Estate No. 31-2008366
Court File No. 31-2008366

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ONE KENTON ALZHEIMER CENTER FOR EXCELLENCE (NON-PROFIT) INC.

BOOK OF AUTHORITIES
(Returnable June 26, 2015)

June 24, 2015

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1. *Electro Sonic Inc. (Re)*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List])

2. *In the Matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership,* Estate/Court File No. 32-1896275, Order of Justice Penny, dated August 6, 2014

3. *In the Matter of the Notices of Intention to Make a Proposal of Couch Commerce Inc., Menuplace.com Corporation, Dealfind.com Inc., and 8108773 Canada Inc.,* Estate/Court File No. 31-1906457, *et al,* Order of Justice Newbould, dated September 11, 2014

4. *Re Brainhunter,* 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List])

5. *Re Nortel Networks Corp.* (2009), 55 C.B.R.(5th) 229 (Ont. S.C.J. [Commercial List]

6. *In the Matter of the Notice of Intention of Colossus Minerals Inc.,* Estate/Court File No. CV14-10401-00CL, Order of Justice Wilton-Siegel, dated January 16, 2014

7. *In the Matter of the Notice of Intention of Starfield Resources,* Estate/Court File No. CV13-10034-00CL, Order of Justice Newbould, dated March 15, 2013

8. *Colossus Minerals Inc.(Re),* 2014 ONSC 514 (Ont. S.C.J. [Commercial List])

9. *In the Matter of the Proposal of True North Hardwood Plywood Inc.*, Estate/Court File No. 31-1813900, Order of Justice Newbould, dated December 19, 2013

10. *Canwest Publishing Inc.* 2010 ONSC 222 (Ont. S.C.J. [Commercial List])

11. *P.J. Wallbank Manufacturing Co.,* 2011 ONSC 7641 (Ont. S.C.J. [Commercial List])

12. *OVG Inc., Re,* 2013 ONSC 1794 (Ont. S.C.J. [Commercial List])

13. *Re Cantrail Coach Lines Ltd.* (2005), 10 CBR (5th)164 (B.C. Master)

14. *Re Cosgrove-Moore Bindery Services Ltd.* (2000), 17 C.B.R. (4th) 203

15. *Re H&H Fisheries Ltd.* (2005), 2005 NSSC 346 (N.S.S.C.)

16. *Re Baldwin Valley Investors* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List])

17. *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S.S.C.)

18. *Goldman Hotels v. Power Workers' Union* (2007), 34 C.B.R.(5th) 25 (Ont. S.C.J)

TAB

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2014 ONSC 942
Ontario Superior Court of Justice [Commercial List]

Electro Sonic Inc., Re

2014 CarswellOnt 1568, 2014 ONSC 942, 14 C.B.R. (6th) 256, 237 A.C.W.S. (3d) 585

In the Matter of the Notice of Intention to Make a Proposal of Electro Sonic Inc.

In the Matter of the Notice of Intention to Make a Proposal of Electro Sonic of America LLC

D.M. Brown J.

Heard: February 10, 2014
Judgment: February 10, 2014
Docket: 31-1835443, 31-1835488

Counsel: H. Chaiton for Applicants, Electro Sonic Inc. and Electro Sonic of America LLC
I. Aversa for Royal Bank of Canada

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Practice and procedure

Companies were owned by same parties and were involved in distribution of electronic and electrical parts — One company was Ontario corporation and other was Delaware corporation — On February 6, 2014, both companies filed notices of intention to make proposals pursuant to s. 50.4 of Bankruptcy and Insolvency Act (BIA) — Companies applied for administrative consolidation, administrative professionals charge, and authorization for proceedings in United States — Application granted — Court ordered administrative consolidation of two proceedings — There was possibility of applicants applying together at future dates for relief such as stay extensions and sale approvals, and companies shared same lender — Applicants were granted administrative charge in amount of $250,000 on property of companies to secure payment of reasonable fees and expenses of legal advisors and proposal trustee — Factors taken into account included: senior secured did not oppose granting of charge, operations of two companies were highly integrated, and Ontario company technically met BIA definition of "insolvent person" — Proposal trustee was authorized to apply to United States Bankruptcy Court for relief pursuant to Chapter 15 of United States Bankruptcy Code — Proposal trustee was most appropriate person to act as representative in respect of any proceeding under BIA for purpose of having it recognized in jurisdiction outside Canada.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Callidus Capital Corp. v. Xchange Technology Group LLC (2013), 2013 ONSC 6783, 2013 CarswellOnt 15133 (Ont. S.C.J. [Commercial List]) — referred to

Van Breda v. Village Resorts Ltd. (2012), 17 C.P.C. (7th) 223, 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 91 C.C.L.T. (3d) 1, 343 D.L.R. (4th) 577, 429 N.R. 217, 10 R.F.L. (7th) 1, (sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note), 291 O.A.C. 201, (sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572 (S.C.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2(1) "insolvent person" — considered

s. 50(1) — considered

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 279 — referred to

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
R. 3 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.04(1) — referred to

APPLICATION by companies for administrative consolidation, administrative professionals charge, and authorization for proceedings in United States.

***D.M. Brown J.*:**

I. Motions for administrative consolidation of NOI proceedings, an Administrative Professionals Charge and authorization to initiate Chapter 15 proceedings

1 Electro Sonic Inc. ("ESI") is an Ontario corporation with its registered office in Markham, Ontario. Electro Sonic of

America LLC ("ESA") is a Delaware limited liability corporation which carries on business from a facility in Tonawanda, New York. Both companies are owned by the Rosenthal family. Both companies are involved in the distribution of electronic and electrical parts.

2 On February 6, 2014, both companies filed notices of intention to make proposals pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. MNP Ltd. was appointed proposal trustee.

3 Both companies applied for three types of relief: (i) the administrative consolidation of the two proceedings; (ii) the approval of an Administrative Professionals Charge on the property of both companies to secure payment of the reasonable fees of the legal advisors; and, (iii) authorization that the proposal trustee could act as foreign representative of the NOI proceedings and could apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code* (the "Code"). At the hearing I granted the orders sought; these are my reasons for so doing.

II. Administrative consolidation

4 Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits: *Bankruptcy and Insolvency General Rules*, s. 3; *Ontario Rules of Civil Procedure*, Rule 1.04(1). One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court. Administrative consolidation of two bankruptcy proceedings would be analogous to bringing two separate civil actions under common case management.

5 In the present case, the evidence disclosed that the operations of ESI and ESA are highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions, including payroll. As well, ESI has been the sole customer of ESA in 2013 and 2014.

6 Given the possibility of the applicants applying together at future dates for relief such as stay extensions and sale approvals, and given that both companies share the same lender — Royal Bank of Canada — it made sense to order that both bankruptcy proceedings be consolidated for the purposes of future steps in this order. For those reasons, I granted the administrative consolidation order sought.

