

Court File No. 31-2646144
Estate No. 31-2646144

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

**IN THE MATTER OF THE BANKRUPTCY AND
INSOLVENCY ACT, RSC 1985, c B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF TRIBALSCALE INC. OF THE CITY OF TORONTO IN
THE PROVINCE OF ONTARIO**

FACTUM OF TRIBALSCALE INC.

(Re: Continuation Under the *Companies' Creditors' Arrangement Act*)

July 29, 2020

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PART I – OVERVIEW

1. TribalScale Inc. (“**TribalScale**” or the “**Applicant**”) seeks an Order, substantially in the form attached at Tab 4 of the Motion Record (the “**Initial Order**”)¹ that, among other things:

- (a) declares that TribalScale is a company to which the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”) applies;
- (b) authorizes the continuation under the CCAA of this Notice of Intention to Make a Proposal (“**NOI**”) proceeding under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”), commenced on May 19, 2020;
- (c) stays all proceedings and enforcement processes taken or that might be taken in respect of the Applicant, the Proposed Monitor, or their respective employees and representatives until October 31, 2020 (the “**Stay Period**”);
- (d) appoints MNP LTD (“**MNP**” or the “**Proposed Monitor**”) as monitor;
- (e) approves the following charges over the property of the Applicant, listed in order of priority (the “**Priority Charges**”):
 - (i) an administration charge as formerly approved in the NOI proceeding, to the maximum amount of \$125,000, in favour of the Applicant’s counsel, the Proposed Monitor, and the Proposed Monitor’s counsel (the “**Administration Charge**”); and,

¹ Proposed form of Draft Order, [Motion Record of TribalScale Inc. \(Returnable July 31, 2021\)](#), at Tab 4, Record page 159 (PDF page 164)

- (ii) a directors' charge, to the maximum amount of \$125,000, in favour of the directors and officers of the Applicant (the "**D&O Charge**").

PART II – FACTS

A. Background

2. TribalScale is a software engineering and development firm that provides services to companies located in Canada and in the United States in respect of digital product strategy, design, and development for web, mobile, and emerging technologies.²

3. On May 19, 2020, TribalScale filed an NOI pursuant to section 50.4(1) of the BIA. MNP was appointed as the proposal trustee in the NOI proceedings.³

4. On June 17, 2020, the Honourable Madam Justice Gilmore granted an Order extending the time for TribalScale to make a proposal under the BIA up to July 31, 2020 and approved an Administration Charge of up to \$125,000.⁴

5. The facts upon which TribalScale relies on are substantially set out in the affidavit of Sheetal Jaitly, sworn July 25, 2020 (the "**Jaitly Affidavit**").⁵

6. Unless otherwise stated, all monetary amounts defined herein are stated in Canadian dollars.

² Affidavit of Sheetal Jaitly, dated 25 July 2020, **Motion Record of TribalScale Inc. (Returnable July 31, 2021)**, at Tab 2 [**Jaitly Affidavit**] at Record Page 12 (PDF Page 18), Affidavit para 7

³ Jaitly Affidavit, *supra* at Record Page 11 (PDF Page 17), Affidavit para 2

⁴ Jaitly Affidavit, *supra* at Record Page 11 (PDF Page 17), Affidavit para 3

⁵ Jaitly Affidavit, *supra*

B. The Applicant's Business, Operations, and Corporate Structure

7. TribalScale was incorporated on August 18, 2015 under the Ontario *Business Corporations Act*, RSO 1990, c B-16 (the “**OBCA**”) with head offices at 1410 – 8 King Street East, Toronto, Ontario, M5C 1B6.⁶

8. TribalScale's business primarily specializes in creating bespoke enterprise software solutions for large, institutional clients.⁷

9. TribalScale has a subsidiary corporation in the United States in order to facilitate its US customer relations. This entity, TribalScale US Inc. (“**TribalScale US**”), is a wholly owned subsidiary of TribalScale incorporated in the State of New York. TribalScale US has no significant assets.⁸

