

**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  
SWARMIO MEDIA HOLDINGS INC., SWARMIO INC., AND SWARMIO MEDIA INC.

Applicants

**FACTUM OF THE APPLICANTS**

June 20, 2023

**MILLER THOMSON LLP**  
Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto ON M5H 3S1

**Larry Ellis LSO# 49313K**  
[lellis@millerthomson.com](mailto:lellis@millerthomson.com)  
Tel: 416.595.8639

**Asim Iqbal LSO#61884B**  
[aiqbal@millerthomson.com](mailto:aiqbal@millerthomson.com)  
Tel: 416. 597.6008

**Monica Faheim LSO #: 82213R**  
[mfaheim@millerthomson.com](mailto:mfaheim@millerthomson.com)  
Tel: 416.595.6087

Lawyers for the Applicants

## TABLE OF CONTENTS

PART I - INTRODUCTION .....	2
PART II - SUMMARY OF FACTS .....	3
A. The Applicants .....	4
B. The Business .....	5
C. Employees And Key Customer Relationships .....	7
D. Financial Circumstances And Cash Flow .....	8
E. Creditors of Swarmio Group .....	8
F. Challenges, Liquidity Issues and Strategic Initiatives .....	9
G. Need for CCAA Proceeding.....	10
PART III - STATEMENT OF ISSUES.....	11
PART IV - LAW AND ARGUMENT .....	12
A. The Applicants Meet Technical Requirements of CCAA.....	12
B. Circumstances Exist That Make The Initial Order Appropriate .....	14
C. Relief Requested at Initial Order is Reasonably Necessary .....	15
D. The Stay in favour of Directors and Officers is Appropriate .....	16
E. GT Should Be Appointed As Monitor .....	16
F. The DIP Loan And DIP Lenders Charge Should Be Approved.....	17
G. The Administration Charge Should Be Granted .....	20
H. Directors' Charge .....	21
I. The Applicant Should Be Authorized To Incur No Further Costs In Connection With Its Securities Filing Obligations.....	22
PART V - ORDER REQUESTED .....	23
SCHEDULE "A" LIST OF AUTHORITIES .....	25
SCHEDULE "B" RELEVANT STATUTES .....	26

**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  
SWARMIO MEDIA HOLDINGS INC., SWARMIO INC., AND SWARMIO MEDIA INC.  
Applicants

**FACTUM OF THE APPLICANTS**

**PART I - INTRODUCTION**

1. Swarmio Media Holdings Inc. ("**Swarmio Parent**"), Swarmio Inc. ("**Swarmio OpCo**") and Swarmio Media Inc. ("**Swarmio Media**", together with Swarmio Parent and Swarmio OpCo, the "**Swarmio Group**", the "**Company**" or the "**Applicants**") bring this application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c-C. 36, as amended (the "**CCAA**").
2. The Applicants seek an initial order (the "**Initial Order**") for the following relief, which is necessary to maintain the *status quo* and to give the Applicants the time required to develop a restructuring plan in consultation with its advisors and the proposed Monitor:
  - (a) declaring that the Applicants are companies to which the CCAA applies;
  - (b) granting a stay of proceedings in favour of the Company up to and including July 1, 2023 (the "**Initial Stay Period**");
  - (c) appointing Grant Thornton Limited ("**GT**") as the monitor of the Company (the "**Proposed Monitor**" or the "**Monitor**", as applicable);

- (d) granting an administration charge to secure the professional fees and disbursements of the Applicants' counsel, the Monitor and its counsel up to a maximum amount of \$100,000 (the "**Administration Charge**");
- (e) granting a charge in favour of the current directors and officers of the Company in the amount of \$100,000 (the "**Directors' Charge**");
- (f) approving interim financing in the amount of \$135,000 (the "**DIP Financing**") under the terms of the DIP Term Sheet (as defined below) between the Company and the DIP Lender (as defined below) to fund the Company's operations during the Initial Stay Period; and
- (g) authorizing Swarmio Parent to incur no further expenses in relation to the Securities Filings (as defined in the Initial Order) and declaring that none of the directors, officers, employees, advisors and other representatives of the Applicants, or the Monitor (and its directors, officers, partners, advisors, employees and representatives) shall have any personal liability for any failure by the Company to make Securities Filings.

