

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

**IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, C. B.16, AS
AMENDED**

**AND IN IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C., 1985, C. C-44, AS AMENDED**

**AND IN THE MATTER OF A WINDING UP OF
FIRST HAMILTON HOLDINGS INC., FIRST HAMILTON FINANCIAL SERVICES
INC., FIRST HAMILTON CAPITAL INC., FIRST HAMILTON GENERAL PARTNER 2
INC., and FIRST HAMILTON MORTGAGE BROKERS INC.**

Applicants

FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. First Hamilton Holdings Inc. (“**FHH**”) makes this application on behalf of itself and its subsidiaries, First Hamilton Financial Services Inc. (“**FHFS**”), and First Hamilton General Partner 2 Inc. (“**FHGP2**”) pursuant to the *Ontario Business Corporations Act* (the “**OBCA**”); and (b) First Hamilton Capital Inc. (“**FHC**”) and First Hamilton Mortgage Brokers Inc. (“**FHMB**” and, together with FHH, FHFS, FHGP2 and FHC, the “**FHH Entities**”) pursuant to the *Canada Business Corporations Act* (Canada) (the “**CBCA**”), for, among other things:

- (a) An order for a voluntary winding-up of FHH and its subsidiaries under the supervision of this Court;
- (b) An order appointing MNP Ltd. (“**MNP**”) as liquidator of the FHH Entities;
- (c) granting a priority charge over the assets, properties and undertakings of the FHH Entities (collectively, the “**Property**”) to secure the fees and disbursements of the Liquidator, its counsel, and counsel to the FHH Entities in respect of this Application (the “**Administration Charge**”); and
- (d) staying all proceedings and remedies taken or which might be taken in respect of the FHH Entities, or any of their property, except upon leave of this Court being granted, or as otherwise provided.

2. The court-supervised winding-up of the FHH Entities is in the best interest of creditors, shareholders and other parties and, accordingly, is just and equitable in the circumstances. The other relief requested is ancillary to and in furtherance of the winding-up of the FHH Entities.

3. Accordingly, FHH respectfully submits that this application be granted.

PART II – FACTS

4. The facts relevant to the application for court supervision of the voluntary winding-up of the FHH Entities are set out in the Affidavit of Joseph Thomson sworn May 19, 2020.

PART III – ISSUES

5. The primary issue to be determined on this application is whether a court-supervised winding-up, in the nature of the draft Winding-Up Order, should be granted.

PART IV – LAW AND ARGUMENT

6. Pursuant to subsection 207(1) (b) of the OBCA, an Ontario corporation may be wound up by order of the Court in the following circumstances:

(b) where the court is satisfied that,

(ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,

...

(iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

(c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation.

[OBCA, s.207\(1\)](#)

7. Similarly, subsection 214(2)(b) of the CBCA provides that a winding-up with respect to a federal corporation (in this case, FHC and FHMB) may be made under court supervision upon application where the applicant explains why the Court should supervise the liquidation and dissolution of the corporation.

[CBCA, s. 214\(2\)\(b\)](#)

8. In the case at bar, the Court should order the court-supervised winding-up of the FHH Entities for any one or more of the following reasons: (a) it is in furtherance of the resolution of the directors of the FHH Entities, and the consent of shareholders holding more than 80 % of the shares entitled to vote upon a resolution for the winding up of FHH; (b) it is just and equitable; and (c) it is in the best interests of the FHH Entities' stakeholders.

The Winding-Up Should be Court-Supervised in Furtherance of the Directors' Resolution and Majority Shareholder Consent

9. In *Fallis v. United Fuel Investments, Ltd.*, the Supreme Court of Canada considered subsection 10(b) of what was then the *Federal Winding-up Act*, R.S.C. 1952, c. 296 (the “**Winding-up Act**”), a provision that is functionally equivalent to subsection 207(1)(c) of the OBCA and 211(8) of the CBCA. Subsection 10(b) of the Winding-Up Act 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.” The Court of Appeal for Ontario granted the winding-up order, holding that where such a resolution 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 right to decide that a corporation be wound up under the purview of the Court rests with the majority shareholders. The Supreme Court of Canada went on to hold that there were only “minor examples of the exercise of discretion” under subsection 10(b) of the old Winding-up Act.

[Fallis v. United Fuel Investments, Ltd., \[1963\] S.C.J. No. 39, pgs. 8-9 \[Fallis\]](#)

10. Given the similarity between subsection 10(b) of the Winding-up Act and the OBCA and CBCA with respect to shareholder approval, FHH respectfully submits that the holding in *Fallis* is applicable to the case bar.

11. The board of directors of FHH has approved this application seeking the court-supervised wind-up of FHH and its direct subsidiaries.