10. All of the substantive business of TribalScale and TribalScale US is conducted directly through TribalScale as the main operating entity.⁹

11. Until the recent onset of the COVID-19 public health crisis, all of TribalScale's substantive business operations were conducted from its leased offices located at Suite 800, 200 Wellington Street, Toronto. The Applicant's operations have since entirely transitioned to remote work-from-home procedures in accordance with Provincial public health guidelines. The Applicant's computer and office equipment has been moved to off-site storage.¹⁰

⁶ Jaitly Affidavit, *supra* at Record Page 12 (PDF Page 18), Affidavit para 6

⁷ Jaitly Affidavit, *supra* at Record Page 12 (PDF Page 18), Affidavit para 8

⁸ Jaitly Affidavit, *supra* at Record Page 13 (PDF Page 19), Affidavit para 10

⁹ Jaitly Affidavit, *supra* at Record Page 14 (PDF Page 20), Affidavit para 17

¹⁰ Jaitly Affidavit, *supra* at Record Page 13 (PDF Page 19), Affidavit para 11

12. TribalScale has significantly scaled-down its workforce since the NOI filing and currently employs approximately 30 full-time employees; TribalScale US also employs one employee based in Chicago, as previously mentioned. The Applicant also contracts with four consultants.¹¹

C. Assets and Liabilities of the Applicant

(1) Assets

13. As a technology service company, TribalScale's enterprise value is primarily derived from its going concern business, namely its revenue stream and customer contracts. Given the nature of the Applicant's business, its value lies principally in its employees, customer contracts, intellectual property, goodwill, and accounts receivable.¹²

(2) Secured Obligations

14. TribalScale's only material secured creditor is 1924191 Ontario Inc. ("**192**"), pursuant to an assignment of the debt and security dated April 30, 2020 between the Bank of Nova Scotia ("**Scotiabank**") and 192.¹³

15. TribalScale currently owes 192 \$2.465 Million, plus accrued interest and costs.¹⁴

16. Additionally, approximately \$112 Thousand is owing to the Business Development Bank of Canada ("**BDC**") in respect of a lease-loan agreement for certain leasehold improvements, dated April 27, 2017.¹⁵

¹¹ Jaitly Affidavit, *supra* at Record Page 13 (PDF Page 19), Affidavit para 12

¹² Jaitly Affidavit, *supra* at Record Page 15 (PDF Page 21), Affidavit para 19

¹³ Jaitly Affidavit, *supra* at Record Page 16 (PDF Page 22), Affidavit para 21

¹⁴ Jaitly Affidavit, *supra* at Record Page 16 (PDF Page 22), Affidavit para 22

¹⁵ Jaitly Affidavit, *supra* at Record Page 18 (PDF Page 24), Affidavit para 26(c) - 27

(3) Unsecured Obligations

17. TribalScale has approximately \$3.3 Million in unsecured liabilities.¹⁶

18. The Applicant's significant unsecured creditors include Zayo Canada Inc., previously operating under the name Allstream Business Inc. ("**Zayo**"). Zayo was the landlord of TribalScale pursuant to a sublease in respect of TribalScale's former offices. The sublease was terminated by Zayo prior to the filing of the NOI as a result of non-payment of rent by TribalScale during the COVID crisis.¹⁷

19. TribalScale is current on all employee payments¹⁸ and is also up to date on remittances of HST and source deductions.¹⁹

D. Insolvency

20. Prior to June 2019, TribalScale began experiencing liquidity issues principally as a result of the loss of two major customer contracts.²⁰

21. Prior to losing these contracts, TribalScale had significantly expanded and scaled up its operations following its financial success in the first three years of business.²¹

22. Notwithstanding the loss of the customer contracts and its associated revenue, TribalScale did not go through the much-needed process of scaling back down its operations, including by