## **PART II - SUMMARY OF FACTS**

3. The full facts in support of this application are set out in the Affidavit of Vijai Karthigesu ("**First Karthigesu Affidavit**"), filed. All capitalized terms not otherwise defined herein shall have the same meanings prescribed to them in the First Karthigesu Affidavit.

4. The Swarmio Group is an early stage, pre-revenue technology and media company focused on the gaming sector. The Company is insolvent and unable to raise the capital necessary to fund its development. It has exhausted its liquidity and has not made payroll.<sup>1</sup>
5. Before bringing this application under the CCAA, the Company pursued numerous strategic alternatives over the last year and a half with no success. The Company requires the breathing room afforded by the CCAA to obtain interim financing, develop and implement a sale process, and identify a value-maximizing transaction for the going-concern sale of the business.<sup>2</sup>

**A. The Applicants**

*Swarmio Media Holdings Inc. (Swarmio Parent)*

6. Swarmio Parent is the publicly-listed parent company of the Swarmio Group. It holds 100% of the equity of Swarmio Inc.<sup>3</sup>
7. Swarmio Group's management team, including myself, is located primarily in the Greater Toronto Area in Ontario. Its other employees, such as developers and software engineers, operate out of leased premises in Nova Scotia.<sup>4</sup>

*Swarmio Inc. (Swarmio OpCo)*

8. Swarmio OpCo is a wholly-owned subsidiary of Swarmio Parent. It is the operating entity

---

<sup>1</sup> Affidavit of Vijai Karthigesu sworn June 20, 2023 (the "**First Karthigesu Affidavit**"), Tab 1 to the Application Record of the Applicants dated June 20, 2023 (the "**Application Record**").

<sup>2</sup> First Karthigesu Affidavit at para 6, Tab 1 to the Application Record.

<sup>3</sup> First Karthigesu Affidavit at para 7, Tab 1 to the Application Record.

<sup>4</sup> First Karthigesu Affidavit at paras 9-10, Tab 1 to the Application Record.

of the Swarmio Group and is a federal corporation under the *Canada Business Corporations Act*. Swarmio OpCo employs the majority of the Company's employees and owns the majority of the Company's assets, including intellectual property. Employees are located in Ontario and Nova Scotia.<sup>5</sup>

*Swarmio Media Inc. (Swarmio Media)*

9. Swarmio Media is a federal corporation incorporated on May 5, 2020. Its registered head office is located in Halifax, Nova Scotia. Swarmio Media is the signatory to a majority of the Company's material contracts with its key suppliers and partners.<sup>6</sup>

**B. The Business**

10. The following is a summary of Swarmio Group's primary product offerings:<sup>7</sup>

(a) Swarmio Hive for Telecommunications Operators: Swarmio Hive is a software-as-a-service (SaaS) solution for telecommunications operators. It provides a turn-key platform that permits telecommunications operators to penetrate the gaming market and monetize the use of gaming platforms by their own customers. Under this service, the Company delivers the platform to the telecommunications operator, and has a revenue sharing agreement with the telecommunications operator.

(b) Swarmio Matrix for Game Developers and Publishers: Swarmio Matrix is an edge computing platform that is meant to provide an enhanced gaming experience to gamers

---

<sup>5</sup> First Karthigesu Affidavit at para 14, Tab 1 to the Application Record.

<sup>6</sup> First Karthigesu Affidavit at pars 16-17, Tab 1 to the Application Record.

<sup>7</sup> First Karthigesu Affidavit at para 26, Tab 1 to the Application Record.

through technology that minimizes network lag or latency. The Company partners with telecommunications operators, global data centers and co-location providers to deploy Swarmio Matrix. These partners provide access to their servers and network, which operates to enhance the quality of experience for gamers using the network. The partner is compensated either based on the utilization of their physical infrastructure, or shares in the revenue it generates from the physical infrastructure.

(c) Swarmio Pay for Game Publishers and Game Content Distributors: Swarmio Pay is an alternate payment aggregation service that combines regional telecommunications DCB (Direct Carrier Billing) and electronic wallet payments solutions. Swarmio Pay provides a seamless and convenient payment experience by integrating various payment methods into a single platform. Swarmio Pay enables game publishers and content distributors to reach and monetize the gamers in regions where the credit card penetration is very low such as South Asia, North Africa and Latin America. Swarmio Pay charges a transaction fee for every transaction.

