

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

IN THE MATTER OF THE LIQUIDATION OF LWP CAPITAL INC.
PURSUANT TO THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C.
1985, c. C-44, AS AMENDED

and

KSV ADVISORY INC. IN ITS CAPACITY AS LIQUIDATOR OF LWP
CAPITAL INC.

Applicant

FACTUM OF THE APPLICANT

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**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE LIQUIDATION OF LWP CAPITAL INC.
PURSUANT TO SECTION 211 OF THE *CANADA BUSINESS
CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

and

KSV ADVISORY INC. IN ITS CAPACITY AS LIQUIDATOR OF LWP
CAPITAL INC.

APPLICANT

FACTUM OF THE APPLICANT

PART I - NATURE OF THE APPLICATION

1. The Applicant, KSV Advisory Inc. (“KSV”) in its capacity as the liquidator (in such capacity, the “**Liquidator**”) of LWP Capital Inc., formerly “Legumex Walker Inc.” (“LWP” or the “**Company**”), makes this application under section 211(8) of the *Canada Business Corporations Act*, R.S.C. 1989, c. C-44, as amended (the “**CBCA**”) for an order, among other things, continuing the voluntary liquidation of LWP under the supervision of the Court.
2. On November 9, 2015, the shareholders of LWP passed a special resolution (the “**Special Resolution**”) approving the voluntary liquidation of LWP pursuant to section 211(8) of the CBCA at a time to be determined by LWP’s directors (the “**Directors**”), and the plan of liquidation and distribution (the “**Liquidation Plan**”) substantially in the form attached to the Special Resolution.
3. On December 31, 2015, the Directors passed a resolution appointing KSV as the Liquidator and formally adopting the final Liquidation Plan substantially in the form approved

by the Special Resolution, effective December 31, 2015 (the “**Effective Date**”). As of that date, in accordance with the Liquidation Plan, the Company has ceased to carry on business activities.

4. In order to effect an efficient and orderly liquidation, the Liquidator seeks the approval of a procedure for the solicitation, determination and resolution of claims against LWP and its former directors and officers (the “**Claims Process**”). The Liquidator also seeks other ancillary relief in furtherance of the liquidation and the Claims Process, including:

- (a) staying all proceedings and remedies taken or which might be taken in respect of LWP, its subsidiaries, its directors and officers or the Liquidator;
- (b) granting a priority charge in the amount of \$200,000 over the assets, properties and undertakings of LWP (collectively, the “**Property**”) to secure the fees and disbursements of the Liquidator and its legal counsel (the “**Administration Charge**”); and
- (c) exempting LWP or the Liquidator from the requirement under the CBCA to provide shareholders with any further audited financial statements or auditor’s reports and to appoint an auditor.

5. The Liquidation Plan contemplates this application and mandates it with respect to implementing the Claims Process. A court-supervised liquidation of LWP is in the best interests of the Company’s creditors and shareholders. The other relief requested in the draft Liquidation Order and the draft Claims Procedure Order is in furtherance of the orderly liquidation of LWP and makes appropriate use of the flexibility afforded by the CBCA to allow the Liquidator to liquidate the Property in a manner that will maximize value for its stakeholders. Accordingly, the Liquidator respectfully submits that this application be granted.

PART II - FACTS

6. The relevant facts with respect to this application are briefly outlined herein. They are more fully set out in the First Report of the Liquidator dated January 4, 2016 (the “**First Report**”) and the Affidavit of Joel Horn, to be filed (the “**Horn Affidavit**”). Capitalized terms in this factum that are not otherwise defined have the same meanings as in the First Report.

A. Background of Sale and Divesture Transactions

7. LWP was incorporated on April 20, 2011 under the CBCA. The Company was comprised of two operating segments: (a) the “Special Crops” segment; and (b) the “Oilseed Processing” segment.

First Report, Application Record, Tab 2, para. 2.0.1

8. In March 2015, the Directors formed a special committee to consider the Company’s strategic alternatives (the “**Special Committee**”). The Special Committee engaged AltaCorp Capital Inc. (“**ACI**”) as the Company’s financial advisor and investment banker. ACI carried out a sale process for the Company that resulted in a sale transaction (the “**Scoular Transaction**”) for the Special Crops division to The Scoular Company (“**Scoular**”).

First Report, Application Record, Tab 2, paras 2.1.1 and 2.1.2

9. Pursuant to an asset purchase agreement with Scoular dated September 14, 2015, the Company sold or caused the sale of substantially all of its special crops assets, including its equity interest in Legumex Walker China Ltd. and, indirectly, Legumex Walker (Tianjing) International for gross proceeds of \$94 million, less closing and post-closing adjustments, plus \$71.5 million, representing a preliminary estimate for the net working capital amount at closing.

First Report, Application Record, Tab 2, para. 2.1.3

Horn Affidavit, to be filed, para. 6

10. The Scoular Transaction was overwhelmingly approved by 99.56% of the Company's shareholders on November 9, 2015. The transaction closed on November 23, 2015.

First Report, Application Record, Tab 2, para. 2.1.4 and Appendix "D"

11. ACI's sale process did not result in a transaction for the oilseed processing segment operated by Pacific Coast Canola LLC ("PCC"), one of the Company's U.S. subsidiaries, which is 84% indirectly owned by the Company.