¹⁶ Jaitly Affidavit, *supra* at Record Page 18 (PDF Page 24), Affidavit para 29

¹⁷ Jaitly Affidavit, *supra* at Record Page 18 (PDF Page 24), Affidavit para 30

¹⁸ Jaitly Affidavit, *supra* at Record Page 19 (PDF Page 25), Affidavit para 36

¹⁹ Jaitly Affidavit, *supra* at Record Page 18 (PDF Page 24), Affidavit para 31

²⁰ Jaitly Affidavit, *supra* at Record Page 21 (PDF Page 27), Affidavit para 44

²¹ Jaitly Affidavit, *supra* at Record Page 21 (PDF Page 27), Affidavit para 45

reducing its head count, to deal with the drops in revenue. This led to a breach by TribalScale of its debt facilities with Scotiabank and a significant cash crunch on the business.²²

23. To address these issues, since July 2019, TribalScale undertook various steps to restructure its business operations. Namely, TribalScale, with the assistance of its financial advisor at the time, implemented a process to better manage its accounts receivable and accounts payable, reduced its employee headcount, as well as a refocused emphasis on profitable customer contracts.²³

24. In addition to the above, TribalScale, with the support of Scotiabank, conducted a comprehensive sale and investment marketing process to seek potential investors and purchasers for the business.²⁴

25. Between the summer of 2018 through to March 2019, the company was in discussions with various potential purchasers. However, no submitted bid offered recovery sufficient for Scotiabank, the principal secured lender at the time.²⁵

26. TribalScale's business has also been significantly impacted by the COVID-19 emergency measures imposed by the provincial government. When COVID-19 emergency measures were imposed, TribalScale further reduced its employee headcount and implemented a work-from-home policy to comply with provincial government directives and ensure safety of its staff.²⁶

27. On or around May 18, 2020, and notwithstanding that TribalScale was suffering as a result of loss of revenue during the pandemic, TribalScale's landlord, Zayo opted to terminate its

²² Jaitly Affidavit, *supra* at Record Page 21 (PDF Page 27), Affidavit para 45

²³ Jaitly Affidavit, *supra* at Record Page 21 (PDF Page 27), Affidavit para 46

²⁴ Jaitly Affidavit, *supra* at Record Page 21 (PDF Page 27), Affidavit para 47

²⁵ Jaitly Affidavit, *supra* at Record Page 21 (PDF Page 27), Affidavit para 48

²⁶ Jaitly Affidavit, *supra* at Record Page 22 (PDF Page 28), Affidavit para 50

sublease with TribalScale, alleging non-payment of rent. As a result, and to avoid further enforcement steps by the sublandlord, TribalScale opted to file for protection under the BIA.²⁷

28. Since the NOI Filing on May 19, 2020, TribalScale has continued operating its business at a reduced level. While TribalScale is continuing to service customers and execute new customer contracts and has been able to obtain relief through government subsidies, its revenues have decreased since 2019.²⁸

E. Objectives for Continuing these Proceedings Under the CCAA

29. TribalScale seeks to continue the restructuring efforts initiated through the NOI proceedings under the CCAA.

30. Thus far, the Applicant's restructuring efforts have focused on: (i) discussions with its material secured creditor, 192; (ii) the performance of current customer contracts, (ii) the execution of new customer contracts; (iii) the collection of outstanding receivables; and (iv) the strategic "right-sizing" of the business with the assistance of MNP.²⁹

31. At the time of this Application, the Applicant's immediate objectives are to: (i) resolve a dispute with a customer, Sirius XM Connected Vehicle Services ("Sirius"); and, (ii) to implement a transaction with 192 and its other creditors.³⁰

²⁷ Jaitly Affidavit, *supra* at Record Page 22 (PDF Page 28), Affidavit para 50

²⁸ Jaitly Affidavit, *supra* at Record Page 22 (PDF Page 28), Affidavit para 52

²⁹ Jaitly Affidavit, *supra* at Record Page 22 (PDF Page 28), Affidavit para 54

³⁰ Jaitly Affidavit, *supra* at Record Page 23 (PDF Page 29), Affidavit para 55

(i). **Outstanding receivable issue**

32. TribalScale's most significant outstanding receivable is owed by Sirius with respect to an engagement to develop an in-vehicle e-commerce program (generally, the "**Sirius Project**").³¹

33. The particulars of the Sirius Project were detailed in a prior report to the Court by TribalScale on June 17th and are further detailed in the Jaitly Affidavit.

