

**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 LOYALTYONE, CO.

(the "**Applicant**")

**FACTUM OF THE APPLICANT  
(Settlement Authorization Order)**

September 20, 2024

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## PART I - INTRODUCTION

1. This factum is filed in support of the motion by the Applicant for an order (the “**Settlement Authorization Order**”) that:

- (a) approves the Consent to Judgment and Minutes of Settlement (as defined below) between the Applicant and His Majesty the King in connection with the proceeding pending before the Tax Court of Canada (the “**Tax Court**”) (2020-1038(IT)G) (the “**Tax Appeal**”) with any such minor amendments as may be approved by the Court and directs the Applicant and His Majesty the King to comply with the terms thereof subject to entry by the Tax Court of an order consistent with the Consent to Judgment; and
- (b) authorizes, empowers and directs KSV Restructuring Inc., in its capacity as Monitor of the Applicant (the “**Monitor**”), *nunc pro tunc*, to cause the Applicant to enter into the Consent to Judgment and Minutes of Settlement and do those things necessary to give effect to (a) above.

## PART II - SUMMARY OF FACTS

### A. BACKGROUND

2. The background regarding this motion is set out in more detail in the Eighth Report of the Monitor dated September 16, 2024 (the “**Eighth Report**”).

3. The Applicant commenced this proceeding under the *Companies’ Creditors Arrangement Act* (this “**CCAA Proceeding**”) in March of 2023.

4. Following completion of a Court approved sale and investment solicitation process, the Court granted an approval and vesting order on May 12, 2023 in respect of an asset purchase

agreement (the “**BMO APA**”) with Bank of Montreal (“**BMO**”).<sup>1</sup> On June 1, 2023, the transaction contemplated by the BMO APA closed and the Applicant sold substantially all of its operating assets to two affiliates of BMO (the “**Transaction**”).<sup>2</sup> Certain assets, including the proceeds of the Tax Appeal (as defined below), were excluded from the sale.

5. Pursuant to an additional Order (the Ancillary Relief Order) granted on May 12, 2023, upon closing of the Transaction, the Applicant’s directors and officers were deemed to resign (other than certain officers of the Applicant who remained employed by the Applicant upon closing but later became employees of BMO) and the Monitor was authorized and empowered to exercise any powers which may be properly exercised by a board of directors or any officers of the Applicant.<sup>3</sup>

6. Pursuant to paragraph 5(f) of the Ancillary Relief Order, the Monitor requires the consent of certain of the Applicant’s secured lenders or further Order of this Court to cause the Applicant to settle or compromise any proceedings instituted with respect to the Applicant, including the Tax Appeal.<sup>4</sup>

## **B. THE TAX APPEAL**

7. In September 2015, CRA initiated an income tax audit of the Applicant for the tax year ending December 31, 2013. As a result of that audit, in December 2019, CRA issued an assessment which disallowed deductions claimed by the Applicant associated with deferred revenue for services in the amount of \$348.5 million. This resulted in additional taxes (and related

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<sup>1</sup> *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Approval and Vesting Order](#)).

<sup>2</sup> Seventh Report of the Monitor dated June 10, 2024, at para. 2.2(1) (“**Seventh Report**”).

<sup>3</sup> *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Ancillary Relief Order](#)) (“**Ancillary Relief Order**”).

<sup>4</sup> [Ancillary Relief Order](#) at para 5(f).

interest and penalties) for the Applicant for the 2013 taxation year in the amount of \$109.8 million (the “**2013 Tax Assessment**”).<sup>5</sup>

8. The Applicant contested the 2013 Tax Assessment by filing a notice of objection with CRA and in July 2020 filed a Notice of Appeal of the 2013 Tax Assessment (the “**Tax Appeal**”) with the Tax Court of Canada (the “**Tax Court**”).<sup>6</sup>

9. In 2020, CRA completed audits for the 2014, 2015, and 2016 taxation years and, based on the same substantive reserve issue as in the 2013 Tax Assessment, issued assessments in the amounts of \$11.1 million for 2014 and \$4.0 million for 2015. The Applicant has filed notices of objections with CRA with respect to these assessments.<sup>7</sup>

10. Taxation authorities in Alberta and Quebec have issued consequential assessments based on the 2013 Tax Assessment with respect to the Applicant’s 2013, 2014, 2015 and 2016 tax years. The Applicant has also filed notices of objections with respect to such reassessments.<sup>8</sup>

11. The Applicant satisfied approximately \$96 million of the federal and provincial amounts assessed in the 2013 Tax Assessment through a combination of payments (and having other amounts applied) to the 2013 Tax Assessment.<sup>9</sup>