12. Given that PCC was in a distressed financial position and was in default of its senior credit facility, the Company negotiated a transaction whereby a purchaser would acquire the Company's indirect 84% interest in PCC for nominal cash consideration (the "PCC Transaction"). Pursuant to the PCC Transaction, PCC will be granted a release from its principal secured lenders and lien registrant of any claims against PCC and its affiliates. The PCC Transaction is expected to close during the week of January 4, 2016.

First Report, Application Record, Tab 2, paras 2.2.1, 2.2.2 and 2.2.3

Horn Affidavit, to be filed, para. 6

B. LWP's Financial Position

13. A portion of the proceeds from the Scoular Transaction was disbursed to pay the Company's expenses, to pay liabilities incurred before closing or between closing and the Effective Date, and to repay the Company's secured debt obligations. After making such payments and disbursements, the Company held [S●] in its bank accounts, which is in the process of being transferred to the Liquidator.

Horn Affidavit, to be filed, para. 8

14. The principal assets of the Company consist of:
- a) cash of approximately C\$23.6 million and US\$7.1 million, which is in the process of being transferred to bank accounts maintained by the Liquidator;
 - b) cash on deposit in the bank accounts maintained by the Company's subsidiaries, totaling approximately US\$262,000 as at January 4, 2016, which will be transferred to the Liquidator in the coming months, net of any claims and/or expenses to dissolve the subsidiaries;
 - c) accounts receivable with a book value of approximately C\$239,000 and US\$5.9 million; and
 - d) potential tax refunds.

First Report, Application Record, Tab 2, para. 3.1.1

15. As of December 31, 2015, the Company does not have any known outstanding liabilities other than: (i) those arising in the ordinary course from time to time; (ii) certain amounts owing to former employees; (iii) certain prescribed environmental remediation costs (which are expected to be below C\$700,000); and (iv) the professional fees and disbursements associated with these liquidation proceedings.

Horn Affidavit, to be filed, para. 5

16. According to the Company's books and records, the amount owing to the Company's trade creditors total approximately C\$253,000. The Liquidator is working with the Company and its advisors to identify and quantify any other known obligations. The Liquidator will cause those obligations, if bona fide, to be satisfied from the Company's cash on deposit.

First Report, Application Record, Tab 2, paras. 3.2.2 and 3.2.3

17. The Company's secured creditors are (i) GM Financial Canada Leasing Inc. in respect of certain leased vehicles; and (ii) HSBC Bank Canada, HSBC Bank USA, National Association and Farm Credit Canada in respect of a letter of credit which expired on December 31, 2015 and for which the Liquidator understands the Company has no exposure.

First Report, Application Record, Tab 2, para. 3.2.4 and Appendix "E"

18. The Liquidator is not aware of any outstanding legal proceedings against the Company.

First Report, Application Record, Tab 2, para. 3.2.4

19. The Liquidator understands that the proceeds of the Scoular Transaction are expected to substantially exceed all of the Company's known outstanding obligations. The Company estimates that there will be funds available for distribution to shareholders ranging from C\$1.69 to C\$1.98 per common share, depending on the results of the Claims Process.

Horn Affidavit, to be filed, paras. 8-9

First Report, Application Record, Tab 2, para. 3.0.1

C. The Voluntary Liquidation of LWP and the Liquidation Plan

20. On November 9, 2015, the shareholders of LWP passed a special resolution approving, among other things, the voluntary liquidation and dissolution of the Company pursuant to the CBCA at a time to be determined by the Company's Directors, and the Liquidation Plan substantially in the form attached to the Notice of Special Meeting of Shareholders.

First Report, Application Record, Tab 2, para. 1.0.1

21. On December 31, 2015, the Directors passed a resolution appointing KSV as the Liquidator and formally adopting the finalized Liquidation Plan substantially in the form approved by the Special Resolution, effective December 31, 2015.

First Report, Application Record, Tab 2, para. 1.0.4

22. Pursuant to the Liquidation Plan, Joel Horn, Ivan Sabourin, Jay Lubinsky and Mick Fleming were appointed inspectors for LWP's liquidation (collectively, the "**Inspectors**"). The Liquidator believes that this slate of inspectors, which are large shareholders and/or executives of the Company, will be of assistance to the Liquidator in carrying out its mandate under the Liquidation Plan and the proposed Claims Process.

First Report, Application Record, Tab 2, paras. 5.0.2 and 5.0.3 and Appendix "C"

23. Section 4.2(c) of the Liquidation Plan provides that the Liquidator shall forthwith after the Effective Date make an application to the Court under Section 211(8) of the CBCA to have the liquidation supervised by the Court if the Liquidator considers such an application advisable.

First Report, Application Record, Tab 2, para. 1.0.6 and Appendix "C"

24. The Liquidator considers this application for Court supervision advisable. The principal purpose of bringing such an application is to allow the Liquidator to administer the Claims Process.

First Report, Application Record, Tab 2, paras. 6.1.2 and 7.0.2

D. The Claims Process

25. Section 4.2(d) of the Liquidation Plan expressly directs the Liquidator to establish and implement a Claims Process. The Liquidation Plan defines "Claims Process" to mean "the

process established by the Liquidator and approved by the Court for the identification, resolution and barring of certain Claims, including, *inter alia*, the issuance of a final order of the Court establishing the Claims”.

