Appendix “D”.

⁴⁸ [CCAA](#), *supra* note 46, s 3(1).

- (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.⁴⁹

39. In *Re Stelco Inc.* (“*Stelco*”), Farley J. held that a company would also be insolvent under the CCAA “if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring”.⁵⁰

40. The Applicants are insolvent under both the BIA’s disjunctive test and the broader test set out in *Stelco*. As discussed above, each of the Applicants are facing a liquidity crisis and as a result have been unable to satisfy their obligations generally as they become due, including their debt service obligations to Pace.

41. Finally, subsection 3(1) of the CCAA provides that this Act shall apply in respect of a debtor company or affiliated debtor companies if the total of the claims against the affiliated debtor companies is more than \$5 million. Subsection 3(2) of the CCAA provides further that companies will be deemed to be affiliates if each of them is controlled by the same person. Clearbeach and Forbes are affiliated companies. Each are controlled by Jane Lowrie, who holds all of the securities of Forbes directly, and all of the securities of Clearbeach indirectly through Brookwood Resources Inc., in both cases to which are attached more than fifty per cent of the votes that may be cast to

⁴⁹ [Bankruptcy and Insolvency Act, R.S.C 1985, c. B-3](#), s 2(1).

⁵⁰ [Stelco Inc., Re. \[2004\] OJ No 1257](#) at paras 26, 40, BOA at Tab 5.

elect the Applicants' respective directors.⁵¹ The aggregate total of the claims against the Applicants is in excess of \$5 million.⁵²

42. In light of the foregoing, the Applicants are insolvent within the meaning of the CCAA and each is a "debtor company" to which the CCAA applies.

B. The Stay of Proceedings Should be Approved

43. Section 11.02 of the CCAA provides this Court with the jurisdiction to impose a stay of proceedings for a period of not more than 10 days if it is satisfied that circumstances exist that make the order appropriate.⁵³ A stay of proceedings is appropriate where it maintains the *status quo* and provides applicants with breathing room while they seek to restore solvency and emerge from the CCAA on a going-concern basis.⁵⁴

44. The Applicants require the Stay of Proceedings to prevent enforcement action by their creditors, including certain municipalities and landowners on whose land their oil and gas assets are situated. It would be detrimental to the Applicants' business and stewardship and remediation efforts if proceedings were commenced or continued or rights and remedies were executed against them. The Stay of Proceedings will stabilize and preserve the value of the Applicants' business and provide the breathing space necessary to conduct an orderly restructuring while the Applicants' business operations are continued and Clearbeach's environmental and stewardship applications are satisfied.⁵⁵

⁵¹ Lowrie Affidavit, *supra* note 1 at para 5, Application Record at Tab 2; Pre-Filing Report, *supra* note 1 at paras 14, 18.

⁵² Lowrie Affidavit, *ibid* at para 37, Application Record at Tab 2.

⁵³ [CCAA](#), *supra* note 46, s 11.02.

⁵⁴ [Century Services](#), *supra* note 43 at para 14, BOA at Tab 3; [Canwest Global Communications Corp. 2011 ONSC 2215](#) at paras 24-25, BOA at Tab 6; [Target Canada Co \(Re\), 2015 ONSC 303](#) at para 8, BOA at Tab 7.

⁵⁵ Lowrie Affidavit, *supra* note 1 at para 49, Application Record at Tab 2.

45. The Applicants submit that the proposed Stay of Proceedings is in the best interests of the Applicants and their stakeholders, meets the statutory requirements, and is appropriate in the circumstances.

46. The Cash Flow Forecast demonstrates that the Applicants will have sufficient liquidity to fund their obligations and the costs of these CCAA proceedings through the end of the proposed Stay of Proceedings.⁵⁶

C. The Administration Charge Should be Granted

47. The Applicants are seeking a charge in the amount of \$100,000 to secure the professional fees and disbursements of the Proposed Monitor, along with its counsel and the Applicants' counsel, at their standard rates and charges, incurred prior and subsequent to the date of the Initial Order (the "**Administration Charge**").⁵⁷

48. Section 11.52 of the CCAA expressly provides this Court with the jurisdiction to grant an administration charge in favour of a court-appointed monitor and the legal experts engaged by such monitor and the debtor company, provided notice is given to the secured creditors likely to be affected by the charge.⁵⁸ The following list of non-exhaustive factors are to be considered when granting such charges:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;

⁵⁶ Lowrie Affidavit, *ibid* at para 62, Application Record at Tab 2; Pre-Filing Report, *supra* note 1 at paras 40-46.

⁵⁷ Lowrie Affidavit, *ibid* at para 54, Application Record at Tab 2.

⁵⁸ [CCAA](#), *supra* note 46, s 11.52.

- (c) whether there is 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.⁵⁹

49. The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

- (a) the Applicants' business is highly regulated and subject to numerous statutory and regulatory restrictions and requirements;
- (b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA proceedings and assist the Applicants with continuing their ordinary course business operations;
- (c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles; and
- (d) the Proposed Monitor is supportive of the Administration Charge and its quantum.⁶⁰

⁵⁹ [Canwest Publishing Inc., 2010 ONSC 222](#), at para 54, BOA at Tab 8.