12. The Tax Appeal relates to relief sought by the Applicant in the Tax Court to appeal a reassessment that was issued by the Minister of National Revenue in respect of the Applicant’s taxation year ending December 31, 2013 on the basis that the Applicant correctly computed reserves for that taxation year. A trial in respect of the Tax Appeal was scheduled to begin on September 9, 2024 (the “**Tax Appeal Trial**”).<sup>10</sup> On September 3, 2024, at a scheduled pre-hearing conference in the Tax Appeal, the trial was adjourned to permit the Applicant to bring a motion

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<sup>5</sup> Eighth Report of the Monitor dated September 16, 2024 (“**Eighth Report**”) at para. 3.0(2).

<sup>6</sup> Eighth Report at para. 3.0(3).

<sup>7</sup> Eighth Report at para. 3.0(4).

<sup>8</sup> Eighth Report at para. 3.0(5).

<sup>9</sup> Eighth Report at para. 3.0(6).

<sup>10</sup> Eighth Report at para. 3.0(7).

before this Court to seek approval of the Consent to Judgment and Minutes of Settlement, described below.<sup>11</sup>

### C. PROPOSED SETTLEMENT OF THE TAX APPEAL

13. In the summer of 2024, counsel to His Majesty the King approached the Applicant with an offer to resolve the Tax Appeal such that His Majesty the King will agree entirely with the Applicant's position on the issue in dispute in the Tax Appeal, on a without costs basis. Following negotiations on the terms of the proposed settlement, on September 3, 2024, the Applicant and His Majesty the King entered into a consent to judgment (the "**Consent to Judgment**") and minutes of settlement (the "**Minutes of Settlement**") reflecting the terms agreed upon.<sup>12</sup>

14. The Applicant and the Monitor kept key stakeholders (including the Applicant's secured lenders and Bread Financial Holdings, Inc. ("**Bread**")) apprised on a regular basis of all material developments regarding the potential settlement, including providing and consulting with those stakeholders on the various drafts of the Minutes of Settlement and Consent to Judgment received and negotiated.<sup>13</sup>

15. A summary of the key terms of the Minutes of Settlement and Consent to Judgment are as follows:

- (a) The Minutes of Settlement are subject to this Court granting an Order approving them;
- (b) The Consent to Judgment provides that the Tax Appeal is allowed, without costs, and the matter is referred back to the Minister of National Revenue (the "**Minister**") for reconsideration and reassessment on the basis that the Applicant is entitled to

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<sup>11</sup> Eighth Report at para. 3.1(6).

<sup>12</sup> Eighth Report at para. 3.1(1).

<sup>13</sup> Eighth Report at para. 3.1(2).

a further reserve under paragraph 20(1)(m) of the *Income Tax Act* (Canada) in the amount of \$348,527,381, as originally claimed by the Applicant in its income tax return for the December 31, 2013 taxation year in respect of the service component;

- (c) Upon receiving an order from the Tax Court of Court of Canada with respect to the Consent to Judgment (the “**Tax Court Order**”), the Minister shall promptly issue to the Applicant a reassessment on the terms of the Tax Court Order for the Applicant’s 2013 taxation year; and
- (d) Each party shall bear its own costs in connection with the settlement of the Tax Appeal.<sup>14</sup>

16. The effect of the Consent to Judgment and Minutes of Settlement, if approved and implemented, is that the CRA will reassess the Applicant’s 2013 tax return on the same basis originally claimed by the Applicant (and sought by the Applicant in the Tax Appeal), without costs.<sup>15</sup> Put differently, the Applicant will be entirely successful on the Tax Appeal without the attendant risks (and additional costs) of litigating this issue.<sup>16</sup>

17. As relates to the without costs nature of the settlement, it is customary for tax appeals to be settled without costs, there is risk of the Applicant being liable for costs if His Majesty the King were to be successful in reducing the Applicant’s reserve claim by even a small amount in litigation and any cost award would, in any event, ultimately be in the discretion of the Tax Court.<sup>17</sup>

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<sup>14</sup> Eighth Report at para 3.1(3), and Appendices “A” and “B”.

<sup>15</sup> Eighth Report at para. 3.1(4) and 3.1(5).

<sup>16</sup> Eighth Report at para. 3.2(2).

<sup>17</sup> Eighth Report at para. 3.2(3).