First Report, Application Record, Tab 2, para. 6.1.1 and Appendix “C”

26. Under section 226 of the CBCA, notwithstanding the dissolution of a corporation, a civil, criminal or administrative action may be brought against the corporation within two years after its dissolution as if it had not been dissolved. Any property that would have been available to satisfy any judgment or order if the corporation had not been dissolved remains available for that purpose. Moreover, a shareholder to whom any of its property has been distributed is liable to any person claiming under this section to the extent of the amount received by that shareholder upon the distribution, and an action to enforce such liability may be brought within two years after the date of dissolution.

First Report, Application Record, Tab 2, paras. 6.1.3 and 6.1.4

27. Accordingly, the Claims Process, as set out in the Liquidation Plan and the proposed Claims Procedure Order, is intended to identify any and all possible claims against the Company and/or its directors and officers prior to distribution to shareholders in order to mitigate the risk of claims arising subsequent to the liquidation and dissolution of the Company.

First Report, Application Record, Tab 2, para. 6.1.6 and Appendix “C”

28. The proposed Claims Process is summarized in paragraph 6.1.2 of the First Report. The Claims Process would involve the provision of notice to potential claimants, in a variety of ways, with respect to the requirement to file a Proof of Claim on or before March 15, 2016 (the “**Claims Bar Date**”). The draft Claims Procedure Order provides a process for

determining and resolving both Company Claims and D&O Claims, as those terms are defined in the Order.

29. The Liquidator considers that the identification of claimants set out in the Claims Process will provide potential claimants with sufficient and timely notification in order for those parties, if any, to submit their Proof of Claim prior to the Claims Bar Date.

First Report, Application Record, Tab 2, paras. 6.2.1 and 6.2.2

E. Financial Statements and Disclosure

30. Part XIV of the CBCA requires the directors of a corporation to provide to its shareholders with comparative financial statements, including an auditor's report thereon, unless certain specified exemptions are met.

First Report, Application Record, Tab 2, para. 8.0.1

31. The Liquidator is seeking an Order confirming that neither the Company nor the Liquidator is required to comply with Part XIV of the CBCA for the following reasons:

- a) The Company's only material assets (principally cash and accounts receivable) can be readily valued;
- b) The Company's liabilities will be determined by the results of the Claims Process (subject to this Court's approval of the Claims Procedure Order);
- c) Pursuant to the Liquidation Plan, the Liquidator will report to the Company's shareholders with respect to these proceedings and any material developments relating to the Company's assets, material claims and distributions. The Liquidator will post on its website press releases and other information relevant to the Company, including updates on the estimated funds available for distribution;

- d) Pursuant to Section 223(2) of the CBCA, the Liquidator shall apply to the Court within one year after its appointment and after paying or making adequate provision for all claims for: (i) approval of the final accounts and for an order permitting the Liquidator to distribute money or in kind the remaining property of the Company to its shareholders; or (ii) an extension of time, setting out the reasons therefor;

- e) Section 155 of the CBCA dealing with the required actions of a company's directors do not apply in these circumstances given that the Directors resigned on the Effective Date of the Liquidation Plan and that the powers of the Directors and shareholders cease and vest in the Liquidator pursuant to section 219(1)(b) of the CBCA;

- f) The Company's annual audit fee is approximately C\$400,000, and the payment of such fee would reduce funds available for distribution to the Company's shareholders. It is the Liquidator's view that an auditor's report and the associated costs are no longer required as the Company does not carry on any business activities and almost all of its assets were monetized as a result of the Scoular Transaction; and

- g) An audit opinion could not have any implication on the trading of the Company's shares as they were delisted from trading from the TSX on December 31, 2015.

First Report, Application Record, Tab 2, para. 8.0.2 and Appendix "C"

F. The Liquidator Considers This Application Appropriate

32. The Liquidator considers it appropriate and in the best interests of the Company's creditors and shareholders for the liquidation of LWP to be continued under the supervision of the Court for the following reasons, among others:

- (d) It will enable the Liquidator to carry out the Claims Process contemplated by the Liquidation Plan and the proposed Claims Procedure Order;
- (e) It provides a mechanism for a stay of proceedings against the Company, its subsidiaries, the Directors and the Liquidator, which, in turn, will allow the Liquidator to implement an orderly and efficient liquidation and Claims Process;
- (f) It will facilitate the Liquidator's ability to implement all of the other aspects of the Liquidation Plan;
- (g) It will protect the Liquidator from liability in implementing the Liquidation Plan;
- (h) It will allow the Liquidator to efficiently enforce the terms of the Liquidation Plan and any corresponding ancillary relief provided in the CBCA in connection therewith as against any third parties; and
- (i) It will afford the Liquidator the ability to seek the advice and directions of this Court in connection with any of the foregoing, should that become necessary.

First Report, Application Record, Tab 2, paras. 7.0.1 and 7.0.2 and Appendix "C"

33. The other relief requested in the draft Liquidation Order and draft Claims Procedure Order is in furtherance of the liquidation and the Claims Process, including:

- (a) staying all proceedings and remedies taken or which might be taken in respect of LWP, its subsidiaries, its directors and officers or the Liquidator, except upon leave of this Court being granted or as otherwise provided;
- (b) granting the Administration Charge in the principal amount of C\$200,000 to secure the fees and disbursements of the Liquidator and its counsel; and
- (c) exempting LWP or the Liquidator from the requirement under subsections 155(1) and 159(1) of the CBCA to provide LWP's shareholders with further audited financial statements or auditor's reports and from the requirements of Part XIV of the CBCA regarding the appointment and duties of an auditor.