11. Telecommunication providers contract with Swarmio Group, directly or through its partners, to develop a platform that connects their users with game publishers and facilitates gaming and in-game purchases. The Company and telecommunication operators then earn a portion of the revenue generated from gamers' purchases through revenue sharing agreements.<sup>8</sup>
12. Swarmio Group's technology and platform will allow users, without credit cards, to make

---

<sup>8</sup> First Karthigesu Affidavit at para 25, Tab 1 to the Application Record.

in-game purchases through their existing account with their telecommunication provider.<sup>9</sup>

**C. Employees And Key Customer Relationships**

13. Prior to this filing, the Company had 22 full-time employees located in Canada. The Company also contracts with approximately 50 independent consultants to perform a wide-range of functions and services, including software development and project management. Most of the Company's consultants are located outside of Canada.<sup>10</sup>
14. The Company is currently behind on its payroll obligations and owes approximately \$1,099,097 to its Canadian employees.<sup>11</sup>
15. The Company's primary target market is telecommunication companies in the Middle East, North Africa and South Asia. The Company and its partners have established contractual relationships with several large telecommunication companies to develop, license and distribute Swarmio Group's technology as the gaming platform for their subscribers.<sup>12</sup>
16. These relationships are critical to the Company's intended business model. They provide a large global user-base and distribution channel for the Company's technology.<sup>13</sup>

---

<sup>9</sup> First Karthigesu Affidavit at para 25, Tab 1 to the Application Record.

<sup>10</sup> First Karthigesu Affidavit at para 29, Tab 1 to the Application Record.

<sup>11</sup> First Karthigesu Affidavit at para 30, Tab 1 to the Application Record.

<sup>12</sup> First Karthigesu Affidavit at para 32, Tab 1 to the Application Record.

<sup>13</sup> First Karthigesu Affidavit at para 33, Tab 1 to the Application Record.



**D. Financial Circumstances And Cash Flow**

17. As at December 31, 2022, the Company, on a consolidated basis, had assets with a book value of approximately \$1.2 million.<sup>14</sup>
18. The total liabilities of the Company as at June 10, 2023 amount to approximately \$10,266,328.<sup>15</sup>

**E. Creditors of Swarmio Group**

*Government Claims*

19. The Company currently has a contingent source deduction obligation based on payroll arrears in the amount of approximately \$288,289.00.<sup>16</sup>

*Secured Debt Obligations*

20. As further described in the First Karthigesu Affidavit, Swarmio Parent is indebted to the following secured creditors. Swarmio Parent granted each of these secured creditors a security interest in all of its present and after-acquired personal property:<sup>17</sup>

(a) 2184907 Ontario Inc. (“**218**”) in the principal amount of \$1,000,000 pursuant to the 218 Note; and

(b) Subordinated Secured Creditors in the aggregate principal amount of approximately \$602,800.

---

<sup>14</sup> First Karthigesu Affidavit at para 36, Tab 1 to the Application Record.

<sup>15</sup> First Karthigesu Affidavit at para 38, Tab 1 to the Application Record.

<sup>16</sup> First Karthigesu Affidavit at para 39, Tab 1 to the Application Record.

<sup>17</sup> First Karthigesu Affidavit at paras 41-49, Tab 1 to the Application Record.

21. The other CCAA Applicants, Swarmio OpCo and Swarmio Media, neither guaranteed nor granted security in connection with the above-referenced secured debt of Swarmio Parent.
22. In addition, Swarmio OpCo is party to two loan agreements with the Business Development of Canada (BDC) (the “**BDC Loan Agreements**”) in the aggregate principal amount of \$250,000. The outstanding balance under the BDC Loan as of May 20, 2023 was \$38,100.<sup>18</sup>

#### *Unsecured Debt*

23. Swarmio OpCo is indebted to unsecured creditors on account of loans for the aggregate amount of approximately \$4 million. The Swarmio Group also owes trade creditors the aggregate amount of approximately \$2.1 million. Details of the unsecured debt are set out in the First Karthigesu Affidavit.

