



District of British Columbia
Division No.:03-Vancouver
Court No.: B-240300
Estate No.: 11-3089419
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF CLOUD DIAGNOSTICS CANADA ULC**

NOTICE OF APPLICATION

**Name of applicant: Cloud Diagnostics Canada ULC (the "Applicant") or
("Cloud DX")**

To: The Service List

TAKE NOTICE that an application will be made by the Applicant to the presiding judge or associate judge at the courthouse at the Vancouver Law Courts, 800 Smithe Street, Vancouver, British Columbia V6Z 2E1 on June 28, 2024 at 9:45 a.m. for the order set out in Part 1 below.

The applicant estimates that the application will take 10 minutes.

This matter is not within the jurisdiction of an associate judge.

Part 1: ORDER SOUGHT

1. An Order substantially in the form attached hereto as Schedule "A":
 - a) abridging the time for service of this Notice of Application;
 - b) approving an interim lending facility agreement to be entered into by Cloud DX (the "**Third DIP Loan Agreement**"), in the amount of \$700,000 and granting a charge (the "**Third DIP Charge**") on the assets, undertakings and properties of Cloud DX in favour of the lenders in their capacity as such under the DIP Loan Agreement (collectively the "**Third DIP Lender**"), ranking ahead of all other charges other than the Administration Charge as defined in the order of Madam Justice Sharma made herein on June 11, 2024;

2. Cloud DX may also seek such further and other relief as counsel may advise this Honourable Court.

Part 2: FACTUAL BASIS

Parties and Business

1. Cloud DX is an unlimited liability company registered and in good standing under the laws of the Province of British Columbia.
2. On June 5, 2024, Cloud DX filed a notice of intention to file a proposal under section 50.4 of the *Bankruptcy and Insolvency Act* (Canada). Crowe MacKay & Company Ltd. was appointed as the proposal trustee.
3. The relevant background facts relating to Cloud DX are set out in the notice of application for an Administration Charge and First DIP Charge filed herein on June 10, 2024, and in the affidavit #1 of Robert Kaul, filed herein on June 13, 2024.

Interim Financing and DIP Charges

4. Cloud DX requires interim financing to continue operating through these proceedings and to advance an eventual sales process, with a view to maintaining going concern value and formulating and presenting a proposal to Cloud DX's creditors. Funding is required to pay Cloud DX's employees, suppliers and other obligations including restructuring costs, insurance, and professional fees in these proceedings.
5. In consultation with the Proposal Trustee, Cloud DX has prepared a cash flow statement pursuant to s.50.4(2)(a) of the BIA (the "**Cash Flow Statement**"). The Cash Flow Statement was attached to the report of the Proposal Trustee filed in these proceedings, demonstrating that Cloud DX requires funding for its operations and expenses. However, since the Cash Flow Statement was drafted, Cloud DX has become aware that the premium that is required to pay for directors and officers insurance is higher than anticipated. Accordingly, with the

approval of the Proposal Trustee, Cloud DX seeks a third tranche of interim financing in the amount of \$700,000 instead of \$450,000.

First DIP Charge

6. As contemplated by the Cash Flow Statement, Cloud DX obtained an agreement for interim financing in the amount of \$120,000 (the "**First DIP Loan**").
7. By way of an order made by Madam Justice Sharma on June 11, 2024 herein, an interim financing charge of \$120,000 over the property of Cloud DX has been ordered (the "**First DIP Charge**") as contemplated by the Cash Flow Statement. The lenders have advanced funds to Cloud DX pursuant to the First DIP Charge in accordance with the First DIP Loan, and the funds advanced were used for payroll and costs to service customers. Due to the need for immediate funds on very short notice, Cloud DX did not seek an order, and the lenders agreed that their loan would not have priority over CRA.

Second DIP Charge

8. As contemplated by the Cash Flow Statement, Cloud DX obtained an agreement for interim financing in the amount of \$400,000 (the "**Second DIP Loan**").
9. By way of an order made by Mister Justice Kent on June 14, 2024 herein, an interim financing charge of \$400,000 over the property of Cloud DX has been ordered (the "**Second DIP Charge**") as contemplated by the Cash Flow Statement. The lenders have advanced funds to Cloud DX pursuant to the First DIP Charge in accordance with the First DIP Loan, and the funds advanced were used for payroll and costs to service customers.

Third DIP Charge

10. Cloud DX requires further interim financing, and has now secured an agreement with lenders for a third tranche of interim financing (the "**Third DIP Loan**").