III. Administrative Charge

7 The applicants seek a charge in the amount of $250,000 on the property of ESI and ESA to secure payment of the reasonable fees and expenses of the legal advisors retained by the applicants, MNP and its legal counsel (the "Administrative Professionals"). The applicants sought an order granting such an Administrative Professionals Charge priority over security interests and liens, save that the Charge would be subordinate to the security held by RBC and all secured claims ranking in priority thereto.

8 The applicants filed evidence identifying their creditors, as well as the results of searches made under the Personal

Property Registration systems in Ontario and British Columbia and under the Uniform Commercial Code in respect of ESA. The applicants complied with the service requirements of *BIA* s. 64.2(1).

9 RBC did not oppose the Charge sought, but advised that it might later bring a motion to lift the stay of proceedings to enable it to enforce its security or to appoint an interim receiver.

10 As noted, ESA is a Delaware corporation with its place of business in New York State. ESA filed evidence that it has a U.S. dollar bank account in Canada, although it did not disclose the amount of money in that account.

11 *BIA* s. 50(1) authorizes an "insolvent person" to make a proposal. Section 2 of the *BIA* defines an "insolvent person" as, *inter alia*, one "who resides, carries on business or has property in Canada". That statutory definition would seem to establish the criteria upon which an Ontario court can assume jurisdiction in proposal proceedings, rather than the common law real and substantial connection test articulated by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.).

12 In the present case, I took into account several factors in granting a Charge over the property of both applicants, including property in New York State:

(i) the senior secured for both companies, RBC, did not oppose the granting of the Charge;

(ii) according to the results of the UCC search, the other secured creditor of ESA which has filed a collateral registration is ESI, a related company, which seeks the Charge;

(iii) the operations of ESI and ESA are highly integrated;

(iv) ESA has filed evidence of some assets in Canada, thereby technically meeting the definition of "insolvent person" in the *BIA*: *Callidus Capital Corp. v. Xchange Technology Group LLC*, 2013 ONSC 6783 (Ont. S.C.J. [Commercial List]), para. 19; and,

(v) the proposal trustee intends to apply immediately for recognition of these proceedings under Chapter 15 of the *Code* which will afford affected persons in the United States an opportunity to make submissions on the issue.

IV. Proposal trustee as representative in foreign proceedings

13 The proposal trustee was the most appropriate person to act as a representative in respect of any proceeding under the *BIA* for the purpose of having it recognized in a jurisdiction outside Canada: *BIA*, s. 279. It followed that the proposal trustee should be authorized to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *Code*.

Application granted.

TAB

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Court File No. 32-1896275

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE Mr.	)	WEDNESDAY, THE 6th
JUSTICE PENNY	)	DAY OF AUGUST, 2014
	)	

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF XS CARGO LIMITED PARTNERSHIP

ORDER

THIS MOTION, made by XS Cargo Limited Partnership ("**XS LP**"), pursuant to, *inter alia*, sections 64.1, 64.2 and 183 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Duncan Reith sworn August 1, 2014 and the exhibits thereto (the "**Reith Affidavit**"), and on hearing the submissions of counsel for XS LP and XS Cargo GP Inc. ("**XS GP**, together with XS LP, "**XS Cargo**"), counsel for the Canadian Imperial Bank of Commerce ("**CIBC**") and of PricewaterhouseCoopers Inc., in its capacity as trustee to the Notices of Intention to Make a Proposal (collectively, the "**NOIs**") of each of XS LP and XS GP (the "**Trustee**"), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

ADMINISTRATIVE CONSOLIDATION

2. **THIS COURT ORDERS** that the proposal proceedings of XS LP (estate number: 32-1896275) and XS GP (estate number 32-1896278) (collectively, the "**Proposal Proceedings**") are hereby administratively consolidated and the Proposal Proceedings are hereby authorized and directed to continue under the following joint title of proceedings:

Estate Number: 32-1896275
Court File Number: 32-1896275

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF XS CARGO LIMITED PARTNERSHIP

Estate Number: 32-1896278
Court File Number: 32-1896278

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF XS CARGO GP INC.

3. **THIS COURT ORDERS** that all further materials in the Proposal Proceedings shall be filed with the Commercial List Office only in the XS LP estate and court file, estate number 32-1896275 and court file number 32-1896275.

APPROVAL OF SISP

4. **THIS COURT ORDERS** that the sale, refinancing and investment solicitation process in respect of XS Cargo's assets (the "**SISP**"), as set out in the Reith Affidavit, be and is hereby

approved and that the Trustee is hereby authorized and empowered to take such steps as are necessary or desirable to carry out the SISP, provided that any definitive agreement to be executed by XS Cargo in respect of the sale of all or part of the Property (as defined below) shall require further approval of this Court.

ACCOMMODATION AGREEMENT

5. **THIS COURT ORDERS** that the Accommodation Agreement (Exhibit B to the Reith Affidavit) (the "**Accommodation Agreement**"), is hereby approved, the execution thereof is hereby ratified and that XS Cargo is hereby authorized and empowered to perform its obligation thereunder.

CASH MANAGEMENT

6. **THIS COURT ORDERS** that all cash management and banking arrangements presently in existence between XS LP and CIBC shall be maintained during these proceedings.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

7. **THIS COURT ORDERS** that XS Cargo shall indemnify its directors and officers (collectively, the "**D&Os**") against obligations and liabilities that they may incur as directors or officers of XS Cargo after the filing of the NOIs, except to the extent that, with respect to any of the D&Os, the obligation or liability was incurred as a result of the such D&O's gross negligence or wilful misconduct.

8. **THIS COURT ORDERS** that the D&Os of XS Cargo shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of XS Cargo's current and future

assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceed thereof (the "**Property**"), which charge shall not exceed an aggregate amount of $1,571,000, as security for all claims relating to any obligations or liabilities the D&Os may incur after the filing of the NOIs in relation to their respective capacities as directors or officers for: (a) goods and services tax and all other amounts payable under Part IX the *Excise Tax Act* (Canada) (the "**ETA**") or any similar legislation in any other jurisdiction of Canada, including the Quebec sales tax imposed pursuant to an *Act Respecting the Québec Sales Tax* and any amount payable as harmonized sales tax in any applicable province under the ETA, (b) all other provincial taxes payable under any provincial jurisdiction of Canada, (c) wages and vacation pay not already covered by Section 81.3 of the BIA, and (d) for severance obligations for XS LP's current employees in the Province of Saskatchewan up to a maximum of $41,397, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, willful misconduct or gross or intentional fault. The D&O Charge shall have the priority set out in paragraphs 15 and 17 herein.

9. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the D&Os shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 8 of this Order.

ADMINISTRATION CHARGE

10. **THIS COURT ORDERS** that the Trustee, counsel to the Trustee and counsel to XS Cargo shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by XS Cargo as part of the costs of these proceedings. XS Cargo is hereby authorized and directed to pay the accounts of the Trustee, counsel for the Trustee and counsel for XS Cargo as such accounts are rendered.