#### **F. Challenges, Liquidity Issues and Strategic Initiatives**

24. The Company has spent years developing its technology. To finance its operations, in November 2021, the Company went public. The Company raised approximately \$9 million from public shareholders, which it utilized to execute on its strategy.<sup>19</sup>
25. But the Company ran into a number of unanticipated challenges. They experienced a lengthier than expected sales cycle. Contractual negotiations with its large telecommunications companies took longer than expected, along with the proper

---

<sup>18</sup> First Karthigesu Affidavit at para 49, Tab 1 to the Application Record.

<sup>19</sup> First Karthigesu Affidavit at para 77, Tab 1 to the Application Record.

implementation and integration of the Company's technology into the existing platforms of its telecommunication partners.<sup>20</sup>

26. The Company unsuccessfully pursued a number of strategic alternatives. These included a failed equity financing; a failed attempt to sell the business to a third party; a failed attempt to sell the business to one of its telecommunication partners; and a failed attempt to generate revenue through a new business line.<sup>21</sup>
27. The Company still does not generate material revenue from its operations, and it has exhausted the liquidity raised from its initial public offering and rounds of secured and unsecured debt, and equity financing during 2022. In addition, rising costs from inflation and other factors following the Covid-19 pandemic, experienced across all industries, similarly adversely impacted the Company's operations.<sup>22</sup>

**G. Need for CCAA Proceeding**

28. In March, 2023, after the Company exhausted its financing from the Subordinate Secured Creditors, the Company raised \$1 million of secured debt from 218 under the 218 Note. This provided additional runway until the end of Q1 2023. The Company's management also injected \$1-million of equity financing in 2022.
29. The Company has now exhausted all of its available liquidity and it has missed a number of employee payroll cycles. The Company continues to work diligently to maintain positive

---

<sup>20</sup> First Karthigesu Affidavit at paras 78-79, Tab 1 to the Application Record.

<sup>21</sup> First Karthigesu Affidavit at paras 78-81, Tab 1 to the Application Record.

<sup>22</sup> First Karthigesu Affidavit at para 82, Tab 1 to the Application Record.

relationships with employees despite the missed payroll.<sup>23</sup>

30. Given the Company's liquidity challenges, the Company, in consultation with their advisors, have determined that it is in the Company's best interests seek creditor protection, design and implement a court-supervised sale process for the going-concern sale of the Company's business.<sup>24</sup> The Company expects the DIP lender to be a bidder in the sale process.
31. Swarmio Group is a specialized business that requires the technology and expertise of its founders to succeed. The Company believes the likely purchaser will be a strategic partner that has an existing relationship with the Company (*i.e.*, a telecommunications provider) or who has previously entertained a sale or investment transaction, or a lender to the Company.<sup>25</sup>
32. The Company intends to utilize this initial 10-day period to develop a sales process.

### **PART III - STATEMENT OF ISSUES**

33. The issues to be determined by this Honourable Court on this application are whether:
  - (a) the Applicants meet the technical requirements of the CCAA;
  - (b) circumstances exist that make the granting of the Initial Order appropriate;
  - (c) GT should be appointed as Monitor in these CCAA proceedings;

---

<sup>23</sup> First Karthigesu Affidavit at para 87, Tab 1 to the Application Record.

<sup>24</sup> First Karthigesu Affidavit at para 89, Tab 1 to the Application Record.

<sup>25</sup> First Karthigesu Affidavit at para 90, Tab 1 to the Application Record.

- (d) the DIP Loan and DIP Lender's Charge should be approved;
- (e) the Administration Charge should be approved;
- (f) the Directors' Charge should be approved; and
- (g) the Applicants should be authorized to incur no further costs in connection with its Securities Filing Obligations (as defined below).

#### **PART IV - LAW AND ARGUMENT**

##### **A. The Applicants Meet Technical Requirements of CCAA**

###### ***(i) The Applicants are "affiliated debtor companies"***

34. The CCAA applies to a "affiliated debtor companies" where the total claims against them exceeds \$5,000,000.<sup>26</sup> A "debtor company" includes provincially incorporated affiliated companies having assets or doing business in Canada that are insolvent.<sup>27</sup> A parent company and its subsidiaries are "affiliated" under the CCAA.<sup>28</sup>
35. Here, each of the Applicants comprising the Swarmio Group are affiliated debtor companies with claims against them in excess of \$5,000,000:
- (a) Swarmio Parent is a British Columbia company with a registered office in British Columbia;

---

<sup>26</sup> s. 3(1), *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA").