12. In addition, shareholders of FHH, representing approximately 80.2% of the votes which could be cast in respect of a special resolution, have consented to FHH applying to the Ontario Superior Court of Justice seeking the court-supervised wind-up of FHH and its direct subsidiaries.

13. Although FHH is confident that a special resolution authorizing the court-supervised winding up of FHH and its subsidiaries would be passed if sought, FHH is concerned about the length of time that it would take to proceed with a special resolution to implement a winding-up of the FHH Entities.

14. The OBCA defines “special resolution” as a resolution approved (i) by a written resolution of all of the shareholders entitled to vote or (ii) by holders holding 66 2/3% of the voting shares cast at a meeting duly called for the purpose of considering the resolution. The OBCA also requires that at least ten days’ prior notice of the shareholders’ meeting be given to all shareholders holding voting shares.

[OBCA, ss. 1\(1\),96\(1\)](#)

15. In the case of FHH, two of the seven holders of the class B voting shares entitled to vote on the winding up of FHH hold their class B voting shares of FHH through brokerage accounts at LBS. If FHH were to ask all shareholders holding voting shares to sign such a special resolution, there would be significant delays due to the need to get proxies from LBS, for the 2 minor holders of class B voting shares held on their behalf in LBS accounts.

16. Similarly, if FHH were to call a shareholders meeting of all holders of class B voting shares, such a meeting could not be held for at least ten days after the mailing of the notice calling the

shareholders' meeting and proxies would need to be pursued by shareholders holding their shares in brokerage accounts.

17. FHH and its subsidiaries desire to implement an orderly wind-up under a court-supervised winding up. However, it is impractical to seek a special resolution of FHH Class B voting shares in the circumstances in light of the attendant delays in pursuing a special resolution.

It is Just and Equitable that the PSC Entities be Wound-Up

18. In addition to the Court's ability to rely on the consent of the directors and majority of the shareholders in granting the Order, the OBCA and the CBCA also give the Court the jurisdiction to order the winding-up of a corporation where it is "just and equitable".

[OBCA, s. 207\(1\)\(b\)\(iv\); CBCA, s. 214\(1\)\(b\)\(ii\)](#)

19. This Court has held that the words "just and equitable" in subsection 207(1)(b)(iv) of the OBCA "are words of the widest significance that must be given a broad interpretation". Whether it is, in fact, just and equitable that a corporation be wound up depends on the particular facts of each case.

[West Van Inc. v. Beswick Group Holding, 2008 CanLII 40139 \(ONSC\), paras. 22-23](#)

20. A corporation may be wound up where the corporation's "substratum", or purpose, has disappeared or been exhausted. Put simply, where it is not possible for a corporation to carry on the real business for which it was formed, a winding-up order may be appropriate.

[Sound Advice Inc. \(Trustee of\) v. 358074 Ontario Ltd. \(1984\), 5 O.A.C. 288 \(Div. Ct.\)](#)

It is in the Interest of FHH Entities' Stakeholders That the Voluntary Winding-Up Continue under the Supervision of this Court

21. Having the winding-up of the FHH Entities brought under the supervision of this Court will (a) facilitate the liquidator's ability to develop and implement the steps for the liquidation, including a claims process, if required; (b) provide for an ability to efficiently enforce the steps required to liquidate the FHH Entities and any corresponding ancillary relief provided in the OBCA (in the case of FHH, FHFS, and FHGP2) or CBCA (in the case of FHC and FHMB) in connection with the liquidation as against any third parties; (c) afford the liquidator the ability to seek the advice and directions of the Court should that become necessary under the circumstances; and (d) afford the liquidator certain protection in carrying out the liquidation.

22. These tools are particularly necessary in the present circumstances where the continuation of FHH's business is no longer viable given the recent Order of this court directing the court-supervised winding up of PSC, which managed the portfolio of investments on behalf of FHH.

The Draft Winding-Up Order Should Be Granted

23. On an application for court-supervision of a voluntary winding-up, both the OBCA and the CBCA provide the court with the broad jurisdiction to make any order it thinks fit. The statutes provide the Court with broad discretion to fashion any order necessary to achieve a fair and equitable result based on the facts of the case before it.

[OBCA, s. 207\(2\); CBCA, s. 217](#)

[Manitou Gold Inc. v. Kenwest Mines Limited, 2009 CanLII 69797 \(ON SC\) at para. 18](#)

24. In addition to an order that the winding-up of FHH Entities be carried out under the supervision of the Court, the draft Winding-Up Order contains the customary and usual provisions

applied in a receivership. Much of the relief requested, including approving and affirming the appointment of MNP as Liquidator, are specifically authorized by the OBCA and the CBCA.