18. Subject to this Court granting the Settlement Authorization Order, it is anticipated that the parties will return before the Tax Court to seek the Tax Court Order on or before October 4, 2024.<sup>18</sup>

19. As a result of the Consent to Judgment, it is the Applicant's expectation that a refund will be payable to the Applicant for the 2013 taxation year and that CRA will reassess applicable pre-filing taxation years subsequent to 2013 in a consistent manner. To the extent any post-2013 consequential assessments result in an overpayment of tax for a particular taxation year which would result in a net refund, such refunds should also be payable to the Applicant.

**D. QUANTUM OF THE TAX PROCEEDS (AND OTHER AMOUNTS) OWING TO THE APPLICANT AND ENTITLEMENT THERETO**

20. Although the proposed settlement represents the best outcome on the substantive tax dispute the Applicant could have achieved, there remains additional matters to be addressed and resolved before any proceeds of the Tax Appeal (the "**Tax Proceeds**") are received by the Applicant or available for stakeholders.

21. Provided the Settlement Authorization Order is granted and after the Tax Court Order is received from the Tax Court, the Applicant intends to work with the Monitor, the Applicant's key stakeholders (including its secured creditors and Bread) and CRA to determine the quantum of the Tax Proceeds owing to the Applicant as a result of the Settlement Reassessment (as defined in the Minutes of Settlement) and any other amounts payable to the Applicant for related reassessments for tax years subsequent to 2013.<sup>19</sup>

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<sup>18</sup> Eighth Report at para. 3.1(6) and 3.2(7).

<sup>19</sup> Eighth Report at para. 4.0(3).

22. Also, CRA has asserted that it may seek Court approval to setoff certain claims it may have against amounts owing to the Applicant (the “**Setoff Claims**”).<sup>20</sup>

23. If CRA asserts Setoff Claims, those claims, and the ability of CRA to effect a setoff, may need to be addressed by this Court to determine the amounts to be received by the Applicant.<sup>21</sup>

24. The Settlement Authorization Order, should it be granted, provides that it is without prejudice to the right, if any, of CRA to seek by further order of this Court to setoff amounts owing to the Applicant against amounts that are alleged to be owing to CRA by the Applicant, and the right of the Applicant and any other party in interest to oppose such setoff.

25. In addition to these issues, there is also an ongoing litigation process relating to the Tax Matters Agreement between Alliance Data Systems Corporation (now known as Bread) and Loyalty Ventures Inc. dated November 5, 2021 (“**TMA**”), and in particular, provisions of the TMA that relate to claims that Bread may assert against the Applicant for amounts equivalent to the proceeds received (or to be received) in respect of certain disputed tax amounts (the “**TMA Litigation**”).<sup>22</sup>

26. On July 10, 2024, this Court made an endorsement in respect of the TMA Litigation (the “**TMA Litigation Endorsement**”), in which the Court, among other things:

- (a) determined that the Applicant is a party to the TMA and that a disclaimer of the TMA was not permitted; and

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<sup>20</sup> As described in more detail in section 4.0 the Seventh Report of the Monitor dated June 10, 2024. In May of 2024 CRA advised the Applicant, the Monitor and Bread that CRA would only seek such Setoff Claims subject to obtaining the consent of the Applicant and the Monitor or further order of the Court.

<sup>21</sup> Eighth Report at para. 4.0(3).

<sup>22</sup> Eighth Report at para. 5.0(1).

- (b) did not grant Bread's request for a constructive trust or proprietary claim over the Tax Proceeds and found that it was premature to address Bread's request for an order directing the Applicant to comply with the TMA.

27. On July 31, 2024, the Applicant and the Monitor filed a motion for leave to appeal certain aspects of the order to be made pursuant to the TMA Litigation Endorsement to the Ontario Court of Appeal.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

28. The issues to be determined on this Motion are whether the Court should:

- (a) approve the Consent to Judgment and Minutes of Settlement; and
- (b) authorize and direct the Monitor to, *nunc pro tunc*, cause the Applicant to enter into the Consent to Judgment and Minutes of Settlement.

#### **A. THE CONSENT TO JUDGMENT AND MINUTES OF SETTLEMENT SHOULD BE APPROVED**

29. The effectiveness of the Minutes of Settlement and Consent to Judgment, and therefore entry by the Tax Court of an order consistent with the Consent to Judgment, are subject to obtaining this Court's approval thereof.

30. This Court has the jurisdiction to approve the Minutes of Settlement and Consent to Judgment pursuant to section 11 of the CCAA, which provides the CCAA Court with powers to make any order that it considers appropriate.<sup>23</sup>

31. Settlement agreements are routinely approved by this Court during CCAA proceedings.<sup>24</sup>

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<sup>23</sup> *Companies' Creditors Arrangement Act*, [R.S.C. 1985, c. C-36 s 11](#). See also, *Nortel Networks Corp., Re.*, [2010 ONSC 1708](#), paras 66-70.