34. The dispute resulted from the fact that Sirius refused to pay TribalScale for the Sirius Project, on the basis of alleged deficiencies in TribalScale's work product. Sirius did not raise the alleged deficiencies on contractually delineated and required approval dates in the course of the Project. TribalScale's position is that it fulfilled its obligations under the Sirius Project and provided all required deliverables in a good, workmanlike manner;³² regardless, Sirius is not permitted to claim the existence of deficiencies at this stage, as it was contractually obliged to approve relevant work product and failed to previously note any deficiencies, effectively waiving any right to challenge the quality of the deliverables.³³

35. To date, Sirius has not communicated to TribalScale the nature of the alleged problems with the Project, nor has it described what aspect of the deliverables was unsatisfactory.³⁴

36. The Applicant has engaged in discussions with Sirius with a view to resolution of the dispute. No material developments have resulted thus far. Accordingly, it is increasingly likely that TribalScale will bring a motion to compel Sirius to comply with the contractual terms of the Sirius Project.³⁵

³¹ Jaitly Affidavit, *supra* at Record Page 23 (PDF Page 29), Affidavit para 58

³² Jaitly Affidavit, *supra* at Record Page 24 (PDF Page 30), Affidavit para 60

³³ Jaitly Affidavit, *supra* at Record Page 25 (PDF Page 31), Affidavit para 65

³⁴ Jaitly Affidavit, *supra* at Record Page 25 (PDF Page 31), Affidavit para 66

³⁵ Jaitly Affidavit, *supra* at Record Page 25 (PDF Page 31), Affidavit para 67

(ii). Proposed CCAA Transaction

37. The Applicant is in the process of negotiating a transaction to resolve the secured indebtedness with 192 (the “**CCAA Transaction**”). This Transaction will likely take the form of a conversion of the secured debt of 192 into equity and provide for cash payment to BDC. The prospective terms of the proposed CCAA Transaction are set out fully in the Jaitly Affidavit.³⁶

38. The proposed CCAA Transaction is intended to maintain TribalScale as a going-concern in order to preserve the revenue-generating capabilities of the company for the benefit of all stakeholders. The proposed transaction is likely to achieve these goals, without having an undue and interruptive effect on TribalScale’s operations.³⁷

39. It is likely that the parties will be in a position to finalize the transaction contemplated under the Proposed SPA within the initial 13-week period of the CCAA, following the granting of the Initial Order and TribalScale will return to this Court to seek approval of such CCAA Transaction.³⁸

PART III – ISSUES

40. The issues at his motion are:

- (a) whether this Court should permit TribalScale to continue its NOI proceedings under the CCAA;
- (b) whether this Court should grant the proposed extension of the Stay of Proceedings;
- (c) whether this Court should approve MNP as Monitor of the Applicant;

³⁶ Jaitly Affidavit, *supra* at Record Page 26 (PDF Page 32), Affidavit para 68

³⁷ Jaitly Affidavit, *supra* at Record Page 27 (PDF Page 33), Affidavit para 70

³⁸ Jaitly Affidavit, *supra* at Record Page 27 (PDF Page 33), Affidavit para 71

- (d) whether this Court should approve the Priority Charges;
- (e) strictly in the alternative, whether this Court should extend the stay of proceedings in the NOI Proceeding from July 31, 2020 up to and including September 14, 2020.