PART III- ISSUES AND THE LAW

34. This application addresses the following issues:
- (a) whether the voluntary liquidation of LWP should be continued under the supervision of this Court pursuant to section 211(8) of the CBCA;
 - (b) whether the Liquidation Plan and the appointment of the Liquidator thereunder should be approved and affirmed;
 - (c) whether the other ancillary relief requested in the draft Liquidation Order and draft Claims Procedure Order should be granted; and
 - (d) whether the liquidator and the Company should be exempt from complying with the requirements under Part XIV of the CBCA to appoint an auditor and provide shareholders with audited financial statements and an auditor's reports.

A. The Voluntary Liquidation of LWP Should Be Continued Under Court Supervision

35. Since LWP was incorporated under the CBCA, it is a “corporation” under the Act.

CBCA, ss. 2(1)

36. Pursuant to subsection 211(3) of the CBCA, a corporation can voluntarily liquidate and dissolve by special resolution of the shareholders. This section does not apply to a corporation that is an insolvent person or a bankrupt as those terms are defined in the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended.

CBCA, ss. 208(1) and 211(3)

37. The above conditions have been met by LWP. On November 9, 2015, the shareholders of LWP approved by way of special resolution the voluntary liquidation and dissolution of the Company pursuant to the CBCA and in accordance with the Plan of Liquidation. As explained in the Horn Affidavit, LWP is a solvent company.

First Report, Application Record, Tab 2, paras. 2.0.1, 7.0.1 and 7.0.2

Horn Affidavit, to be filed, para. 8

38. Subsection 211(8) of the CBCA provides that at any time during the liquidation of a corporation, any interested person can apply to a court for an order that the liquidation be continued under the supervision of the Court. An application to a court under subsection 211(8) must state the reasons why the Court should supervise the liquidation. There are no other stated requirements for when a court shall make such an order.

CBCA, ss. 211(8) and 215(1)

39. Pursuant to section 4.2(c) of the Liquidation Plan, the Liquidator may, at any time, make an application to this Court to have the liquidation supervised by this Court if the Liquidator considers such an application advisable.

First Report, Application Record, Tab 2, Appendix "C"

40. The Liquidator considers an application for Court-supervision to be advisable under the circumstances because it will, among other things:

- (a) enable the Liquidator to carry out the Claims Process contemplated by the Liquidation Plan and the proposed Claims Procedure Order;
- (b) facilitate the Liquidator's ability to implement the other aspects of the Liquidation Plan;
- (c) protect the Liquidator from liability in implementing the Liquidation Plan;
- (d) provide a mechanism for a stay of proceedings against the Company, its subsidiaries, the Directors and the Liquidator, subject to the approval of this Court, which in turn will allow the Liquidator to implement an orderly and efficient liquidation and Claims Process;
- (e) allow the Liquidator to efficiently enforce the terms of the Liquidation Plan and any corresponding relief provided in the CBCA as against third parties; and
- (f) afford the Liquidator the ability to seek the advice and directions of this Court in connection with any of the foregoing should that become necessary.

First Report, Application Record, Tab 2, para. 7.0.1

41. Accordingly, the Liquidator has determined that it is in the best interests of the Company's creditors and shareholders that the voluntary liquidation of the Company be continued under the supervision of this Court. The Claims Process, which cannot be implemented without this Court's approval, will provide a mechanism and unified forum for

potential unknown creditors to make claims. The Claims Process contemplates providing written notice to known creditors and publication of the Claims Process Notice in major Canadian and US newspapers, thereby facilitating the identification of claims.

42. Court supervision of this liquidation is also in the best interests of LWP's shareholders since the Claims Process will reduce the possibility of claims against LWP arising subsequent to its liquidation and distribution of the Property to its shareholders. This will reduce, or eliminate, the possibility that shareholders will be liable for such claims to the extent that a distribution to the shareholders is made.

43. The support of the Company's shareholders for the requested relief is demonstrated by the fact that the shareholders voted to approve the Liquidation Plan, which expressly authorized the Liquidator to make this application and specifically required the Liquidator to effect and implement the Claims Process under the Court's supervision.

First Report, Application Record, Tab 2, paras. 1.0.2 and 6.1.2 and Appendices "A" and "C"

44. This Court has previously ordered the court supervision of a liquidation under very similar circumstances pursuant to the corresponding provisions in the *Ontario Business Corporations Act*, R.S.O. 1990, c. B-16, as amended (the "OBCA"). In both *Re Diversinet* and *Re Coventree Inc. (Liquidator of)*, the corporation's shareholders had passed a special resolution approving the voluntary wind-up of the corporation pursuant to section 193 of the OBCA. Subsequently, the appointed liquidator made an application to this Court seeking approval of, among other things, a winding-up order and a claims procedure order, substantively similar to the orders requested in this application. Morawetz J. approved each of the orders sought by the liquidator in those cases.

Re Diversinet Corp, Winding-Up Order and Endorsement of Justice Morawetz granted October 18, 2013, Toronto CV-13-10282-00CL (ONSC [Commercial List]) [*Diversinet*], Book of Authorities, Tab 1

Re Coventree Inc (Liquidator of), Winding-Up Order and Endorsement granted February 15, 2012, Toronto CV-12-9594-00CL (ONSC [Commercial List]) [*Coventree*], Book of Authorities, Tab 2

45. Court-supervision of a liquidation under section 211 of the CBCA has been granted by the Quebec Superior Court on a number of occasions, in each case where the liquidator supported such an application.