<sup>24</sup> See e.g., *Carillion Canada Holdings et al. (Re)* (November 6, 2020), (ONSC) (Commercial List), Court File No. CV-18-590812-00CL ([Settlement Approval Order](#)) at paras 2, 3 and 5; *Robertson v Proquest Information Learning Company*, [2011 ONSC 1647](#), at para 22; *Re Calpine Canada Energy Ltd.*, [2007 ABQB 504](#) at para 71; leave to appeal

32. When approving a settlement in the context of the CCAA, the Court must be satisfied that:

- (a) the settlement would be beneficial to the debtor and its stakeholders generally;
- (b) the settlement is fair and reasonable; and
- (c) the settlement is consistent with the purpose and spirit of the CCAA.<sup>25</sup>

33. These requirements are all satisfied in the present circumstances.

34. First, the Minutes of Settlement and Consent to Judgment provide substantial benefits to the Applicant and its stakeholders as the result of the settlement therein is a complete acceptance by CRA of the Applicant's position on the Tax Appeal.<sup>26</sup> Upon implementation of the settlement, the Minister will be required to promptly issue a reassessment for the Applicant's 2013 tax year consistent with the Applicant's position on the underlying tax reserve issue that had been in dispute.<sup>27</sup> This outcome is what the Applicant could have achieved on the substantive issue in dispute in the Tax Appeal had it been entirely successful at trial.<sup>28</sup> Receipt of this reassessment is a critical input for the Applicant and its advisors to understand CRA's position on the amount owing to the Applicant as a result thereof, which will impact amounts owing to the Applicant for subsequent tax years.<sup>29</sup>

35. Second, the settlement is fair and reasonable considering, among other things:

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dismissed 2007 ABCA 266; *Forme Development Group Inc, (Re)* (February 25, 2021), (ONSC) (Commercial List), Court File No. CV-18-608313-00CL ([Order](#)) at para 2 [*Forme*]; *Inscape Corporation (Re)* (June 9, 2023) (ONSC) (Commercial List) Court File No. CV-23-00692784-00CL ([Settlement Approval Order](#)); *Nortel Networks Corp., Re., 2010 ONSC 1708*, paras 66-70; *Peraso Technologies Inc (Re)*, (October 14, 2020) (ONSC) (Commercial List) Court File No. CV-20-00642010-00CL ([Settlement Approval Order](#)); See also cases where the Court required the parties comply with the terms of the settlement being approved e.g., *Quinto Mining Corp, Re, 2016 QCCS 6342* at para 116 and *Arrangement relatif à FormerXBC Inc (Xebec Adsorption Inc)*, (September 29, 2023), (CSQC) (Commercial Division), Court File No. 500-11-061483-224 ([Order Extending the Stay of Proceedings, Approval a Settlement Payment and Other Ancillary Relief](#)) at para 11.

<sup>25</sup> *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp.*, [2013 ONSC 1078](#) at [para 49](#).

<sup>26</sup> Eighth Report at para. 3.2(2).

<sup>27</sup> Eighth Report at para. 3.2(4).

<sup>28</sup> Eighth Report at para. 3.2(4).

<sup>29</sup> Eighth Report at para. 3.2(5).

- (a) the settlement avoids any further costs being incurred in connection with the Tax Appeal and the attendant risks of pursuing the Tax Appeal, including the risk of the Applicant being liable for costs if His Majesty the King were to be successful at trial in reducing the Applicant's reserve claim by even a small amount;<sup>30</sup>
- (b) the Minutes of Settlement and Consent to Judgment are the result of several months of negotiations between the parties;<sup>31</sup> and
- (c) the Applicant's key stakeholders (including Bread and the Applicant's secured lenders) were apprised on a regular basis of all material developments regarding the potential settlement, including providing and consulting with those stakeholders on the various drafts of the Minutes of Settlement and Consent to Judgment received and negotiated.<sup>32</sup>

36. Third, the settlement is consistent with the purpose and spirit of the CCAA since the settlement resolves the Tax Appeal consensually rather than through litigation and is an important step toward realizing on the Applicant's remaining assets for the benefit of its stakeholders and completing this CCAA proceeding.

37. The Monitor has been closely involved through the process leading to the Minutes of Settlement and Consent to Judgment.

38. The Monitor is supportive of the Applicant entering into the Consent to Judgment and Minutes of Settlement and is of the view that the settlement of the Tax Appeal on the terms set out in the Minutes of Settlement and Consent to Judgment is in the best interests of the Applicant and all of its stakeholders.<sup>33</sup>

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<sup>30</sup> Eighth Report at para. 3.2(3).