11. **THIS COURT ORDERS** that the Trustee and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Trustee and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

12. **THIS COURT ORDERS** that the Trustee, counsel to the Trustee and counsel to XS Cargo shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed $260,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Trustee and such counsels, after the filing of the NOIs in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 15 and 17 herein.

KERP CHARGE

13. **THIS COURT ORDERS** that the Key Employee Retention Plans (the "**KERP**") filed with the Court are hereby ratified and that XS Cargo is hereby authorized and empowered to perform its obligation thereunder and to make the payments in accordance with the terms set out in said KERP.

14. **THIS COURT ORDERS** that the employees eligible under the KERP shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property, which charge shall not exceed $380,000, as security for payment of the obligations set forth under the KERP. The KERP Charge shall have the priority set out in paragraphs 15 and 17 herein.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

15. **THIS COURT ORDERS** that the priorities of the D&O Charge, the Administration Charge, the KERP Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $260,000);

Second – D&O Charge (to the maximum amount of $1,571,000); and

Third – KERP Charge (to the maximum amount of $380,000).

16. **THIS COURT ORDERS** that the filing, registration or perfection of the D&O Charge, the Administration Charge or the KERP Charge (collectively, the "**Charges**") shall not be required, and that the Charges 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 such failure to file, register, record or perfect.

17. **THIS COURT ORDERS** that the Charges shall constitute a charge on the Property and such Charges shall rank ahead in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, except for the Encumbrances in favour of those

that have not been served with notice of this application. XS Cargo and the beneficiaries of the Charges shall be entitled, if necessary, to seek priority ahead of any Encumbrances in favour of any person that have not been served with notice of this application and that are likely to be affected by such priority.

18. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, XS Cargo shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless XS Cargo also obtains the prior written consent of the Trustee, the beneficiaries of the Charges, or further Order of this Court.

19. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency (expressly or impliedly) made herein; (b) any motion(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such motion(s); (c) any assignments for the general benefit of creditors made or deemed to have been 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, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds XS Cargo, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the payments made in accordance with the KERP shall create or be deemed to constitute a breach by XS Cargo of any Agreement to which it is a party;

(b) none of the Key Employees (as defined in the Motion) or Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from XS Cargo making payments in accordance with the KERP, the creation of the Charges, or the execution, delivery or performance of any related documents; and

(c) the payments made by XS Cargo pursuant to this Order, 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.

20. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in XS Cargo's interest in such real property leases.

CONFIDENTIALITY

21. **THIS COURT ORDERS** that XS Cargo' financial statements (Exhibit C to the Reith Affidavit) and the unredacted versions of the KERP filed with the Court shall be kept confidential and under seal with the Court until, as the case may be, further order of this Court.

SERVICE AND NOTICE

22. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'www.pwc.com/car-xscargo'.

23. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to XS Cargo's creditors or other interested parties at their respective addresses as last shown on the records of XS Cargo and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

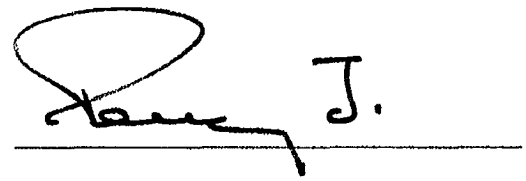
24. **THIS COURT ORDERS** that the Trustee shall not take possession of the Property and shall take no part whatsoever in management or supervision of the management of the business of XS Cargo and shall not, in carrying out the SISP or otherwise fulfilling its obligations hereunder or under the BIA, be deemed to have taken possession or control of the Business or Property, or any part thereof.

25. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Trustee under the BIA or as an officer of this Court, the Trustee shall incur no liability or obligation as a result of its appointment or the carrying out of the SISP or the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Trustee by the BIA or any applicable legislation.

26. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist XS Cargo, the Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to XS Cargo and to the Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Trustee in any foreign proceeding, or to assist XS Cargo and the Trustee and their respective agents in carrying out the terms of this Order.

27. **THIS COURT ORDERS** that each of XS Cargo and the Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, whereby located, for the recognition of this Order and for assistance in carrying out the terms of this Order, including the enforcement of any Charge established hereby.

28. **THIS COURT ORDERS** that any interested party (including XS Cargo and the Trustee) may apply to this court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any as this court may order.



IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3

MOTION OF XS CARGO LIMITED PARTNERSHIP UNDER SECTION 64.1, 64.2 and 183 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3

Court File No: 32-1896275

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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Counsel for the Applicant

TAB

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Estate / Court File No.: 31-1906457
Estate / Court File No.: 31-1906494
Estate / Court File No.: 31-1906471
Estate / Court File No.: 31-1906487

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	**THURSDAY, THE 11th DAY**
	)	
JUSTICE NEWBOULD	)	**OF SEPTEMBER, 2014**

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF COUCH COMMERCE INC., MENUPALACE.COM CORPORATION, DEALFIND.COM INC., and 8108773 CANADA INC.

ORDER
(Expanding Powers of Proposal Trustee and Approving DIP Financing)

THIS MOTION made by Couch Commerce Inc., Menupalace.com Corporation, Dealfind.com Inc., and 8108773 Canada Inc. (collectively, the **"Couch Group"**) for an Order pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the **"BIA"**), the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44 (the **"CBCA"**), and the Ontario *Business Corporations Act*, R.S.O. 1990, B. 16 (the **"OBCA"**), *inter alia*, (a) administratively consolidating the estate and proposal proceedings of the Couch Group; (b) approving the First Report to Court of MNP Ltd. in its capacity as Trustee in the proposal of the Couch Group (in such capacity, the **"Proposal Trustee"**) and the conduct and activities of the Proposal Trustee outlined therein; (c) appointing John R. Sharpe as Director of the Couch Group; (d) expanding the powers of the Proposal Trustee; (e) approving the interim financing of the Couch Group by nCrowd Inc. (**"nCrowd"** or the **"DIP Lender"**) substantially in accordance with the terms of the DIP Loan Agreement appended to the First Report (defined below) and granting a priority charge in favour of the DIP Lender; and (f) extending the stay of proceedings in respect of the Couch

Group to and including October 30, 2014, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of John Sharpe, sworn September 10, 2014 (the **"Sharpe Affidavit"**), and the Exhibits thereto, and First Report to Court of the Proposal Trustee dated September 11, 2014 (the **"First Report"**), and on hearing the submissions of counsel for the Couch Group, the Proposal Trustee, nCrowd Inc., B.E.S.T. Funds, and those other counsel listed on the Counsel Slip, no one appearing for any other party although duly served as appears from the Affidavit of Service of Fiorella Sasso, sworn September 11, 2014,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

ADMINISTRATIVE CONSOLIDATION

2. **THIS COURT ORDERS** that the proposal proceedings of Couch Commerce Inc. (Estate Number 31-1906457), Menupalace.com Corporation (Estate Number 31-1906494), Dealfind.com Inc. (Estate Number 31-1906471), and 8108773 Canada Inc. (Estate Number 31-1906487) (collectively, the **"Proposal Proceedings"**), are hereby administratively consolidated and the Proposal Proceedings are hereby authorized and directed to continue under the following joint title of proceedings, *nunc pro tunc*:

Estate / Court File No.: 31-1906457
Estate / Court File No.: 31-1906494
Estate / Court File No.: 31-1906471
Estate / Court File No.: 31-1906487

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF COUCH COMMERCE INC., MENUPALACE.COM CORPORATION, DEALFIND.COM INC., and 8108773 CANADA INC.