⁶⁰ Lowrie Affidavit, *supra* note 1 at paras 55-56, Application Record at Tab 2; Pre-Filing Report, *supra* note 1 at paras 30-31.

D. The Directors' Charge Should be Granted

50. The Applicants are seeking a charge in the amount of \$100,000 to secure the indemnity of their directors and officers (collectively, the “**Directors and Officers**”) for liabilities they may incur during these CCAA proceedings (the “**Directors' Charge**”).

51. Section 11.51 of the CCAA authorizes this Court to grant the Directors' Charge in an amount it considers appropriate where the secured creditors likely to be affected by the charge are given notice thereof. Such a charge may not be granted if adequate indemnification insurance for the benefit of a debtor company's directors and officers could be obtained at a reasonable cost.⁶¹

52. The purpose of granting a charge under the CCAA to secure the indemnity of a debtor company's directors and officers is to “keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring”.⁶²

53. The Applicants submit that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

- (a) the Directors and Officers have indicated their continued service and involvement in these CCAA proceedings is conditional upon the granting of the Directors' Charge;
- (b) the Applicants do not maintain insurance policies in respect of the potential liability of the Directors and Officers and the Directors' Charge is therefore required to

⁶¹ [CCAA](#), *supra* note 46 at s 11.51(3)-(4).

⁶² [Canwest Global Communications Corp. \(Re\)](#), [2009] OJ No. 4286 at paras 46-48, BOA at Tab 9.

ensure that the Directors and Officers are protected against liabilities they could incur during these CCAA proceedings;

- (c) the Directors' Charge would only cover obligations and liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings and does not cover willful misconduct or gross negligence;
- (d) the Applicants will require the active and committed involvement of the Directors and Officers in order to continue their business operations in the ordinary course, particularly due to the strict regulatory environment in which the Applicants operate;
- (e) the amount of the Directors' Charge is reasonable in the circumstances and is limited to the potential exposure of the Directors and Officers in these CCAA proceedings; and
- (f) the Proposed Monitor is supportive of the Directors' Charge and its quantum.⁶³

E. The Settlement Agreement Should be Approved and the Unredacted Settlement Agreement Should be Sealed

1. The Settlement Agreement Should be Approved

54. The CCAA confers jurisdiction on courts to “approve transactions, including settlements during the stay period [...] and prior to the proposal of any plan of compromise or arrangement”.⁶⁴

⁶³ Lowrie Affidavit *supra* note 1 at paras 57-60, Application Record at Tab 2; Pre-Filing Report, *supra* note 1 at paras 32-35.

⁶⁴ [Nortel Networks Corporation \(Re\), 2010 ONSC 1708](#) at para 70, BOA at Tab 10; [Fraser Papers Inc \(Re\), 2012 ONSC 4882](#) at para 54, BOA at Tab 11; [Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp, 2013 ONSC 1078](#) at para 44 [*Labourers' Pension Fund*], BOA at Tab 12.

Settlement agreements that facilitate a successful restructuring and resolve issues between stakeholders without recourse to the court are to be encouraged in CCAA proceedings.⁶⁵

55. When determining whether a settlement agreement should be approved under the CCAA, courts consider whether the proposed settlement:

- (a) is fair and reasonable;
- (b) will be beneficial to the debtor and its stakeholders generally; and
- (c) is consistent with the purpose and spirit of the CCAA.⁶⁶

56. Having regard to the foregoing considerations, the Applicants submit that the terms of the Settlement Agreement are fair and reasonable, in the best interests of the Applicants and their stakeholders, and are consistent with the purpose of the CCAA. Specifically, the Settlement Agreement:

- (a) provides a comprehensive and commercially reasonable compromise between the Settlement Parties, including the Applicants and Pace, in the circumstances;
- (b) avoids the potentially extensive and costly litigation of the issues arising from or in connection to the Pace Indebtedness, the Pace Security, the Lagasco Claim and the Pace/Lowrie Claim;
- (c) permits the Applicants to focus their efforts on a broad restructuring of their business in the best interests of their stakeholders;

⁶⁵ [*Great Basin Gold Ltd \(Re\)*, 2012 BCSC 1773](#) at para 15, BOA at Tab 13.

⁶⁶ [*Labourers' Pension Fund*](#), *supra* note 64 at para 49, BOA at Tab 12; [*Urbancorp \(Woodbine\) Inc \(Re\)*, 2018 ONSC 2966](#) at para 21, BOA at Tab 14.