11. A true copy of the term sheet for the Third DIP Loan is attached to the Affidavit #3 of Robert Kaul, sworn herein.
12. The lenders under the First DIP Loan and the Second DIP Loan have consented to the Third DIP Loan and Third DIP Charge having priority over the First DIP Loan, the First DIP Charge, the Second DIP Loan, and the Second DIP Charge.
13. Given the intangible and specialized nature of Cloud DX's business and assets, its greatest value is as a going concern, and the best option to achieve value for stakeholders (including creditors and employees) is to allow Cloud DX to eventually advance a sales process in these proceedings. In order to do so, Cloud DX requires the DIP loans contemplated by the Cash Flow Statements and the trustee's report filed herein, including the Second DIP Loan to meet its obligations and maintain value.
14. The financing sought under the Third DIP Loan is particularly urgent as it is required in order to maintain operations and continue as a going concern. The financing is necessary in order for Cloud DX to remain operating. The amount sought is consistent with the Cash Flow Statement.

Part 3: LEGAL BASIS

1. Cloud DX relies upon:
 - a) BIA, Part III Division I;
 - b) *Bankruptcy and Insolvency Rules*, C.R.C., c. 368, Rules 11 – 13;
 - c) *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as amended, Rule 8-5;
 - d) the inherent jurisdiction of this Honourable Court; and
 - e) such further and other legal basis as counsel may advise and this Honourable Court may allow.

Abridged Service

2. Pursuant to Rule 8-5 of the *Supreme Court Civil Rules*, this Honourable Court may order that an application be heard on short notice, thereby abridging the time for service of the application.

Supreme Court Civil Rules, Rule 8-5

3. In the circumstances, Cloud DX believes that no creditor will be materially prejudiced by an order for short notice, and for the reasons set out in the affidavit #3 of Robert Kaul, Cloud DX believes that it needs to work very expeditiously to make progress with the SISP.

DIP Charge

4. Section 64.2 of the BIA authorizes the Court to grant a priority charge in respect of the Proposal Trustee, its counsel, and counsel for Cloud DX.
5. Section 50.6 of the BIA authorizes the Court to approve interim financing and order a priority charge as security for amounts advanced to a debtor in respect of the financing.
6. The approval by the court of DIP charge is a matter of discretion and is fact dependent: *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd.*, 2021 ABCA 66, para. 19. Factors will include the risks inherent in the circumstances, relative prejudice and options available for further financing. The benefits of a restructuring relative to a bankruptcy are also relevant.
7. In this case, the order sought is for a reasonable amount. The prejudice to creditors of the orders sought is minimal. The prejudice to the clients of Cloud DX if it is required to suddenly cease operations is profound. There are no known options for other financing immediately available. On a bankruptcy, the value to creditors will be minimal, whereas there is a reasonable prospect of recovery if there is a successful restructuring.

Part 4: MATERIAL TO BE RELIED ON

1. At the hearing of this Application, the applicant will rely on:
 - a) Affidavit #1 of Robert Kaul, filed June 13, 2024 (redacted);
 - b) The First Report of the Proposal Trustee, filed June 10, 2024;
 - c) Affidavit #2 of Robert Kaul, sworn June 13, 2024;
 - d) Affidavit #3 of Robert Kaul, sworn June 26, 2024;
 - e) Affidavit #2 of Jonathan McNair, sworn June 26, 2024;
 - f) Affidavit #2 of Kim MacDonald, sworn June 26, 2024; and
 - g) such further and other materials as counsel may advise and this Honourable Court may allow.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- a) file an application response in Form 33,
- b) file the original of every affidavit, and of every other document, that
 - i) you intend to refer to at the hearing of this application, and
 - ii) has not already been filed in the proceedings, and
- c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - i) a copy of the filed application response;
 - ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: June 26, 2024

Thomas W. Deneka FOR
Signature of lawyer for applicant
Jonathan L. Williams

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

Signature of [] Judge
[] Associate Judge

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- none of the above

Schedule "A"

District of British Columbia
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ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE)
) 28/JUN/2024
)

THE APPLICATION of Cloud Diagnostics Canada ULC ("Cloud DX"), coming on for hearing at Vancouver, British Columbia on the 28th day of June, 2024, AND ON HEARING Thomas W. Deneka, counsel for Cloud DX, and those other counsel listed in Schedule "A" hereto; AND UPON READING the material filed AND PURSUANT TO the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 as amended (the "BIA") and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS THAT:

Service

1. The time for service of the Notice of Application and materials referred to herein be and is hereby abridged and the Notice of Application is properly returnable today.