PART IV – LAW & ARGUMENT

A. TribalScale Should be Permitted to Continue Under the CCAA

41. Section 11.6(a) of the CCAA provides this Court with express authority to permit TribalScale to continue its NOI proceedings under the CCAA.³⁹

42. On a motion to continue an NOI proceeding under the CCAA, this Court has consistently applied the following framework (the “**CCAA Continuation Criteria**”)⁴⁰ – the Applicant is required to demonstrate to the Court that:

- (a) it has not filed a proposal under the BIA;
- (b) the proposed continuation is consistent with the purposes of the CCAA; and,
- (c) it has satisfied the threshold requirements of an initial CCAA application – namely,
 - (i) the applicant is a “debtor company” whose liabilities exceed \$5 million and, (ii) the applicant has included all relevant information pursuant to section 10(2) of the CCAA.⁴¹

43. TribalScale satisfies each of the CCAA Continuation Criteria.

³⁹ *Companies Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] at s 11.6(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.”)

⁴⁰ (*Re Clothing for Modern Times Ltd.*, 2011 ONSC 7522 at para 9 (Brown J.); *Comstock Canada Ltd. (Re)*, 2013 ONSC 4756 [Comstock] at paras 37-43 (Morawetz J.); *Urbancorp Inc. (Re)*, 2016 ONSC 3288 at paras 36-41 (Newbould J.)

⁴¹ *Ibid*

(1) TribalScale has not filed a proposal

44. It is an uncontroverted fact that TribalScale has not filed a Proposal under the BIA.

(2) The proposed continuation is consistent with the purposes of the CCAA

45. The CCAA is a remedial regime primarily designed to rehabilitate insolvent corporations. The provisions of the CCAA provide for a structured environment in which an insolvent company can continue to carry on business, and retain control over its assets, while the it attempts to gain the approval of creditors for a proposed arrangement that will enable it to remain in operation for the future benefit of all stakeholders.⁴²

46. The late Justice Marc Rosenberg (as he then was) summarized the purposes of the CCAA as to “facilitate [outcomes] that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees”.⁴³

47. TribalScale’s proposed objectives, as detailed above, are consistent with the purposes of the CCAA. The Applicant intends to utilize the protection and the flexibility afforded by the CCAA in order to resolve disputes with clients and to facilitate a transaction forming the basis for a proposal to its creditors. The CCAA will assist TribalScale to avoid a straight bankruptcy and liquidation that would see the going-concern value of the Applicant eliminated, resulting in no recovery to unsecured creditors.

⁴² *Canadian Airlines Corp. (Re)*, 9 CBR (4th) 1 at para 19, citing *Pacific National Lease Holding Corporation*, 19 BCAC 134 (BCCA) at para 22

⁴³ *Citibank Canada v Chase Manhattan Bank of Canada*, [1991] OJ No 944 (WL) at para 49.

(3) TribalScale has satisfied the threshold requirements of an initial CCAA application

TribalScale is a debtor company whose liabilities exceed \$5 Million

48. A “debtor company” is defined under section 2(1) of the CCAA as, *inter alia*, a “company” that is “insolvent” or that has committed an act of bankruptcy within the meaning of the BIA.⁴⁴

49. As a corporation incorporated pursuant to the OBCA, TribalScale falls under the definition of “company” in the CCAA.⁴⁵

50. Through the filing of the NOI, the Applicant committed an act of bankruptcy;⁴⁶ TribalScale was unable to meet its obligations generally as they become due, rendering it insolvent within the meaning of the BIA.⁴⁷

51. TribalScale’s liabilities are approximately \$5.8 Million, exceeding the statutory threshold of \$5 Million in liabilities.

52. Accordingly, TribalScale is a “debtor company” whose liabilities exceed \$5 Million, to which the CCAA applies.

TribalScale has disclosed all relevant information required by s. 10(2) of the CCAA

53. TribalScale and the Proposal Trustee have provided each of the documentary items required pursuant to section 10(2) of the CCAA⁴⁸ in support of this Motion, namely:

- (a) the Second Report of MNP in its capacity as Proposal Trustee, dated July 27, 2020 (the “**Second Report**”) provides updated and extended cash flow projections for

⁴⁴ CCAA, *supra* s 2(1)

⁴⁵ CCAA, *supra* s 2(1) (“means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province”)