- (d) affords the Applicants an opportunity to continue discussions with the MNRF to address Clearbeach's environmental and stewardship obligations; and
- (e) provides certainty and finality with respect to the issues arising from or in connection to the Pace Indebtedness, the Pace Security, the Lagasco Claim and the Pace/Lowrie Claim.⁶⁷

2. The Unredacted Settlement Agreement Should be Sealed

57. Courts should exercise their discretion to grant sealing orders where: (a) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (b) the salutary effects of the order outweigh its deleterious effects.⁶⁸ In insolvency proceedings, sealing orders have been granted over “confidential and commercially sensitive documents to protect the interests of debtors and other stakeholders”.⁶⁹

58. Courts often seal settlement agreements and certain other contracts given their confidential and commercially sensitive nature.⁷⁰ Communications made (i) in respect of actual or contemplated litigation, (ii) with an intention that they not be disclosed in the event negotiations failed, and (iii) to effect a settlement, attract settlement privilege – “a social value of superordinate importance capable of justifying a sealing order”.⁷¹

59. Applied here, the Settlement Agreement should be protected from public disclosure given that it contains sensitive and confidential information that if disclosed, could be detrimental to the

⁶⁷ Lowrie Affidavit *supra* note 1 at para 66, Application Record at Tab 2.

⁶⁸ [Sierra Club of Canada v Canada \(Minister of Finance\), 2002 SCC 41](#) at para 53, BOA at Tab 15; [Courts of Justice Act, RSO 1990, c. C. 43](#), s 137(2).

⁶⁹ [Danier Leather Inc \(Re\), 2016 ONSC 1044](#) at para 82, BOA at Tab 16.

⁷⁰ [Nortel Networks Corporation \(Re\), 2010 ONSC 1096](#) at paras 24, 47, BOA at Tab 17; [Hollinger Inc \(Re\), 2011 ONCA 579](#) at paras 15-21 [*Hollinger*], BOA at Tab 18.

⁷¹ [Hollinger](#), *ibid* at para 20, BOA at Tab 18.

business and operations of the Applicants and Pace. Additionally, the disclosure of such information will limit the Applicants' restructuring options and may jeopardize their ability to enter into further settlements with their stakeholders in the course of the CCAA proceedings.

PART V: RELIEF REQUESTED

60. For the foregoing reasons, the Applicants request that this Court issue the Initial Order and the Settlement Approval Order, including the sealing order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18TH DAY OF MAY 2021

Bennett Jones LLP

Bennett Jones LLP
Lawyers for the Applicants

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [Canadian Airlines Corp., \(Re\) \(2000\), 19 CBR \(4th\) 1](#)
2. [Canwest Global Communications Corp., 2011 ONSC 2215](#)
3. [Canwest Global Communications Corp. \(Re\), \[2009\] OJ No. 4286](#)
4. [Canwest Publishing Inc., 2010 ONSC 222](#)
5. [Century Services Inc. v. Canada \(Attorney General\), 2010 SCC 60](#)
6. [Comstock Canada Ltd. \(Re\), 2013 ONSC 4756](#)
7. [Danier Leather Inc. \(Re\), 2016 ONSC 1044](#)
8. [Fraser Papers Inc. \(Re\), 2012 ONSC 4882](#)
9. [Great Basin Gold Ltd. \(Re\), 2012 BCSC 1773](#)
10. [Hollinger Inc. \(Re\), 2011 ONCA 579](#)
11. [Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp, 2013 ONSC 1078](#)
12. [Nortel Networks Corporation \(Re\), 2010 ONSC 1096](#)
13. [Nortel Networks Corporation \(Re\), 2010 ONSC 1708](#)
14. [\(Re\) Clothing for Modern Times Ltd., 2011 ONSC 7522](#)
15. [Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41](#)
16. [Stelco Inc., Re, \[2004\] OJ No 1257](#)
17. [Target Canada Co. \(Re\), 2015 ONSC 303](#)
18. [Urbancorp \(Woodbine\) Inc. \(Re\), 2018 ONSC 2966](#)

SCHEDULE B – STATUTES RELIED ON

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

Section 2, “Insolvent Person”

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

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

Section 2(1), “Company”

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies

Section 3

Application

- (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.

Affiliated companies

- (2) For the purposes of this Act,
- (a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
 - (b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

- (3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

- (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
- (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

- (a) it is controlled by
 - (i) that other company,
 - (ii) that other company and one or more companies each of which is controlled by that other company, or
 - (iii) two or more companies each of which is controlled by that other company; or
- (b) it is a subsidiary of a company that is a subsidiary of that other company.

Section 11

General Power of Court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 11.001

Relief reasonably necessary

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.

Section 11.02

Stays, etc. – initial application

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

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

Stays, etc. — other than initial application

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

Restriction

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

Section 11.51

Security or charge relating to director's indemnification

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

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

Section 11.52

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 debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

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

Priority

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

Section 11.6

Notwithstanding the *Bankruptcy and Insolvency Act*,

- (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
- (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

- (i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or
- (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

Courts of Justice Act, R.S.O. 1990, c. C.43

Section 137

Documents Public

- (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

- (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

- (3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

- (4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

**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 CLEARBEACH RESOURCES INC. AND
FORBES RESOURCES CORP.**

Court File No.: CV-21-00662483-00CL

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

Proceedings Commenced in Toronto

**FACTUM
(Returnable May 20, 2021)**

BENNETT JONES LLP

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

Richard Swan (LSO# 32076A)
Raj Sahni (LSO# 42924U)

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

Lawyers for the Applicants