Pension Financial Services Canada Inc (Syndic de), Order granted February 1, 2013, Montreal No. 500-11-044039-135 (QSC [Commercial Division]); 2014 QCCS 4078, Book of Authorities, Tab 3

Construction Frank Catania et Associés inc (Syndic de), Liquidation Order granted September 18, 2014, Montreal No. 500-11-047375-148 (QSC [Commercial Division]); 2014 QCCS 4359, Book of Authorities, Tab 4

Re ACE Aviation Holdings Inc, Order granted June 28, 2012, Montreal No. 500-11-042912-127 (QSC [Commercial Division]), Book of Authorities, Tab 5

46. Accordingly, the Applicant respectfully submits that this Court should allow the liquidation and dissolution of the Company to be continued under the supervision of the Court.

B. The Liquidation Plan and the Appointment of the Liquidator Thereunder Should Be Approved and Affirmed

47. As noted above, under the CBCA, a solvent corporation can voluntarily liquidate and dissolve by special resolution of the shareholders.

CBCA, ss. 208(1) and 211(3)

48. Where shareholders of a company have authorized by special resolution an application to liquidate the corporation, the Court's discretion to refuse to grant the order is extremely limited. In *United Fuel Investments Ltd., Re*, the Supreme Court of Canada considered the interpretation of subsection 10(b) of what was then the federal *Winding-up Act*, R.S.C. 1952, c. 296, a provision that is functionally equivalent to subsection 211 of the CBCA and section 193

of the OBCA.¹ The Ontario Court of Appeal granted the winding-up order, holding that where a special resolution of shareholders has been passed, any discretion to refuse the winding-up order should only be exercised if it could be shown that the “action of the majority shareholders was fraudulent or equivalent to bad faith”. In dismissing the appeal, the Supreme Court of Canada stated that, subject to fraud or bad faith on the part of the majority shareholders, the shareholders have the right to decide that a corporation be wound up under the purview of the Court.

***United Fuel Investments Ltd, Re*, [1963] SCR 397 at paras. 13-15, 24-28, 40, DLR (2d) 1, aff'g [1962] OR 162 at para. 37, 31 DLR (2d) 331 (ONCA), Book of Authorities, Tab 6**

49. The holding in *United Fuel* is applicable to the case at bar and was implicitly accepted by this Court in *Coventree* and *Diversinet*.

***Coventree, supra*, Book of Authorities, Tab 2**

***Diversinet, supra*, Book of Authorities, Tab 1**

50. LWP’s shareholders have passed a special resolution that authorizes an application to liquidate the Company. Specifically, LWP’s shareholders approved the Liquidation Plan, which appointed the Liquidator. There is nothing to suggest that any action of LWP’s shareholders was fraudulent or done in bad faith. Nor is there any other reason for the Court to exercise its limited discretion not to give effect to the will of the shareholders.

51. As discussed above, the Liquidator considers it advisable to liquidate the Company in accordance with the Liquidation Plan and the Claims Process. Pursuant to the Scoular Transaction, LWP sold substantially all of its assets to Scoular and discontinued its operations. The Liquidator is of the view that approval of the Liquidation Plan and the Claims Process will provide for an orderly and efficient liquidation, which is in the best interest of the

¹ Subsection 10(b) provided that “the Court may make a winding-up order where the company at a special meeting of shareholders called for the purposes has passed a resolution requiring the company to be wound up.”

Company's creditors and shareholders. Accordingly, the Liquidator requests that this Honourable Court approve and affirm the Liquidation Plan and appoint the Liquidator thereunder pursuant to sections 211 and 217 of the CBCA.

C. The Other Relief Requested in the Proposed Liquidation Order and Claims Procedure Order Should Be Granted

52. Section 217 of the CBCA grants the Court broad discretionary powers in the liquidation process. The provision states that the Court may "make any order it thinks fit" in the liquidation of a corporation and sets out a non-exhaustive list of the types of orders the Court may make, including, *inter alia*:

- (a) an order appointing a liquidator, with or without security;
- (b) an order appointing inspectors or referees, specifying their powers and fixing their remuneration;
- (c) an order determining the notice to be given to any interested person, or dispensing with notice to any person; and
- (d) an order determining the validity of any claims made against the corporation:

CBCA, s. 217

***Hollinger v Hollinger*, 2012 QCCA 1682 at para. 15, Book of Authorities, Tab 7**

53. Ontario Courts have interpreted a similar provision in the OBCA as conferring on the Court a broad discretion to make orders in connection with a winding-up order.

***Falus v Martap Developments 87 Ltd*, 2013 ONSC 4115 at paras. 1 and 7 (Div Ct), Book of Authorities, Tab 8**

OBCA, s. 207(2)

54. Much of the relief requested in this application, including the appointment of the Liquidator, the granting of an Administration Charge and the determination of claims against the Company, is specifically authorized in section 217 the CBCA.

55. The remaining relief requested in the draft Orders is in furtherance of the liquidation and is necessary in order to carry out the liquidation in an efficient manner. In particular, a stay of proceedings is necessary to allow the Liquidator to effect an orderly and efficient liquidation and to carry out the Claims Process. Thus, the relief sought should be granted under the Court's discretionary power to make "any order it thinks fit" in connection with the liquidation.