<sup>27</sup> s. 2(1), CCAA.

<sup>28</sup> s. 3(1), CCAA.

- (b) Swarmio OpCo is a wholly-owned subsidiary of Swarmio Parent and is a Canadian federal corporation with a registered office in Nova Scotia;
- (c) Swarmio Media is a wholly owned subsidiary of Swarmio OpCo and a federal Canadian corporation with its registered head office in Sydney, Nova Scotia;
- (d) Swarmio Group’s management team is located in the Greater Toronto Area in Ontario, and other employees are located in Ontario and Nova Scotia
- (e) the Company has operated out of leased office space in Nova Scotia; and
- (f) The total claims against Swarmio Group approach \$11,000,000, well in excess of \$5,000,000.

**(ii) The Applicants are “insolvent”**

36. Insolvency is determined as of the time of the CCAA application.<sup>29</sup> A company is “insolvent” if:<sup>30</sup>

- (a) the company meets the definition of “insolvent person” under the *Bankruptcy and Insolvency Act* (Canada), which includes a person “...who is for any reason unable to meet [its] obligations as they generally become due...”,<sup>31</sup> or
- (b) the company faces a looming liquidity crisis.<sup>32</sup>

---

<sup>29</sup> [Re Stelco Inc. \(2004\)](#), 2004 CarswellOnt 1211 (Ont Sup Ct J [Commercial List]), at para. 4 [*Stelco*].

<sup>30</sup> *Stelco*, at paras. 21–22, and 26.

<sup>31</sup> s. 2, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (“BIA”).

<sup>32</sup> *Stelco*, at para. 40.

37. Here, the Swarmio Group is insolvent because it is unable to pay its obligations as they generally become due. They are in default of their secured debt obligations.<sup>33</sup> They have missed payroll.<sup>34</sup> They owe source deductions.<sup>35</sup> They have received demand letters from various trade creditors.<sup>36</sup> And they do not have liquidity to pay suppliers and employees without interim financing.

*(iii) The Applicants have filed the required documents*

38. Every initial application must contain a weekly cash flow statement and copies of all financial statements prepared during the year before the application.<sup>37</sup> The Company has filed its most recent audited and unaudited annual and interim financial statements and a 9-week cash flow projection prepared by the Company with the assistance of the Proposed Monitor (the "**Cash flow Forecast**").<sup>38</sup>

**B. Circumstances Exist That Make The Initial Order Appropriate**

39. Once the Applicants satisfy the technical requirements of the CCAA, the Applicants must satisfy the court that circumstances exist that make the Initial Order appropriate. Here, such appropriate circumstances exist. The Applicants urgently need financing to fund operations and restructuring costs. They have found interim financing but require the protection of the CCAA and a court-ordered interim financing charge to secure it.

---

<sup>33</sup> First Karthigesu Affidavit at paras 43-55, Tab 1 to the Application Record.

<sup>34</sup> First Karthigesu Affidavit at para 6, Tab 1 to the Application Record.

<sup>35</sup> First Karthigesu Affidavit at para 39, Tab 1 to the Application Record.

<sup>36</sup> First Karthigesu Affidavit at para 72, Tab 1 to the Application Record.

<sup>37</sup> s. 2(1), CCAA.

<sup>38</sup> Exhibit "X" to the First Karthigesu Affidavit, Tab 2X to the Application Record; First Karthigesu Affidavit at para 102, Tab 1 to the Application Record.

40. Moreover, the Applicants need the protection of the CCAA to commence a court-supervised sale process to find a value-maximizing transaction and emerge as a going concern. The Applicants are confident that they will emerge from a sale process with a successful transaction because the DIP Lender has already confirmed its intention to bid in the sale process. A stay affords the Company breathing room to obtain interim financing, develop the sale process and emerge as a going concern. Courts have held that such circumstances are appropriate for an initial order and associated stay of proceedings.<sup>39</sup>

**C. Relief Requested at Initial Order is Reasonably Necessary**

41. Section 11.001 of the CCAA provides the relief granted in the initial order must be limited to what is “reasonably necessary for the continued operations” of the Applicants in the ordinary course of business during the initial 10-day period.<sup>40</sup>

42. The Applicants have limited the relief sought on this application to relief that is reasonably necessary in the circumstances to maintain the *status quo* and to give the Applicants the breathing room necessary to stabilize their operations and develop a sale process for the benefit of their stakeholders.