3. **THIS COURT ORDERS** that all further materials in the Proposal Proceedings shall be filed with the Court only in the Couch Commerce Inc. Estate and Court File, being Estate / Court File No. 31-1906457.

APPROVAL OF FIRST REPORT

4. **THIS COURT ORDERS** that the First Report and the conduct and activities of the Proposal Trustee, as set out in the First Report, are hereby approved.

APPOINTMENT OF DIRECTOR

5. **THIS COURT ORDERS** that John R. Sharpe is hereby appointed as Director (in such capacity, the **"Director"**) of each entity comprising the Couch Group, being Couch Commerce Inc., Menupalace.com Corporation, Dealfind.com Inc., and 8108773 Canada Inc., notwithstanding the provisions and requirements of the CBCA and the OBCA.

NO PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

6. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a **"Proceeding"**), shall be commenced or continued against the Director except with the written consent of the Director or with leave of this Court.

7. **THIS COURT ORDERS** that the Director shall have no liability with respect to any losses, claims, damages, or liabilities, of any nature or kind, from and after the date of this Order except to the extent such losses, claims, damages, or liabilities result from the gross negligence or wilful misconduct on the part of the Director.

EXPANSION OF PROPOSAL TRUSTEE'S POWERS

8. **THIS COURT ORDERS** that the Proposal Trustee, in addition to its prescribed rights and obligations under the BIA and in reliance on the provisions of paragraph 9 below, is hereby further empowered and fully authorized, but shall not be required, to:

(a) monitor, manage, and control the Couch Group's bank accounts, receipts, and disbursements;

(b) advise and assist the Couch Group in their preparation of the Couch Group's cash flow statements;

(c) have full and complete access to the Property (defined below) and Business (defined below) of the Couch Group, including the premises, books, records, data, including data in electronic form, and other financial documents of the Couch Group;

(d) implement processes and protocols for the review, consultation, management, control, and, where necessary, the Proposal Trustee's consent in relation to the following:

(i) disbursement (whether directly, indirectly, and by way of set off or otherwise) of monies to be determined by the Proposal Trustee in consultation with the Couch Group;

(ii) any actions taken with respect to any outstanding business arrangements (including continuation and termination of such arrangements) to be determined by the Proposal Trustee in consultation with the Couch Group which directly or indirectly affect the Couch Group and/or the property and Business of the Couch Group;

(iii) the entering into of new agreements or arrangements by the Couch Group to be determined by the Proposal Trustee in consultation with the Couch Group which directly or indirectly affect the Couch Group and/or the Property and Business of the Couch Group;

(iv) matters relating to the continuation and preservation of insurance coverage pursuant to any insurance policies relating to the Business of the Couch Group and under which the Couch Group and its past, present, and future officers and/or directors are insured parties;

(e) take any and all actions and steps in order to facilitate the completion of a sale transaction;

(f) attend meetings that the Couch Group has with any third party (excluding meetings with legal counsel which are subject to privilege) including, without limitation, governmental authorities, suppliers, customers, any insurers of the Couch Group and insurers of the Couch Group's officers and/or directors, and regulatory authorities in Canada and elsewhere;

(g) review and consult with the Couch Group on its preparation of any reports, agreements, or otherwise relating to the Business and Property of the Couch Group;

(h) meet and attend the Couch Group's board of directors meetings (excluding meetings with legal counsel which are subject to privilege);

(i) assist in the performance of the duties which the Chief Financial Officer currently performs;

(j) advise and assist the Couch Group in the negotiation of any agreement for the purchase and sale of the Business and Property of the Couch Group;

(k) advise and assist the Couch Group in performing such functions or duties as the Proposal Trustee considers necessary or desirable; and

(l) review the Couch Group's press releases and any other public communications;

all of which powers shall be exercised in the Proposal Trustee's discretion (collectively, and together with the Proposal Trustee's rights and obligations under the BIA, the **"Proposal Trustee's Powers"**).

9. **THIS COURT ORDERS** that the Couch Group shall cause the Couch Group, including all of their directors, officers, and employees to co-operate fully with the Proposal Trustee in the exercise of the Proposal Trustee's powers and discharge of its obligations and to provide the Proposal Trustee with the assistance that is necessary to enable the Proposal Trustee to adequately carry out the Proposal Trustee's Powers, functions, duties, and obligations as set out in the BIA, this Order, and any further Orders of this Court.

10. **THIS COURT ORDERS** that the Couch Group shall not and shall cause the Couch Group not to take any action for which the Proposal Trustee's consent is required but has not been obtained, whether pursuant to this Order or otherwise.

11. **THIS COURT ORDERS** that the Proposal Trustee shall be entitled to take such reasonable steps and use such services as it deems necessary in discharging its powers and obligations.

12. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Proposal Trustee under the BIA or as an Officer of this Court, the Proposal Trustee shall incur no liability or obligation as a result of carrying out of the provisions of this Order or any other Order of this Court, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Proposal Trustee by the BIA or any applicable legislation.

13. **THIS COURT ORDERS** that all employees of the Couch Group shall remain the employees of the Couch Group until such time as the Couch Group may terminate the employment of such employees or such employment otherwise terminates. Nothing in this Order, in and of itself, or the exercise by the Proposal Trustee of any of its powers, the performance by the Proposal Trustee of any of its duties, or the use by the Proposal Trustee of any employees of the Couch Group in connection with its appointment and the exercise of its powers and the performance of its duties shall cause the Proposal Trustee to be liable for any employee-related liabilities, including, without limitation, wages, severance pay, termination pay, vacation pay, and pension or benefit amounts.

14. **THIS COURT ORDERS** that the enhancement of the Proposal Trustee's powers as set forth herein, the exercise by the Proposal Trustee of any of its powers, the performance by the Proposal Trustee of any of its duties, or the use by the Proposal Trustee of any employees of the Couch Group in connection with its appointment and the performance of its powers and duties shall not constitute the Proposal Trustee to be the employer, successor employer, or related employer of the employees of the Couch Group within the meaning of any provincial, federal, or municipal legislation, or common law governing employment, pensions or labour standards or any other statute, regulation, or rule of law or equity for any purpose whatsoever or expose the

Proposal Trustee to liability to any individuals arising from or relating to their previous employment by the Couch Group.