56. As noted above, in *Coventree* and *Diversinet*, this Court granted a winding-up order substantively similar to the draft Liquidation Order in this case. In both cases, as in the case at bar, the corporation had no ongoing operating activities and the liquidation was voluntarily commenced by a resolution of shareholders.

D. The Liquidator and LWP Should Not Be Required to Comply with Part XIV of the CBCA

(a) *Part XIV of the CBCA Does Not Apply in a Liquidation*

57. In the normal course, under the CBCA, the directors of a corporation are required to, among other things, provide to the company's shareholders comparative financial statements, including an auditor's report, and appoint an auditor thereon, subject to certain exemptions. The Liquidator submits that these provisions do not apply in the case of a liquidation and dissolution.

CBCA, ss. 155(1), 156, 159(1) and 162

58. Part XVIII of the CBCA is comprised of a self-contained set of requirements that govern the liquidation and dissolution of a corporation. Given the comprehensive set of rights

and obligations that apply when a corporation is being liquidated and dissolved, it is reasonable to conclude that the requirements for appointing an auditor and the tabling of audited financial statements and any report of the auditor in the ordinary course do not apply in a liquidation.

59. Sections 211 and 215 of the CBCA expressly apply to a corporation being liquidated voluntarily. Section 217 of the CBCA applies to corporations being liquidated voluntarily or by order of the court. Nowhere in Part XVIII of the CBCA does it provide that a corporation that is being liquidated is required to present financial statements and an auditor's report to shareholders pursuant to subsections 155(1) or 159(1) of the CBCA or to otherwise ensure compliance with Part XIV. To the contrary, when Part XVIII of CBCA is read in conjunction with Part XIV of the CBCA, it is apparent that the two parts of the CBCA are intended to operate in exclusion to one another.

60. For instance, subsection 221(h) of the CBCA directs the liquidator to deliver to the Court and to the Director, at least once every year or more often as the Court may require, financial statements of the corporation in the form required by section 155 or in such other form as the liquidator may think proper or as the Court may require.

61. This Court previously confirmed in *Diversinet* that a corporation that is being liquidated under the OBCA is exempt from the requirements to provide audited financial statements and appoint an auditor under the corresponding provisions in the OBCA.

Diversinet, supra, Book of Authorities, Tab 1

(b) *The Shareholders Will Not Suffer Any Prejudice if the Relief Sought is Granted*

62. The CBCA protects the interests of the shareholders of an active corporation by providing them with certain interrelated rights, including the right to vote and the right to receive

information concerning the corporation. It is typically at the annual meeting where these rights are exercised. The shareholders generally exercise their vote on the basis of information that they have received about the performance of the corporation. As a result, the shareholders are entitled to receive an accounting from the directors of the corporation concerning the manner in which they have conducted the business and affairs of the corporation. Such an accounting is provided when the financial statements, together with the auditor's report verifying the accuracy of such financial statements, are presented at the annual meeting of the shareholders.

**Igor Ellyn & Karine de Champlain, "Shareholders' Remedies in Canada"
(Paper delivered at the Conference of the Centre for International Legal
Studies, Whistler, April 2005) at 2-6, Book of Authorities, Tab 10**

63. The Supreme Court of Canada in *Hercules Managements Ltd. v. Ernst & Young* made the following observations about the rights exercisable by shareholders at an annual meeting:

[T]he directors of a corporation are required to place the auditor's report before the shareholders at the annual meeting in order to permit the shareholders, as a body, to make decisions as to the manner in which they want the corporation to be managed, to assess the performance of the directors and officers, and to decide whether or not they wish to retain the existing management or to have them replaced.

***Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165 at para. 49,
Book of Authorities, Tab 9**

64. In a liquidation, such oversight and shareholder rights no longer have any meaning. As noted by Kevin McGuinness in *Canadian Business Corporations Law*:

The two basic rights of the shareholders in a liquidation of a corporation are: (1) to insist upon an accounting by the liquidator of his or her conduct of the liquidation and the property of the corporation disposed of; and (2) after application of the property of the corporation in satisfaction of all of its debts, obligations and other liabilities, to receive a ratable distribution among themselves of the remaining property of the corporation, according to the rights and interests of each shareholder concerned in the corporation.

**Kevin P McGuinness, *Canadian Business Corporations Law*, 2nd ed
(Markham: LexisNexis Canada Inc, 2007) at 1597, Book of Authorities, Tab
11**

65. Part XVIII of the CBCA explicitly provides for these two basic rights.

CBCA, ss. 221(h) and (i)

66. The Company's shareholders have received, and will continue to receive throughout the course of the liquidation, information relating to the conduct of the Liquidator and the assets of LWP disposed of. Specifically, the Liquidator is required by section 4.4 of the Liquidation Plan to report to the shareholders at such times as it deems appropriate with respect to matters relating to the assets, LWP and such other matters as may be relevant to the Liquidation Plan. The Liquidator has established a website in respect of LWP where it will regularly post information pertaining to the liquidation, including all material court filings, press releases and notices. In addition, the Liquidator is required to report to this Court on matters relating to the liquidation of LWP from time to time, which reports will be made publicly available on the Liquidator's website. Lastly, subsection 4.2(m) of the Liquidation Plan requires the Liquidator to make an account showing the manner in which the liquidation has been conducted and the assets disposed of.