43. The interim financing requested is based on the Cash Flow Forecast and is limited to what is reasonably necessary within the 10-day period. The charges, including the administration charge and directors’ charge, are similarly sized for the 10-day period. The Applicants

---

<sup>39</sup> [Target Canada Co.](#), 2015 ONSC 303 at para. 8.

<sup>40</sup> s. 11.001, CCAA.



expect to seek an increase to the administration charge (but not the directors' charge) at the Comeback Hearing.

**D. The Stay in favour of Directors and Officers is Appropriate**

44. The Applicants also request that the Stay of Proceedings extend to its directors and officers. Section 11.03 of the CCAA provides that an order made under section 11.02 of the CCAA may provide that no person may commence or continue any action against a director of the company or any claim against directors that arose before the commencement of proceedings under the CCAA and that relates to the obligations of the company.<sup>41</sup>

45. The Stay of Proceedings should extend to the Applicants' directors and officers, so they may focus on the business operations, developing a sale process and identifying a value maximizing transaction for the benefit of all stakeholders. The Applicants need the oversight and guidance of their directors and officers through these CCAA proceedings.

**E. GT Should Be Appointed As Monitor**

46. Under section 11.7 of the CCAA, a court is required to appoint a person to monitor the business and financial affairs of a debtor company at the time that an initial order is made.<sup>42</sup>

47. Section 11.7(2) of the CCAA also sets out certain requirements for and restrictions on who may act as a monitor, including that the monitor be a trustee within the meaning of subsection 2 of the BIA.<sup>43</sup>

---

<sup>41</sup> s. 11.03, CCAA.

<sup>42</sup> s. 11.7, CCAA.

<sup>43</sup> s. 11.7(2).

48. GT is a trustee within the meaning of section 2 of the BIA and is not subject to any of the restrictions pursuant on who may be appointed as monitor set out in section 11.7(2) of the CCAA. GT has also consented to its appointment as Monitor.
49. The Applicants request that GT be appointed monitor of the Applicants during these CCAA proceedings.

**F. The DIP Loan And DIP Lenders Charge Should Be Approved**

50. Section 11.2 of the CCAA allows this Court to grant the DIP Loan and order a priority charge (“**DIP Lender’s Charge**”), on notice to those secured creditors that would be affected and in an amount that the Court considers appropriate having regard to the Cash Flow Forecast.<sup>44</sup> The security or charge may not secure an obligation that exists before the order is made.<sup>45</sup>
51. Section 11.2(5) provides that a court shall not grant an order for interim financing at the same time as granting an initial order under section 11.2 unless it is satisfied that the terms of the loan are limited to those terms that are reasonably necessary for the Applicant’s continued operations in the ordinary course of business during the initial stay of proceedings.<sup>46</sup> What is considered “reasonably necessary” depends on the facts of each case.<sup>47</sup>

---

<sup>44</sup> s. 11.2(1), CCAA.

<sup>45</sup> s. 11.2(1), CCAA.

<sup>46</sup> s. 11.2(5), CCAA.

<sup>47</sup> [\*8440522 Canada Inc., Re\*](#), 2013 ONSC 6167 at para. 30.

52. In determining whether the DIP Lender's Charge is appropriate, courts consider the following factors under section 11.2(4) of the CCAA:<sup>48</sup>
- (a) the period during which the company is expected to be subject to proceedings under the CCAA;
  - (b) how the company's business and financial affairs are to be managed during the proceedings;
  - (c) whether the company's management has the confidence of its major creditors;
  - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
  - (e) the nature and value of the company's property;
  - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
  - (g) the Monitor's report, if any.
53. In accordance with the DIP Term Sheet, the Company is seeking CAD\$135,000 to be made available upon the issuance of the proposed Initial Order. This amount is limited to the amount reasonably necessary to allow the Applicants to meet critical payments and continue operations during the initial 10-day stay of proceedings, as shown in the Cash Flow Forecast.<sup>49</sup>

---

<sup>48</sup> s. 11.2(4), CCAA.