15. **THIS COURT ORDERS** that the Proposal Trustee is not, and shall not be or be deemed to be, a director, officer, manager, or employee of the Couch Group.

16. **THIS COURT ORDERS** that the Proposal Trustee shall continue to have the benefit of all of the protections as set out in the BIA and any such protections shall apply to the Proposal Trustee in fulfilling its duties and exercising any of its powers under this Order or any other Order of this Court.

17. **THIS COURT ORDERS** that subject to paragraph 8(a) above, the Proposal Trustee shall not take possession of the Property (defined below) of the Couch Group and shall take no part whatsoever in the management or supervision of the management of the business of the Couch Group (the **"Business"**) and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

DEBTOR-IN-POSSESSION FINANCING

18. **THIS COURT ORDERS** that the Couch Group is hereby authorized and empowered to obtain and borrow amounts under a credit facility provided by the DIP Lender in order to finance the Couch Group's working capital requirements in accordance with the projected Cash Flow Statement attached to the DIP Loan Agreement during the period of its restructuring, provided that borrowings under such credit facility shall not exceed the amount specified in the DIP Facility (as defined below) unless permitted by further Order of this Court.

19. **THIS COURT ORDERS** that the credit facility referenced in Paragraph 18 above shall be on the terms and subject to the conditions set forth in the DIP Loan Agreement entered into between the Couch Group and the DIP Lender dated September 10, 2014, and appended to the First Report (the **"DIP Facility"**) and the Couch Group's execution of the DIP Facility is hereby authorized and approved.

20. **THIS COURT ORDERS** that the Couch Group is authorized and empowered to execute and deliver such credit agreements, mortgages, charges, and security documents or other definitive documents (collectively, the **"Definitive Documents"**) as are contemplated by the DIP Facility or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Couch Group is hereby authorized and directed to pay and perform, from the effective date of the DIP Facility, all of the indebtedness, interest, fees, liabilities, and obligations to the DIP Lender under and pursuant to the DIP Facility and the Definitive Documents as and when the same become due and are to be performed.

21. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is granted a charge on all of the properties, assets, and undertakings of the Couch Group, which includes but is not limited to all of the existing and after acquired real and personal property, intangible, and tangible assets and undertaking of the Couch Group (the **"Property"**), which charge shall not exceed the aggregate amount owed to the DIP Lender under the DIP Facility and the Definitive Documents (the **"DIP Charge"**).

22. **THIS COURT ORDERS** that, notwithstanding any other provisions of the BIA:

(a) The DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record, or perfect the DIP Charge or any of the Definitive Documents;

(b) Upon demand or the occurrence of an Event of Default under the DIP Facility or the Definitive Documents the DIP Lender may cease making advances to the Couch Group and upon two (2) days notice to the Couch Group and to the Proposal Trustee, may exercise any and all of their rights and remedies against the Couch Group or the Property under or pursuant to the DIP Facility, the Definitive Documents, and DIP Charge, including, without limitation, apply to this Court for the appointment of a Receiver, Receiver and Manager, or Interim Receiver, or for a Bankruptcy Order against the Couch Group and to seize and retain proceeds from the sale of the property and assets of the Couch Group and the cash flow of the Couch Group to repay amounts owing to the DIP Lender in accordance with the DIP Facility and the DIP Charge; and

(c) The foregoing rights and remedies of the DIP Lender shall be enforceable against any Trustee in Bankruptcy, Interim Receiver, Receiver, or Receiver and Manager of the Couch Group or of the Property.

23. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any proposal filed by the Couch Group under the BIA with respect to any advances made under the DIP Facility or the Definitive Documents and the DIP Lender and shall not be stayed pursuant to the provisions of the BIA, however the DIP Lender shall seek leave of the Court prior to taking any enforcement steps.

24. **THIS COURT ORDERS** that each of the DIP Charge shall constitute a specific fixed and floating charge on the Property and shall rank in priority to all other security interests, trusts, liens, charges, mortgages, claims, and encumbrances, secured, statutory or otherwise (collectively, the **"Encumbrances"**) on or against the Property in favour of any other person.

25. **THIS COURT ORDERS** that the filing, registrations, or perfection of the DIP Charge in Canada shall not be required, and that the DIP Charge is and shall be valid and enforceable against the Property for all purposes, including, without limitation, as against any right, title and interest filed, registered, recorded or perfected subsequent to the DIP Charge coming into existence, notwithstanding any such failure to file, register, record or perfect the DIP Charge.

26. **THIS COURT ORDERS** that the DIP Charge and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the DIP Lender under the DIP Charge and/or under the Definitive Documents shall not be limited or impaired in any way by (a) the pendency of these proceedings and any declarations of insolvency made in these proceedings; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy orders made pursuant to such applications; (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) borrowings, incurring debt or the creation of any Encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an **"Agreement"**) which binds the Couch Group and notwithstanding any provision to the contrary in any such Agreement or otherwise:

(a) neither the creation of the DIP Charge nor the execution, delivery, perfection, registration, or performance of the Definitive Documents shall create or be deemed to constitute a breach by the Couch Group of any Agreement to which it is a party;

(b) the DIP Lender shall have no liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Couch Group entering into the Definitive Documents, the creation of the DIP Charge, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Couch Group pursuant to this Order, the Definitive Documents, and the granting of the DIP Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

27. **THIS COURT ORDERS** that the DIP Charge shall attach to the Property (including, without limitation, any lease, sub-lease, offer to lease, license, permit or other contract), notwithstanding any requirement for the consent of the lessor or other party to any such lease, license, permit or other contract, and the failure to comply with any other condition precedent.

28. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property shall only be a Charge in the Couch Group's interest in such real property leases.

STAY EXTENSION

29. **THIS COURT ORDERS** that the time for the Couch Group's filing a proposal, and the stay of proceedings herein, are hereby extended in accordance with subsection 50.4(9) of the BIA to and including October 30, 2014.

SEALING ORDER

30. **THIS COURT ORDERS** that that Confidential Exhibit "P" to the Affidavit of John R. Sharpe sworn September 10, 2014, be and is hereby sealed until further Order of this Court.

GENERAL

31. **THIS COURT ORDERS** that the Proposal Trustee may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

32. **THIS COURT ORDERS** that nothing in this Order shall prevent the Proposal Trustee from acting as interim receiver and/or trustee in bankruptcy of the Couch Group in any proceedings pertaining to the Couch Group pursuant to the BIA.

COMEBACK CLAUSE

33. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Couch Group and the Proposal Trustee and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

AID AND ASSISTANCE OF OTHER COURTS

34. **THIS COURT HEREBY REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Proposal Trustee and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory, and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Proposal Trustee, as an Officer of this Court, as may be necessary or desirable to give effect to this Order.