[OBCA, s. 210; CBCA, s. 217\(b\)](#)

25. For example, the stay of proceedings sought is specifically authorized by the OBCA and implicitly authorized by the CBCA, which provides that the powers listed in the federal statute are not exhaustive and in no way limit the generality of the power of the Court to make any order it sees fit.

[OBCA, s. 216; CBCA, s. 217\(b\)](#)

26. In the cases of *Re Coventree Inc.* and *Re Diversinet Corp.*, the shareholders of those companies had passed special resolutions approving their voluntary wind-up pursuant to section 193 of the OBCA. In both cases, Morawetz J. approved the orders sought providing the same or similar relief sought on this application.

[*Re Coventree Inc. \(15 February 2012\), Toronto CV-12-9594-OOCL*](#)

[*Re Diversient Corp \(17 October 2013\), Toronto CV-13-10282-OOCL*](#)

27. Lastly, the proposed order also provides that Laurentian Bank Securities (“**LBS**”) cannot effect transactions in FHH accounts. The funds and assets in FHH’s accounts at LBS are the companies’ sole or substantial source of funds to fund the liquidation. Accordingly, as such funds and assets will be subject to the Administration Charge, it is appropriate that LBS not take any steps with respect to the funds and assets that would be prejudicial to the Liquidator’s ability to carry out an organized, structured wind-down for the benefit of all of the stakeholders of FHH, including the preferred shareholders.

PART V – RELIEF REQUESTED

28. FHH respectfully requests that this Court grant order substantially in the form of the draft Winding-Up Order filed in its Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2020



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SCHEDULE “A”
LIST OF AUTHORITIES

1. *Fallis v. United Fuel Investments, Ltd.*, [1963] S.C.J. No. 39
2. *West Van Inc. v. Beswick Group Holding*, 2008 CanLII 40139 (ONSC)
3. *Sound Advice Inc. (Trustee of) v. 358074 Ontario Ltd.* (1984), 5 O.A.C. 288 (Div. Ct.)
4. *Manitou Gold Inc. v. Kenwest Mines Limited*, 2009 CanLII 69797 (ON SC)
5. *Re Coventree Inc.* (15 February 2012), Toronto CV-12-9594-OOCL
6. *Re Diversient Corp* (17 October 2013), Toronto CV-13-10282-OOCL

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS

Business Corporations Act, (Ontario) RSO 1990, c B.16

Winding up by court

207 (1) A corporation may be wound up by order of the court,

(a) where the court is satisfied that in respect of the corporation or any of its affiliates,

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) where the court is satisfied that,

(i) a unanimous shareholder agreement entitled a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred,

(ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,

(iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue its business and it is advisable to wind it up, or

(iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

(c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation. R.S.O. 1990, c. B.16, s. 207 (1).

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).

Definitions and interpretation

1 (1) In this Act,

“special resolution” means a resolution that is,

(a) submitted to a special meeting of the shareholders of a corporation duly called for the purpose of considering the resolution and passed, with or without amendment, at the meeting by at least two-thirds of the votes cast, or

(b) consented to in writing by each shareholder of the corporation entitled to vote at such a meeting or the shareholder’s attorney authorized in writing; (“résolution spéciale”)

Notice of shareholders’ meetings

96 (1) Notice of the time and place of a meeting of shareholders shall be sent, in the case of an offering corporation, not less than twenty-one days and, in the case of any other corporation, not less than ten days, but, in either case, not more than fifty days, before the meeting,

(a) to each shareholder entitled to vote at the meeting;

(b) to each director; and

(c) to the auditor of the corporation. R.S.O. 1990, c. B.16, s. 96 (1).

Appointment of liquidator

210 (1) The court in making the winding-up order may appoint one or more persons as liquidator of the estate and effects of the corporation for the purpose of winding up its business and affairs and distributing its property. R.S.O. 1990, c. B.16, s. 210 (1).

Proceedings against corporation after court winding up

216 After the commencement of a winding up by order of the court,

(a) no action or other proceeding shall be proceeded with or commenced against the corporation; and

(b) no attachment, sequestration, distress or execution shall be put in force against the estate or effects of the corporation,

except by leave of the court and subject to such terms as the court imposes. R.S.O. 1990, c. B.16, s. 216.

Canada Business Corporations Act, RSC 1985, c C-44

Further grounds

214 (1) A court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,

(a) if the court is satisfied that in respect of a corporation or any of its affiliates

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) if the court is satisfied that

(i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or

(ii) it is just and equitable that the corporation should be liquidated and dissolved.

Alternative order

(2) On an application under this section, a court may make such order under this section or section 241 as it thinks fit.

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.

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Court File No.:

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**ONTARIO
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Proceeding commenced at Toronto

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