⁴⁶ *Comstock*, *supra* at para 41

⁴⁷ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] at s 1 (insolvent person)

⁴⁸ CCAA, *supra* s 10(2)

the period from July 20, 2020 to October 31, 2020 (the “**Revised Cash Flow Forecast**”),⁴⁹

- (b) the Second Report provides the prescribed representations required of a debtor company regarding the preparation of the Revised Cash Flow Forecast;⁵⁰ and,
- (c) copies of all required financial statements, audited or unaudited, prepared during the year before the application were disclosed to the Court as attachments to the Jaitly Affidavit.⁵¹

B. The Proposed Extension to the Stay of Proceedings should be Granted

54. The Applicant is seeking to extend the existing Stay of Proceedings granted under the BIA through an analogous Stay of Proceedings under the CCAA.

55. Recent amendments to the CCAA have sharply limited the permitted length for a stay of proceedings granted at an *ex parte* initial hearing of a CCAA application to only 10 days.⁵² The policy rationale underlying this recent amendment was to ensure that all parties potentially affected by an order under the CCAA have adequate notice and may respond to substantively to the application at the comeback hearing.⁵³

56. Notably, pursuant to section 11.02(2) of the CCAA, on an application *other than* the initial hearing of a CCAA application, a debtor company may obtain a stay of proceedings for a period

⁴⁹ [Second Report to the Court Submitted by MNP LTD., in its Capacity as Trustee Under the Notice of Intention to Make a Proposal of TribalScale Inc.](#), dated 27 July 2020 [**Second Report**] at PDF page 9, para 23 (presented in full at Exhibit “**D**” – PDF page 36)

⁵⁰ Second Report, *supra* PDF page 5 and following (section V of report)

⁵¹ Exhibits “**B**” through “**D**” to the Jaitly Affidavit, [Motion Record of TribalScale Inc. \(Returnable July 31, 2021\)](#), at Tabs 2-B to 2-D at Record Pages 33-64 (PDF Pages 44-70)

⁵² *CCAA*, *supra* s 11.02(1) (“[...] 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”)

⁵³ [Lydian International Limited \(Re\)](#), 2019 ONSC 7473 at paras 29-31

that is longer than 10 days.⁵⁴ The length of a stay extension granted under section 11.02(2) is discretionary and provides the parties with relative flexibility.⁵⁵ It is not uncommon for a stay extension granted under this section to be for a period of months.

57. The present motion is not an *ex parte* initial application for creditor protection. The relief being sought is – with the exception of the D&O Charge – is substantially a continuation of relief previously granted by this Court in the NOI proceedings. Potentially affected parties, including 192 the Applicant’s material secured creditor, have been provided with proper notice and have had an opportunity to participate in these proceedings for several months. Overall, the position of any individual stakeholder is unlikely to be materially prejudiced by the outcome of this motion – the practical commercial environment and *status quo* for the majority of TribalScale’s stakeholders will remain.

58. It is impractical to limit the period of the Stay of Proceedings available to TribalScale on this motion as though it is an *ex parte* initial application. The policy concerns engaged by an *ex parte* application are not relevant here. Accordingly, this motion should be properly considered in the context of section 11.02(2) of the CCAA for non-initial applications.

59. Pursuant to section 11.02(2) of the CCAA, the Court must be satisfied that (i) an extension of the stay of proceedings is appropriate in the circumstances; and, (ii) that the Applicant has acted, and is acting, in good faith and with due diligence.⁵⁶

60. Since the NOI Filing Date, the Applicant has taken numerous steps to develop and begin implementing its restructuring strategy. Among other things, the Applicant has engaged with its

⁵⁴ CCAA, *supra* s 11.02(2)

⁵⁵ *Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808 at para 21

⁵⁶ CCAA, *supra* s 11.02(2)-(3)

material secured creditor to develop the proposed CCAA Transaction to resolve its secured indebtedness; the Applicant has also continued performance of current customer contracts and engaged new contracts to ensure ongoing cash flow.