Estate / Court File No.: 31-1906457
Estate / Court File No.: 31-1906494
Estate / Court File No.: 31-1906471
Estate / Court File No.: 31-1906487

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF COUCH COMMERCE INC., MENUPALACE.COM CORPORATION, DEALFIND.COM INC., and 8108773 CANADA INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

(PROCEEDING COMMENCED AT TORONTO)

ORDER

(Expanding Powers of Proposal Trustee and Approving DIP Financing)

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Lawyers for the Couch Group

TAB

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2009 CarswellOnt 8207
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

Heard: December 11, 2009
Judgment: December 11, 2009
Written reasons: December 18, 2009
Docket: 09-8482-00CL

Counsel: Jay Swartz, Jim Bunting for Applicants
G. Moffat for Monitor, Deloitte & Touche Inc.
Joseph Bellissimo for Roynat Capital Inc.
Peter J. Osborne for R.N. Singh, Purchaser
Edmond Lamek for Toronto-Dominion Bank
D. Dowdall for Noteholders
D. Ullmann for Procom Consultants Group Inc.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Applicants were protected under Companies' Creditors Arrangement Act — Applicants brought motion for extension of stay period, approval of bid process and approval of "Stalking Horse APA" — Motion granted — Motion was supported by special committee, advisors, key creditor groups and monitor — Opposition came from business competitor and party interested in possibly bidding on assets of applicants — Applicants established that sales transaction was warranted and that sale would benefit economic community — No creditor came forward to object sale of business — It was unnecessary for court to substitute its business judgment for that of applicants.

Table of Authorities

Cases considered by *Morawetz J.*:

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

MOTION by applicants for extension of stay and for approval of bid process and agreement.

***Morawetz J.*:**

1 At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

9. Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

10 The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

11 It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

12 Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

14 The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

18 In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

19 In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

20 With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

21 For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

22 For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

23 The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

24 Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

25 An order shall issue to give effect to the foregoing.

Motion granted.

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2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION
(Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
J. Carfagnini, J. Pasquariello for Monitor, Ernst & Young Inc.
M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Table of Authorities

Cases considered by *Morawetz J.*:

Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co. (2008), 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87

(Ont. S.C.J.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, *(sub nom. Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to

Winnipeg Motor Express Inc., Re (2008), 2008 CarswellMan 560, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man. Q.B.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
s. 363 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

Morawetz J.:

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of

a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

> (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
>
> (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
>
> (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial, supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra, Re PSINet, supra, Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra, Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging, supra,* the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra,* Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra,* at paras. 43, 45.

38 Similarly, in *PSINet Limited, supra,* the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra,* at para. 3.

39 In *Re Stelco Inc., supra,* in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a

going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The

company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

Motion granted.

End of Document

TAB

6

Court File No. CV14-10401-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 16th
	)	
JUSTICE WILTON-SIEGEL	)	DAY OF JANUARY, 2014

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

ORDER

THIS APPLICATION, made by Colossus Minerals Inc. (the "**Company**") pursuant to the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the affidavit of John Frostiak sworn January 13, 2014 (the "**Frostiak Affidavit**"), the Report of Duff & Phelps Canada Restructuring Inc. in its capacity as the Proposal Trustee (the "**Proposal Trustee**"), filed, and on reading the Company's cash-flow statement, appended as Exhibit "A" to the Report of the Proposal Trustee, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice and on hearing the submissions of the Company's Counsel (as hereinafter defined), counsel for the Proposal Trustee and counsel for the DIP Agent (as hereinafter defined), no one else appearing, and on being satisfied that the terms of the DIP Term Sheet (as hereinafter defined) are reasonable and required by the Company,

) counsel for the ad hoc group of noteholders and certain lenders

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

FINANCIAL ADVISOR AND SALE PROCESS

2. **THIS COURT ORDERS** that the Company is authorized to carry out and perform its obligations under (a) its engagement letter with Dundee Capital Markets, a division of Dundee Securities Ltd. (the "**Financial Advisor**"), as financial advisor for the Company dated November 27, 2013, attached as Exhibit N to the Frostiak Affidavit (the "**Engagement Letter**") (including payment of the amounts due to be paid pursuant to the terms of the Engagement Letter, including but not limited to any success or transaction fee under the Engagement Letter), and (b) the Sale and Investment Solicitation Process attached hereto as Schedule "**A**") (the "**Sale Process**").

3. **THIS COURT ORDERS** that all claims of the Financial Advisor pursuant to the Engagement Letter are not claims that may be compromised pursuant to any proposal ("**Proposal**") under the BIA, any plan of arrangement or compromise ("**Plan**") filed by the Company under the *Companies' Creditors Arrangement*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), or any other restructuring and no such Plan, Proposal or restructuring shall be approved that does not provide for the payment of all amounts due to the Financial Advisor pursuant to the terms of the Engagement Letter.

4. **THIS COURT ORDERS** that notwithstanding any order in these proceedings, the Company is authorized to make all payments required by the Engagement Letter, including all fees and expenses, if and when due.

POWERS OF PROPOSAL TRUSTEE

5. **THIS COURT ORDERS** that the Proposal Trustee be and is hereby authorized to take all steps required to implement the Definitive Documents (as hereinafter defined) and Sale Process, including, without limitation, to

(a) assist the Company, to the extent required by the Company, in its dissemination, to the DIP Agent (as hereinafter defined) and its counsel on a weekly or bi-weekly basis of financial and other information as agreed to between the Company and the DIP Agent (as hereinafter defined);

(b) assist the Company in its preparation of the rolling cash-flow forecasts contemplated by the Definitive Documentation (as hereinafter defined) (the "**Cash-Flow Statements**") and reporting required by the DIP Agent, which information shall be reviewed with the Proposal Trustee and delivered to the DIP Agent and its counsel in accordance with the Definitive Documents or as otherwise agreed to by the DIP Agent;

(c) report to this Court at such times and intervals as the Proposal Trustee may deem appropriate with respect to matters relating to the Charged Property (as hereinafter defined), and such other matters as may be relevant to the proceedings herein;

(d) have full and complete access to the Charged Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order; and

(e) perform such other duties as are required by this Order or by this Court from time to time.

6. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Proposal Trustee under the BIA or as an officer of this Court, the Proposal Trustee shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Proposal Trustee under the BIA or any applicable legislation.

ADMINISTRATION CHARGE

7. **THIS COURT ORDERS** that the Proposal Trustee, counsel for the Proposal Trustee and Fasken Martineau DuMoulin LLP as the counsel to the Company in connection with these BIA proceedings (the "**Company's Counsel**") shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements), in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel for the Proposal Trustee and the Company's Counsel (for work performed in connection with these BIA proceedings) on a weekly basis.