First Report, Application Record, Tab 2, para. 8.0.2 and Appendix "C"

67. Furthermore, the only financial information that is relevant to the shareholders at this stage of the liquidation relates to the estimated amount of any future distribution, which is a function of the value of the assets held by LWP and the status of any Claims (as defined in the draft Claims Procedure Order). The assets and liabilities of LWP can easily be determined for this purpose without the need to engage an auditor to verify the accuracy of such information. As described above, LWP has ceased any business activities and/or operations and its only assets consist of cash, cash equivalents, accounts receivable and potential tax refunds. As a result of the proposed Claims Process, any claims of LWP's creditors will be made known to the Liquidator

or will be barred pursuant to the draft Claims Procedure Order. The shareholders will be able to review reports to the Court on the status of Claims as part of the Liquidator's ongoing reporting obligations.

68. Therefore, the Liquidator submits that the rights ordinarily afforded to the shareholders under Part XIV of the CBCA are either wholly supplanted by Part XVIII of the CBCA or are no longer applicable due to the liquidation of the Company. As a result, it is submitted that the relief requested will not prejudice LWP's shareholders.

(c) ***It Would Not be Commercially Reasonable to Require LWP or the Liquidator to Comply with Part XIV of the CBCA***

69. As Kevin McGuinness observes, "There is an implicit intent in any liquidation proceeding that it be concluded as quickly as the circumstances will allow - ideally with the minimum of expense consistent with the prudent administration of the corporation and the closure of its estate."

McGuinness, *supra* at 1579, 1584, Book of Authorities, Tab 11

70. The shareholders of LWP will suffer prejudice if the Company or the Liquidator are required to expend considerable time and expense in engaging an auditor to prepare financial statements and an auditor's report thereon. As described above, the business and financial affairs of LWP have evolved to the point where the presenting of financial statements and an auditor's report thereon have limited relevance, if any, to LWP and its stakeholders. Thus, the cost and time involved in complying with such obligations are no longer commercially reasonable and would only serve to diminish the amount available for distribution to the shareholders.

PART IV- NATURE OF THE ORDER SOUGHT

71. The Liquidator therefore respectfully requests Orders substantially in the form of the draft Liquidation Order attached as Schedule "A" and the draft Claims Procedure Order attached as Schedule "B" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2016.



Marc Wasserman



Sonja Pavic

SCHEDULE "A"

LIST OF AUTHORITIES

Case Law

Tab Case

1. *Re Diversinet Corp*, Winding-Up Order and Endorsement of Justice Morawetz granted October 18, 2013, Toronto CV-13-10282-00CL (ONSC [Commercial List])
2. *Re Coventree Inc (Liquidator of)*, Winding-Up Order and Endorsement granted February 15, 2012, Toronto CV-12-9594-00CL (ONSC [Commercial List])
3. *Penson Financial Services Canada Inc (Syndic de)*, Order granted February 1, 2013, Montreal No. 500-11-044039-135 (QSC [Commercial Division]); 2014 QCCS 4078
4. *Construction Frank Catania et Associés inc (Syndic de)*, Liquidation Order granted September 18, 2014, Montreal No. 500-11-047375-148 (QSC [Commercial Division]); 2014 QCCS 4359
5. *Re ACE Aviation Holdings Inc*, Order granted June 28, 2012, Montreal No. 500-11-042912-127 (QSC [Commercial Division])
6. *United Fuel Investments Ltd, Re*, [1963] SCR 397, 40 DLR (2d) 1, aff'g [1962] OR 162, 31 DLR (2d) 331 (ONCA)
7. *Hollinger v Hollinger*, 2012 QCCA 1682
8. *Falus v Martap Developments 87 Ltd*, 2013 ONSC 4115 (Div Ct)
9. *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165

Secondary Sources

Tab Secondary Source

10. Igor Ellyn & Karine de Champlain, "Shareholders' Remedies in Canada" (Paper delivered at the Conference of the Centre for International Legal Studies, Whistler, April 2005)
11. Kevin P McGuinness, *Canadian Business Corporations Law*, 2nd ed (Markham: LexisNexis Canada Inc, 2007)

SCHEDULE "B"

CANADA BUSINESS CORPORATIONS ACT

R.S.C., 1985, c. C-44, as amended

2.(1) [...]

"corporation"

« société par actions » ou « société »

"corporation" means a body corporate incorporated or continued under this Act and not discontinued under this Act;

[...]

Annual financial statements

155. (1) Subject to section 156, the directors of a corporation shall place before the shareholders at every annual meeting

(a) comparative financial statements as prescribed relating separately to

(i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting, and

(ii) the immediately preceding financial year;

(b) the report of the auditor, if any; and

(c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

1974-75-76, c. 33, s. 149; 1978-79, c. 9, s. 1(F).

[...]

Exemption

156. The Director may, on application of a corporation, authorize the corporation to omit from its financial statements any item prescribed, or to dispense with the publication of any particular financial statement prescribed, and the Director may, if the Director reasonably believes that disclosure of the information contained in the statements would be detrimental to the corporation, permit the omission on any reasonable conditions that the Director thinks fit.

R.S., 1985, c. C-44, s. 156; 2001, c. 14, s. 74.

[...]