61. The Applicant has been, and continues to act, in good faith and with due diligence. Further, as demonstrated in the Revised Cash Flow Forecast, the Applicant will have sufficient liquidity to continue operating during the proposed extension to the Stay of Proceedings up to and including October 31, 2020.⁵⁷

62. The Proposed Monitor supports the proposed extension to the Stay of Proceedings and is of the view that the Applicants have and continue to act in good faith and with due diligence.⁵⁸

C. MNP Should be Appointed as the Monitor

63. Upon the granting of an Initial Order, section 11.7 requires the Court to appoint a licensed insolvency trustee (as defined under the BIA) to monitor the business and financial affairs of the subject debtor.⁵⁹

64. In the present case, it is appropriate for MNP to be appointed as Monitor, as requested. MNP has consented to act as Monitor. MNP is a trustee within the meaning of section 2(1) of the BIA and is not subject to any of the restrictions set out under s. 11.7(2) of the CCAA.⁶⁰

D. The Priority Charges should be Granted

65. The Applicants request that this Court grant super-priority Administration and D&O Charges on the Property (as defined in the Initial Order).

⁵⁷ Second Report, *supra* at PDF page 9, para 23 (presented in full at Exhibit “D” – PDF page 36)

⁵⁸ Second Report, *supra* at PDF page 10, para 27(a)

⁵⁹ CCAA, *supra* s. 11.7

⁶⁰ CCAA, *supra* s. 11.7(2)

66. The Administration Charge is a continuation of the charge previously granted pursuant to the June 17 Order of Gilmore J. No objections were presented to that Charge at that time.

67. Each of the secured creditors who are likely to be affected by the proposed Priority Charges were given notice of this motion.⁶¹

(1) The Administration Charge should be granted

68. Section 11.52 of the CCAA grants this court jurisdiction to order the proposed Administration Charge. The Court has considered the following non-exhaustive list of factors in deciding whether to grant an administration charge pursuant to section 11.52:

- (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 titles;
- (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.⁶²

69. In addition to the fact that this Court granted prior approval of the Administration Charge, the proposed charge is warranted under the CCAA, given that:

- (a) these proceedings will require the extensive involvement of professional advisors subject to the Administration Charge;

⁶¹ As appears from the [Affidavit of Service of Christel Paul](#), sworn 27 July 2020, filed.

⁶² *Re Canwest Publishing Inc.*, 2010 ONSC 222 at para 54.

- (b) professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicants;
- (c) there is no unwarranted duplication of roles, therefore the fees incurred by these proceedings will be minimized;
- (d) the proposed Administration Charge ranks in priority to the interests of the secured creditors, who have twice been given notice of this requested relief;
- (e) the proposed Monitor has indicated that the quantum of the proposed Charge is reasonable in the circumstances.⁶³

(2) The D&O Charge should be granted

70. There is concern that certain directors and officers of the Applicant may discontinue their services during this restructuring unless a D&O Charge is granted to secure the indemnification for potential personal statutory liabilities that may arise post-filing.⁶⁴

71. Section 11.51 of the CCAA provides this Court with the express jurisdiction to grant such a D&O Charge.⁶⁵

72. In *Re Jaguar Mining Inc.*, 2014 ONSC 494, Morawetz J. set out a list of factors that the Court must be satisfied of prior to granting a directors' charge. These factors are:

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

⁶³ Second Report, *supra* at PDF page 11 at paras 30-31

⁶⁴ Jaitly Affidavit, *supra* at Record page 29 (PDF page 35) at Affidavit para 79

⁶⁵ CCAA, *supra* s 11.51

- (b) the amount is appropriate;
- (c) the applicant could not obtain adequate indemnification insurance for the director(s) 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 willful misconduct.⁶⁶

73. In the present case, the proposed Directors' Charge is reasonable and warranted, based on the following factors:

- (a) the secured creditors have been notified of this Application;
- (b) the proposed Monitor has expressed the view that the proposed directors' Charge is reasonable and appropriate in the circumstances;⁶⁷
- (c) as TribalScale is primarily in the business of creating and providing ongoing support to proprietary software applications, the current directors and officers' knowledge of the Applicant's business is truly unique;⁶⁸
- (d) in order to effectively restructure as a going-concern, TribalScale requires the continued participation of its directors and officers who manage its business and commercial activities;⁶⁹
- (e) the proposed Directors' Charge will not secure D&Os as a result of negligence or gross misconduct; and,

⁶⁶ *Re Jaguar Mining Inc.*, 2014 ONSC 494 at para 45.