Interim Financing Charge

2. Cloud DX is authorized and empowered to borrow pursuant to a term sheet for interim financing dated for reference June 26, 2024 (the "**Third DIP Loan Agreement**") between Cloud DX, as borrower, and Brad Miller, Mitchell Wynne, Guarav Puri and

Constatine Zachos, collectively, as lender (in such capacity, the "**Third DIP Lender**"). Cloud DX is authorized and empowered to perform its obligations under the Third DIP Loan Agreement (subject to obtaining such Court and other approvals as may be required in connection with any step or transaction contemplated therein) and to obtain and borrow under the Third DIP Loan Agreement, provided that borrowing under such credit facility shall not exceed the principal amount of \$700,000.00.

3. Cloud DX is authorized and empowered to execute and deliver such mortgages, charges, hypothecs and security documents and other definitive documents (such documents, together with the Third DIP Loan Agreement, collectively, the "**Definitive Documents**"), as are contemplated by the Third DIP Loan Agreement or as may reasonably be required by the Third DIP Lender pursuant to the terms thereof, and Cloud DX is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Third DIP Lender under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provisions of this Order.
4. The Third DIP Lender shall be entitled to the benefit of and is granted a charge (the "Third DIP Charge") on the Charged Property, which Third DIP Charge shall not secure an obligation that exists before this Order is made. The Third DIP Charge shall attach to the Charged Property and shall secure all obligations under the Definitive Documents.
5. Notwithstanding any other provisions of this Order, the Third DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Third DIP Charge or any of the Definitive Agreements.
6. All claims of the Third DIP Lender pursuant to the Definitive Documents are not claims that may be compromised pursuant to any proposal under the BIA filed by Cloud DX without the consent of the Third DIP Lender and the Third DIP Lender shall be treated as unaffected in any proposal filed by Cloud DX under the BIA with respect to any obligations outstanding to the Third DIP Lender under or in respect of the Definitive Documents.

Validity and Priority of Charges Created by this Order

7. The Administration Charge (as defined in paragraph 3 of the Order of Madam Justice Sharma, made June 11 2024 herein), the previous interim financing charge ordered by this Court on June 11, 2024 (the "**First DIP Charge**"), the Second DIP Charge (as defined in paragraph 2 of the Order of Mister Justice Kent, made June 14, 2024 herein) (the "**Second DIP Charge**"), and the Third DIP Charge (together, the "**Charges**") each constitute a mortgage, security interest, assignment by way of security and charge on the Charged Property and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the "**Encumbrances**"), in favour of any person, notwithstanding the order of perfection or attachment, except that the First DIP Charge shall rank subordinate to the interest of the Canada Revenue Agency ("**CRA**") on account of unpaid source deductions owing by Cloud DX to CRA.
8. The priorities as among the Charges shall be:
 - First – the Administration Charge (\$200,000.00);
 - Second – the Third DIP Charge (\$700,000.00);
 - Third – the Second DIP Charge (\$400,000.00);
 - Fourth – (subject to CRA) - the First DIP Charge (\$120,000.00).
9. Any security documentation evidencing, or the filing, registration or perfection of, the Charges shall not be required, and the Charges shall be effective as against the Charged Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect such Charges.
10. The Charges and Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the beneficiaries of the Charges (the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy

order(s) issued pursuant to the BIA or any bankruptcy order made pursuant to such application(s); (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (each, an "Agreement") which binds Cloud DX, and notwithstanding any provision to the contrary in any Agreement:

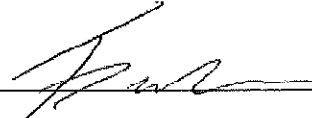
- a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or deemed to constitute a breach by Cloud DX of any Agreement to which it is a party;
- b) none of the Chargees shall have any liability to any person entity whatsoever as a result of any breach of any Agreement caused by or resulting from Cloud DX entering into the Definitive Documents, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and
- c) the payments made by Cloud DX pursuant to this Order, the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

11. The Charges created by this order over leases of real property in Canada shall only be a charge of Cloud DX's interest in such real property leases.

Endorsement

12. Endorsement of this Order by counsel appearing on this application, other than counsel for Cloud DX, is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND
CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS
BEING BY CONSENT:



Signature of
 Party Lawyer for the applicant

BY THE COURT

REGISTRAR

Schedule A – List of Counsel

Owen Bird Law Corporation
#2900 733 Seymour Street
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Attn: Jonathan Williams

Department of Justice Canada
900 840 Howe Street
Vancouver, BC V6Z 2S9
Attn: Christine Matthews

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Attn: Stewart Thom

Department of Justice Canada
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Attn: Aminollah Sabzevari

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