Copies to shareholders

159. (1) A corporation shall, not less than twenty-one days before each annual meeting of shareholders or before the signing of a resolution under paragraph 142(1)(b) in lieu of the annual meeting, send a copy of the documents referred to in section 155 to each shareholder, except to a

shareholder who has informed the corporation in writing that he or she does not want a copy of those documents.

R.S., 1985, c. C-44, s. 159; 2001, c. 14, s. 135(E).

[...]

Appointment of auditor

162. (1) Subject to section 163, shareholders of a corporation shall, by ordinary resolution, at the first annual meeting of shareholders and at each succeeding annual meeting, appoint an auditor to hold office until the close of the next annual meeting.

Eligibility

(2) An auditor appointed under section 104 is eligible for appointment under subsection (1).

Incumbent auditor

(3) Notwithstanding subsection (1), if an auditor is not appointed at a meeting of shareholders, the incumbent auditor continues in office until a successor is appointed.

Remuneration

(4) The remuneration of an auditor may be fixed by ordinary resolution of the shareholders or, if not so fixed, may be fixed by the directors.

1974-75-76, c. 33, s. 156; 1978-79, c. 9, ss. 1(F), 48.

[...]

Application of Part

208. (1) This Part, other than sections 209 and 212, does not apply to a corporation that is an insolvent person or a bankrupt as those terms are defined in subsection 2(1) of the Bankruptcy and Insolvency Act.

R.S., 1985, c. C-44, s. 208; 1992, c. 27, s. 90; 2001, c. 14, s. 101.

[...]

211. [...]

Shareholders resolution

(3) A corporation may liquidate and dissolve by special resolution of the shareholders or, where the corporation has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote.

[...]

Supervision by court

(8) The Director or any interested person may, at any time during the liquidation of a corporation, apply to a court for an order that the liquidation be continued under the supervision of the court as provided in this Part, and on such application the court may so order and make any further order it thinks fit.

R.S., 1985, c. C-44, s. 211; 2001, c. 14, s. 104.

[...]

Application for supervision

215. (1) An application to a court to supervise a voluntary liquidation and dissolution under subsection 211(8) shall state the reasons, verified by an affidavit of the applicant, why the court should supervise the liquidation and dissolution.

1974-75-76, c. 33, s. 208; 1978-79, c. 9, s. 1(F).

[...]

Powers of court

217. In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order to liquidate;
- (b) an order appointing a liquidator, with or without security, fixing the liquidator's remuneration and replacing a liquidator;
- (c) an order appointing inspectors or referees, specifying their powers, fixing their remuneration and replacing inspectors or referees;
- (d) an order determining the notice to be given to any interested person, or dispensing with notice to any person;
- (e) an order determining the validity of any claims made against the corporation;
- (f) an order, at any stage of the proceedings, restraining the directors and officers from
 - (i) exercising any of their powers, or
 - (ii) collecting or receiving any debt or other property of the corporation, and from paying out or transferring any property of the corporation, except as permitted by the court;
- (g) an order determining and enforcing the duty or liability of any present or former director, officer or shareholder
 - (i) to the corporation, or
 - (ii) for an obligation of the corporation;
- (h) an order approving the payment, satisfaction or compromise of claims against the corporation and the retention of assets for such purpose, and determining the adequacy of provisions for the payment or discharge of obligations of the corporation, whether liquidated, unliquidated, future or contingent;
- (i) an order disposing of or destroying the documents and records of the corporation;
- (j) on the application of a creditor, the inspectors or the liquidator, an order giving directions on any matter arising in the liquidation;
- (k) after notice has been given to all interested parties, an order relieving a liquidator from any omission or default on such terms as the court thinks fit and confirming any act of the liquidator;
- (l) subject to section 223, an order approving any proposed interim or final distribution to shareholders in money or in property;

- (m) an order disposing of any property belonging to creditors or shareholders who cannot be found;
- (n) on the application of any director, officer, security holder, creditor or the liquidator,
 - (i) an order staying the liquidation on such terms and conditions as the court thinks fit,
 - (ii) an order continuing or discontinuing the liquidation proceedings, or
 - (iii) an order to the liquidator to restore to the corporation all its remaining property; and
- (o) after the liquidator has rendered a final account to the court, an order dissolving the corporation.

R.S., 1985, c. C-44, s. 217; 2001, c. 14, ss. 108, 135(E); 2011, c. 21, s. 62(F).

[...]

Duties of liquidator

221. A liquidator shall [...]

- (h) deliver to the court and to the Director, at least once in every twelve month period after appointment or more often as the court may require, financial statements of the corporation in the form required by section 155 or in such other form as the liquidator may think proper or as the court may require; and
- (i) after the final accounts are approved by the court, distribute any remaining property of the corporation among the shareholders according to their respective rights.

R.S., 1985, c. C-44, s. 221; 2001, c. 14, ss. 109, 135(E).

ONTARIO BUSINESS CORPORATIONS ACT

R.S.O. 1990, c. B-16, as amended

207. [...]

Court order

(2) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit.

R.S.O. 1990, c. B.16, s. 207 (2).

IN THE MATTER OF THE LIQUIDATION OF LWP CAPITAL INC. PURSUANT TO SECTION 211 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

and

KSV ADVISORY INC. IN ITS CAPACITY AS LIQUIDATOR OF LWP CAPITAL INC.

APPLICANT

Court File No. CV-16-11242-00CL

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

PROCEEDING COMMENCED AT
TORONTO

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