⁶⁷ Second Report, *supra* at PDF page 12 at para 35

⁶⁸ Jaitly Affidavit, *supra* at Record page 29 (PDF page 35) at Affidavit para 80

⁶⁹ Jaitly Affidavit, *supra* at Record page 29 (PDF page 35) at Affidavit para 80

- (f) it is proposed that the Directors' Charge will only be engaged if the D&O Insurance fails to respond to a claim.

E. In the Alternative, the NOI Stay Extension Should be Granted

74. Strictly in the alternative, in the event that this Court does not grant the Initial Order, TribalScale seeks an extension of the stay of proceedings under the NOI proceedings from July 31, 2020 up to and including September 14, 2020.

75. Section 50.4(9) of the BIA provides this Court with express statutory authority to grant the proposed Stay Extension.⁷⁰

76. The proposed stay extension in the NOI Proceeding will provide TribalScale with sufficient breathing room to develop its restructuring plan and submit a proposal to its creditors.

77. No creditors would be materially prejudiced by the proposed stay extension. TribalScale has acted, and continues to act, in good faith and with due diligence during this NOI Proceeding.

78. The Proposal Trustee supports the proposed stay extension and is of the view that the length of the proposed extension is appropriate in the circumstances.⁷¹

PART V – RELIEF REQUESTED

79. For all of the foregoing reasons, the Applicant requests that this Honourable Court grant the draft Initial Order located at Tab 4 of the Motion Record.

⁷⁰ *BIA*, *supra* at s 50.4(9)

⁷¹ References herein to the good faith conduct and support of the Proposal Trustee refer to such comments in the Proposal Trustee's Second Report, *supra* on the subject of converting these proceedings to continue under the CCAA. The comments regarding the debtor's conduct and reasonableness of the extension made in the Second Report are no less applicable with respect to an extension under the BIA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF JULY, 2020

A handwritten signature in blue ink, appearing to read 'C. Fell', is positioned above a horizontal line.

WEISZ FELL KOUR LLP

SCHEDULE "A"**List of Authorities**

1. <i>Canadian Airlines Corp. (Re)</i> , 9 CBR (4th)
2. <i>Citibank Canada v Chase Manhattan Bank of Canada</i> , [1991] OJ No 944 (WL)
3. <i>Comstock Canada Ltd. (Re)</i> , 2013 ONSC 4756
4. <i>(Re) Clothing for Modern Times Ltd.</i> , 2011 ONSC 7522
5. <i>Lydian International Limited (Re)</i> , 2019 ONSC 7473
6. <i>Pacific National Lease Holding Corporation</i> , 19 BCAC 134 (BCCA)
7. <i>Re Canwest Publishing Inc.</i> , 2010 ONSC 222
8. <i>Re Jaguar Mining Inc.</i> , 2014 ONSC 494
9. <i>Sunrise/Saskatoon Apartments Limited Partnership (Re)</i> , 2017 BCSC 808
10. <i>Urbancorp Inc. (Re)</i> , 2016 ONSC 3288

SCHEDULE "B"

Statutory Authorities

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

2(1)

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)

10(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

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.

(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.

- (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.

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.

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.

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.

- (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

2

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)

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

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

Court File No. 31-2646144
Estate No. 31-2646144

**IN THE MATTER OF THE BANKRUPTCY AND
INSOLVENCY ACT, RSC 1985, c B-3, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF TRIBALSCALE INC.**

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

Proceedings commenced at Toronto

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