<sup>49</sup> A copy of the DIP Term Sheet is attached as **Exhibit "W"** to the First Karthigesu Affidavit, Tab 2W to the Application Record.

54. The following additional factors support the approval of the DIP Term Sheet and the granting of the DIP Lender's Charge:
- (i) the availability of the DIP Loan is contingent on an order of this Court approving the DIP Term Sheet and the DIP Lender's Charge being granted to secure any advances made thereunder;
  - (ii) the necessity of the DIP Loan is demonstrated and supported by the Cash Flow Forecast;
  - (iii) the Applicants' business will be managed by its directors and senior management, in consultation with the proposed Monitor;
  - (iv) in the absence of the DIP Loan, the Applicants will be unable to continue to carry on business and will be forced to shut down its operations;
  - (v) no creditor should be materially prejudiced as a result of the DIP Loan and the DIP Lender's Charge; and
  - (vi) the proposed Monitor is supportive of the DIP Loan, the DIP Term Sheet, and the DIP Lender's Charge.
55. For clarity, a principal of the DIP Lender is a former director of the Company, as well as the principal of one of the Company's significant business partners.
56. The terms of the DIP Term Sheet and the amount of the DIP Charge is required and reasonable in the circumstances.

**G. The Administration Charge Should Be Granted**

57. The Applicant seeks a first-ranking priority Initial Administration Charge over the Property (as defined in the Initial Order), in the maximum amount of \$150,000, in favour of the Monitor, counsel to the Monitor, and counsel to the Applicants (collectively, the “**Professionals Group**”), to secure payment of their professional fees and disbursements, whether incurred before or after the date of the Initial Order.
58. The Court may grant an administration charge pursuant to section 11.52 of the CCAA.<sup>50</sup> In deciding whether to grant an administration charge, courts may consider a number of factors, including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.<sup>51</sup>
59. The Applicants submit that it the Administration Charge is appropriate. The Professional Group will play a critical role in assisting the Applicants with these CCAA proceedings, including sale process. Each proposed beneficiary of the Administration Charge is performing distinct functions without duplication. The quantum of the proposed Administration Charge is in line with the nature and size of the Applicants’ business and

---

<sup>50</sup> s. 11.52, CCAA.

<sup>51</sup> [Canwest Publishing Inc. Re.](#) 2010 ONSC 222 at para. 54.

the involvement required by the Professional Group. The proposed Monitor also supports the Administration Charge.

## **H. Directors' Charge**

60. The Applicants seek a Directors' Charge on the Applicants' Property in favour of the Applicants' current officers and directors in priority to all other charges other than the Administration Charge and the DIP Lender's Charge, in the amount of \$100,000.
61. Pursuant to section 11.51 of the CCAA, a court may grant a Directors' Charge on a super-priority basis.<sup>52</sup>
62. In *Jaguar Mining Inc. (Re)*, the court set out the following factors to be considered with respect to the approval of a directors' charge:<sup>53</sup>
- (i) whether notice has been given to the secured creditors likely to be affected by the charge;
  - (ii) whether the amount is appropriate;
  - (iii) whether the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

---

<sup>52</sup> s. 11.51, CCAA.

<sup>53</sup> [\*Jaguar Mining Inc. \(Re\)\*, 2014 ONSC 494](#) at para. 45.

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

- 63. The Applicants' Directors' and Officers' insurance policy has expired and obtaining a new policy is cost-prohibitive and unlikely. In the circumstances, the Company seeks the Directors' Charge as security for the Applicants' indemnification for possible liabilities that may be incurred by the current directors and officers during the CCAA proceedings.
- 64. Notice has been given to the secured creditors likely affected by the Directors' Charge.
- 65. The quantum of the Directors' Charge was developed with the assistance and support of the proposed Monitor. Based on current information available, the Company does not intend to seek a future increase to the Directors' Charge.

**I. The Applicant Should Be Authorized To Incur No Further Costs In Connection With Its Securities Filing Obligations**

- 66. The Applicants seek authorization to dispense with certain securities filing requirements. In particular, the Applicants seek authorization for Swarmio Parent to incur no further expenses in relation to any Securities Filings that may be required by any federal, provincial, or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange.
- 67. The Applicants also seek a declaration that none of the directors, officers, employees, and other representatives of the Applicants, and the Monitor (and its directors, officers,

employees, and representatives) shall have any personal liability for any failure by Swarmio Parent to make Securities Filings.