<sup>31</sup> Eighth Report at para. 3.1(1).

<sup>32</sup> Eighth Report at para. 3.1(2).

<sup>33</sup> Eighth Report at para. 3.2(1).

39. The Monitor recommends that this Court grant the proposed Settlement Authorization Order.<sup>34</sup>

**B. THE MONITOR SHOULD BE AUTHORIZED TO CAUSE THE APPLICANT, NUNC PRO TUNC, TO ENTER INTO THE CONSENT TO JUDGMENT AND MINUTES OF SETTLEMENT**

40. The Settlement Authorization Order if granted would authorize and direct the Monitor to cause the Applicant, *nunc pro tunc*, to enter into the Minutes of Settlement and Consent to Judgment, substantially in the form attached as Appendix “A” and “B” to the Eighth Report.<sup>35</sup>

41. This relief is consistent with the powers granted to the Monitor pursuant to the Ancillary Relief Order, which also contemplates that the Monitor will obtain approval to enter into a settlement of the Tax Appeal.<sup>36</sup>

42. In circumstances where a CCAA monitor has expanded powers, this Court has previously authorized and directed CCAA monitors to cause a CCAA debtor to enter into settlements and other agreements in connection with this Court’s approval thereof.<sup>37</sup>

43. The Applicant has served counsel for His Majesty the King in connection with the Tax Appeal with its materials for this motion, in addition to service on all others on the Service List which include the Applicant’s key stakeholders (i.e., the Applicant’s secured lenders and Bread).

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<sup>34</sup> Eighth Report at para. 3.2(7).

<sup>35</sup> Eighth Report at Appendix “A” and “B”.

<sup>36</sup> [Ancillary Relief Order](#) at para 5(f); *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#) of Conway J) (May 12, 2023) at para 13.

<sup>37</sup> See e.g., [Forme](#) at para 2; *Ivaco Inc. (Re)* (August 4, 2005) (ONSC) (Commercial List), Court File No. 03-CL-5145 ([Approval Order \(PBGC Minutes of Settlement\)](#)) at para 3; See also, *Re 100015689 Ontario Inc. (f/k/a DCL Corporation)* (June 21, 2024), (ONSC) (Commercial List), Court File No. CV-22-00691990-00CL ([Stay Extension Order](#)) at para 4, where this Court authorized the monitor to enter into an escrow release and termination agreement on behalf of the debtor company.

**PART IV - ORDER REQUESTED**

44. For all the reasons above, the Applicant submits that the Court should grant the Settlement Authorization Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of September, 2024.

*Cassels Brock & Blackwell LLP*

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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *100015689 Ontario Inc. (f/k/a DCL Corporation) (Re)*, (June 21, 2024), (ONSC) (Commercial List), Court File No. CV-22-00691990-00CL ([Stay Extension Order](#))
2. *Arrangement relatif à FormerXBC Inc (Xebec Adsorption Inc)*, (September 29, 2023), (CSQC) (Commercial Division), Court File No. 500-11-061483-224 ([Order Extending the Stay of Proceedings, Approval a Settlement Payment and Other Ancillary Relief](#))
3. *Calpine Canada Energy Ltd (Re)*, [2007 ABQB 504](#)
4. *Carillion Canada Holdings et al. (Re)*, (November 6, 2020), (ONSC) (Commercial List), Court File No. CV-18-590812-00CL ([Settlement Approval Order](#))
5. *Forme Development Group Inc, (Re)*, (February 25, 2021), (ONSC) (Commercial List), Court File No. CV-18-608313-00CL ([Order](#))
6. *Inscape Corporation (Re)*, (June 9, 2023), (ONSC) (Commercial List) Court File No. CV-23-00692784-00CL ([Settlement Approval Order](#))
7. *Ivaco Inc, (Re)*, (August 4, 2005), (ONSC) (Commercial List), Court File No. 03-CL-5145 ([Approval Order \(PBGC Minutes of Settlement\)](#))
8. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp.*, [2013 ONSC 1078](#)
9. *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement of Conway J](#))
10. *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Ancillary Relief Order](#))
11. *Nortel Networks Corp., Re*, [2010 ONSC 1708](#)
12. *Quinto Mining Corp, Re*, [2016 QCCS 6342](#)
13. *Robertson v Proquest Information Learning Company*, [2011 ONSC 1647](#)

**SCHEDULE "B"**  
**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

**Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36**

**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.

[...]

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