68. This Court has granted similar relief in favour of several reporting issuers commencing proceedings under the CCAA, including most recently in the CCAA proceedings of *Fire & Flower Holdings Corp. et al.*<sup>54</sup>
69. Incurring the time and costs associated with preparing the Security Filings diverts the Applicants limited resources. Moreover, stakeholders are not prejudiced because detailed financial and other information about the Applicants will be publicly available on the Monitor's website..

#### **PART V - ORDER REQUESTED**

70. Based on the foregoing, the Applicants request that this Honourable Court grant an Initial Order substantially in the form of the Draft Order at **Tab "3"** to the Application Record.

---

<sup>54</sup> [Initial Order](#) dated June 5, 2023 In the Matter of Fire & Flower Holdings Corp. et al, Court File No. CV-23-00700581-00CL.



**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of June, 2023

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

---

Miller Thomson LLP

**MILLER THOMSON LLP**  
Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto ON M5H 3S1

**Larry Ellis LSO# 49313K**  
[lellis@millerthomson.com](mailto:lellis@millerthomson.com)  
Tel: 416.595.8639

**Asim Iqbal LSO#61884B**  
[aiqbal@millerthomson.com](mailto:aiqbal@millerthomson.com)  
Tel: 416. 597.6008

**Monica Faheim LSO #: 82213R**  
[mfaheim@millerthomson.com](mailto:mfaheim@millerthomson.com)  
Tel: 416.595.6087

Lawyers for the Applicants

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [Re Stelco Inc. \(2004\)](#), 2004 CarswellOnt 1211 (Ont Sup Ct J [Commercial List])
2. [Target Canada Co.](#), 2015 ONSC 303
3. [8440522 Canada Inc., Re](#), 2013 ONSC 6167
4. [Canwest Publishing Inc, Re](#), 2010 ONSC 222
5. [Jaguar Mining Inc. \(Re\), 2014 ONSC 494](#)
6. [Initial Order](#) dated June 5, 2023 In the Matter of Fire & Flower Holdings Corp. et al, Court File No. CV-23-00700581-00CL.

**SCHEDULE “B”  
RELEVANT STATUTES**

***Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended***

**Definitions**

**2(1)** In this Act...

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

...

**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;

**Application**

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

**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

### **General power of court**

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

### **Relief reasonably necessary**

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

### **Stays, etc. — initial application**

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

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

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Stays, etc. — other than initial application**

(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

**Stays — directors**

**11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

**Exception**

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

**Persons deemed to be directors**

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section

**Priority — secured creditors**

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

**Priority — other orders**

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

**Factors to be considered**

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

**Additional factor — initial application**

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

**Interim financing**

**11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the

company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

**Priority — secured creditors**

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

**Priority — other orders**

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

**Factors to be considered**

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

**Additional factor — initial application**

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

### **Security or charge relating to director's indemnification**

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

#### **Priority**

**(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.

### **Court may order security or charge to cover certain costs**

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

**(a)** the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

**(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

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

#### **Priority**

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

### **Court to appoint monitor**

**11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the



company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

### **Restrictions on who may be monitor**

(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, R.S.C. 1985, c. B-3, as amended***

#### **Interpretation**

##### **Definitions**

2 In this Act...

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

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

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

...

***trustee*** or ***licensed trustee*** means a person who is licensed or appointed under this Act.

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 SWARMIO MEDIA HOLDINGS INC., SWARMIO INC.,  
AND SWARMIO MEDIA INC.

Court File No CV-23-00701377-00CL

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

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANTS  
(CCAA INITIAL APPLICATION)**

**MILLER THOMSON LLP**

Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto ON M5H 3S1

**Larry Ellis LSO#: 49313K**

lellis@millerthomson.com  
Tel: 416.595.8639

**Asim Iqbal LSO#: 61884B**

aiqbal@millerthomson.com  
Tel: 416.595.8596

**Monica Faheim LSO#: 82213R**

mfaheim@millerthomson.com  
Tel: 416.595.6087

Lawyers for the Applicants