8. **THIS COURT ORDERS** that the Proposal Trustee, counsel for the Proposal Trustee and the Company's Counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all assets, rights, undertakings and properties of the Company, of every nature and kind whatsoever, and wherever situated including all proceeds thereof (the "**Charged Property**"), which Administration Charge shall not exceed an aggregate amount of $300,000, as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 19 and 21 hereof.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

9. **THIS COURT ORDERS** that the Company shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Company after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

10. **THIS COURT ORDERS** that the directors and officers of the Company shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Charged Property, which charge shall not exceed an aggregate amount of $200,000, as security for the indemnity provided in paragraph 9 of this Order. The Directors' Charge shall have the priority set out in paragraphs 19 and 21 herein.

11. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 9 of this Order.

DIP FINANCING

12. **THIS COURT ORDERS** that the execution by the Company of the DIP Term Sheet (as hereinafter defined) and the Support Agreement (as defined in the Frostiak Affidavit) is hereby approved, *nunc pro tunc*, and the Company is hereby authorized and empowered to perform its obligations under the DIP Term Sheet and the Support 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 DIP Term Sheet among the Company, as borrower, and Sandstorm Gold Inc., as administrative agent (the "**DIP Agent**"), and as lender, and certain other lenders party thereto (collectively, the "**DIP Lenders**") in order to finance the Company's working capital requirements (including those of its operating facilities), the Sale Process and other general corporate purposes and capital expenditures, provided that borrowing under such credit facility shall not exceed US$10,000,000.

13. **THIS COURT ORDERS** that such credit facility shall be on substantially the terms and subject to the conditions set forth in the DIP term sheet agreement dated January 13, 2014 and attached as Exhibit J to the Frostiak Affidavit (the "**DIP Term Sheet**"), together with such modifications as may be agreed upon by the Company and the DIP Lenders and consented to by the Proposal Trustee.

14. **THIS COURT ORDERS** that the Company and the DIP Agent and DIP Lenders are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (such documents, together with the DIP Term Sheet, collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Agent pursuant to the terms thereof together with such modifications as may be agreed upon by the Company and the DIP Lenders and consented to by the Proposal Trustee, and the Company is

hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Agent and DIP Lenders under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

15. **THIS COURT ORDERS** that the DIP Agent, as collateral agent and acting on behalf of the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lenders' Court Charge**") on the Charged Property, which DIP Lenders' Court Charge shall not secure an obligation that exists before this Order is made. The DIP Lenders' Court Charge and any contractual security interests granted by the Company pursuant to the Definitive Documents (collectively with the DIP Lenders' Court Charge, the "**DIP Lenders' Charge**") shall attach to the Charged Property and shall secure all obligations under the Definitive Documents. The DIP Lenders' Charge shall have the priority set out in paragraphs 19 and 21 hereof.

16. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Agent may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lenders' Charge (a) the DIP Agent and DIP Lenders may cease making advances to the Company, and (b) the DIP Agent and DIP Lenders may (i) set off and/or consolidate any amounts owing by the DIP Lenders to the Company against the obligations of the Company to the DIP Lenders under the Definitive Documents and may make demand, accelerate payment and give other notices, and (ii) upon four (4) days' notice to the Company and the Proposal Trustee, exercise any and all of their rights and remedies against the Company or the Charged Property under or pursuant to the Definitive Documents or the *Personal Property Security Act* of Ontario or any other applicable jurisdiction, the *Uniform Commercial Code* of the applicable jurisdiction and/or *Mortgages Act* (Ontario) and equivalent legislation in the applicable jurisdiction, including, without limitations, to apply to this Court for the appointment of a receiver, receiver and

manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Agent and DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Charged Property.

17. **THIS COURT ORDERS AND DECLARES** that all claims of the DIP Agent and DIP Lenders pursuant to the Definitive Documents are not claims that may be compromised pursuant to any Proposal filed by the Company or any Plan filed by the Company under the CCAA without the consent of the DIP Agent and, except as contemplated in the Definitive Documents, the DIP Agent and DIP Lenders shall be treated as unaffected in any Proposal or Plan or other restructuring with respect to any obligations outstanding to the DIP Agent or DIP Lenders under or in respect of the Definitive Documents.

18. **THIS COURT ORDERS** that except to the extent contemplated by the Definitive Documents, the Company shall not file a Plan or Proposal in these proceedings or proceed with any other restructuring that does not provide for the indefeasible payment in full in cash of the obligations outstanding under the Definitive Documents as a pre-condition to the implementation of any such Plan or Proposal or any other restructuring without the prior written consent of the DIP Agent.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

19. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Charge and the DIP Lenders' Charge, as among them, shall be as follows, subject to paragraph 21 of this Order:

First – Administration Charge (to the maximum amount of $300,000);

Second – Directors' Charge (to the maximum amount of $200,000); and

Third – DIP Lenders' Charge.

20. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the Directors' Charge or the DIP Lenders' Charge (collectively, the "**Charges**") shall

not be required, and that the Charges 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 such failure to file, register, record or perfect.

21. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Charged Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, other than validly perfected security interests in favour of Dell Financial Services Canada Limited (PPSA File Number 682439715) and GE VFS Canada Limited Partnership (PPSA File Number 678698307) and other validly perfected purchase money security interests (collectively, "**Encumbrances**") in favour of any Person, notwithstanding the order of perfection or attachment.

22. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Charged Property that rank in priority to, or *pari passu* with, any of the Administration Charge, the Directors' Charge or the DIP Lenders' Charge, unless the Company also obtains the prior written consent of the Proposal Trustee, the DIP Lenders and the beneficiaries of the Administration Charge and the Directors' Charge, or further Order of this Court.

23. **THIS COURT ORDERS** that the Administration Charge, the Directors' Charge, the Definitive Documents and the DIP Lenders' Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lenders thereunder 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 BIA, or any bankruptcy order made pursuant to such applications; (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, sublease, offer to lease or other agreement (collectively, an

"**Agreement**") which binds the Company or the DIP Lenders, 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 be deemed to constitute a breach by the Company or the DIP Lenders of any Agreement to which any one of them is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company 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 the Company 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.

24. **THIS COURT ORDERS** that any of the Charges created by this Order over leases of real property in Canada shall only be a charge in the Company's interest in such real property leases.

EXTENSION OF TIME TO FILE PROPOSAL

25. **THIS COURT ORDERS** that the time within which a proposal must be filed with the Official Receiver under section 62(1) of the BIA be and is hereby extended to March 7, 2014.

FOREIGN PROCEEDINGS

26. **THIS COURT ORDERS** that the Proposal Trustee is hereby authorized and empowered to act as the foreign representative in respect of the within proceedings for the purposes of having these proceedings recognized in a jurisdiction outside Canada.

27. **THIS COURT ORDERS** that the Proposal Trustee is hereby authorized as the foreign representative of the Company and of the within proceedings, to apply for foreign recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, and to take such

actions necessary or appropriate in furtherance of the recognition of these proceedings or the prosecution of any sale transaction (including the proposed Sale Process) in any such jurisdiction.

28. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, Brazil or in any other foreign jurisdiction, to give effect to this Order and to assist the parties and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the parties and to the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding.

SUBSTITUTED SERVICE AND CASE WEBSITE

29. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which may be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 of the Rules of Civil procedure this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://www.duffandphelps.com/intl/en-ca/Pages/RestructuringCases.aspx.

GENERAL

30. **THIS COURT ORDERS** that the Company or the Proposal Trustee may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

31. **THIS COURT ORDERS** that nothing in this Order shall prevent the Proposal Trustee from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company or the Charged Property.

32. **THIS COURT ORDERS** that each of the DIP Agent and the Proposal Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and for assistance in carrying out the terms of this Order and any other Order issued in these proceedings.

33. **THIS COURT ORDERS** that any interested party (including the Company, DIP Agent the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order, provided however that the DIP Agent and DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the Definitive Documents up to and including the date this Order may be varied or amended.

34. **THIS COURT ORDERS** that, notwithstanding the immediately preceding paragraph, no order shall be made varying, rescinding or otherwise affecting the provisions of this Order with respect to the Definitive Documents, unless notice of a motion is served on the DIP Agent, the Company and the Proposal Trustee, returnable no later than January 27, 2014.

35. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JAN 16 2014

Schedule "A"

Sale and Investor Solicitation Process

Defined Terms

1. All capitalized terms used but not otherwise defined herein have the meaning given to them in the Order granted by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on January 16, 2014 (the "**Approval Order**") in respect of the Company's proceedings commenced under the BIA on January 13, 2014.

SISP Procedures

2. The Sale and Investor Solicitation Process ("**SISP**") procedures set forth herein describe, among other things:

   > the manner in which the Company's property will be made available for sale and the manner in which the opportunity for an investment in the Company's business can be obtained;

   > the manner in which a Prospective Bidder (as defined below) may gain access to or continue to have access to due diligence materials;

   > the manner in which bidders and bids become Qualified Bidders (as defined below) and Qualified Offers (as defined below), respectively;

   > the receipt and negotiation of offers received;

   > the ultimate selection of a Successful Bidder (as defined below); and

   > the Court's approval thereof.

3. The SISP shall be conducted by the SISP Team (as defined below) in consultation and coordination with the DIP Agent.

4. The SISP will be carried out by the Company, with the assistance of the Financial Advisor under the supervision of the Proposal Trustee (collectively, the "**SISP Team**"). Where this SISP designates a matter the responsibility or obligation of the SISP Team, the SISP Team members shall decide amongst themselves the most effective and efficient manner to

discharge the responsibilities and obligations of the SISP Team.

5. The SISP Team will compile a listing of prospective purchasers and investors. The SISP Team will use all reasonable commercial efforts to contact all parties identified in the list as well as any additional parties that the SISP Team believes could be a potential purchaser or potential investor.

6. The SISP Team will conduct a SISP whereby prospective purchasers and investors will have the opportunity to submit a bid for some or all of the Company's property or make an investment in the Company. An investment in the Company may involve, among other things, a restructuring, recapitalization or other form of reorganization of the business and affairs of the Company.

7. The SISP Team will determine whether the SISP should include newspaper, trade publication, internet or other advertising directed at prospective purchasers and investors.

8. As soon as possible after the date of the Approval Order, the SISP Team will send prospective purchasers and investors a solicitation letter summarizing the acquisition and/or investment opportunity (the "**Teaser Letter**"). The Teaser Letter will include a form of confidentiality agreement ("**CA**") or provide instructions to the prospective purchaser or prospective investor on how they may obtain a CA. The prospective purchasers and prospective investors will be required to sign a CA in order to gain access to confidential information (including access to an electronic data room) and to perform due diligence (each prospective purchaser and investor who signs a CA, referred to herein as a "**Prospective Bidder**"). Those parties who have already executed a confidentiality agreement with the Company in a form satisfactory to the Proposal Trustee (such agreement, also a "**CA**" for the purposes hereof) may be excused from executing a new CA if the Proposal Trustee concludes it is not necessary to do so. All CAs shall inure to the benefit of any purchaser of the Company's business.

9. Any sale of the Company's property and any investment in the Company will be made on an "as is, where is" basis, without surviving representations or warranties of any kind, nature except to the extent otherwise set forth in a definitive sale or investment agreement with a Successful Bidder.

Non-Binding LOIs

10. In order for a Prospective Bidder to participate in the SISP, the Financial Advisor must

receive (at the address set out in the Teaser Letter) from such Prospective Bidder a non-binding letter of intent ("**LOI**") on or before 5:00 p.m. Toronto Time on February 14, 2014 ("**LOI Deadline**"), which LOI shall include:

(a) in respect of a proposed purchase of the Company's property, a reasonably detailed listing and description of the property to be included in the proposed sale, and in the case of an investment in the Company's business, a reasonably detailed description of the manner in which the investment is to be made;

(b) an indication of the proposed purchase price or financial terms of such sale or investment;

(c) an acknowledgment that the sale or investment, as applicable, will be made on an "as is, where is basis";

(d) an estimate of the number of employees of the Company who will become employees of the Prospective Bidder (in the case of a proposed purchase of the Company's property) or shall remain as employees of the Company (in the case of an investment in the Company's business) and, in each case, provisions setting out the terms and conditions of employment for continuing employees;

(e) a description of any liabilities to be assumed by the Prospective Bidder;

(f) any anticipated regulatory and other approvals required to close the proposed transaction and the anticipated time frame and any anticipated impediments for obtaining any such approvals;

(g) a timeline to closing, which is to occur on or before March 14, 2014 with critical milestones; and

(h) such other information reasonably requested by the SISP Team.

11. In addition, in order to be considered by the Company, financial information reasonably requested by the SISP Team to demonstrate that the Prospective Bidder has the financial resources to consummate the transition contemplated by the LOI, must be provided. If the Prospective Bidder intends to acquire the property of the Company or provide an investment through a special purpose vehicle, the equity holders or sponsors of such special purpose vehicle must guarantee the special purpose vehicle's obligations.

12. The SISP Team in consultation with DIP Agent, will review and evaluate the LOIs based on, among other things, the ability of a Prospective Bidder to complete due diligence on a timely basis as well as other purchaser or investor selection criteria that may be developed by the SISP Team in consultation with the DIP Agent. For greater certainty, the SISP Team shall be entitled, following the LOI Deadline, to seek to clarify the terms of an LOI received prior to the LOI Deadline.

Identification of Qualified Bidder(s)

13. The Company, with the assistance of the Financial Advisor and the Proposal Trustee, shall consider each of the LOIs and determine, with the written consent of the DIP Agent, whether to pursue a transaction on the terms set out in the applicable LOI. Any Prospective Bidder(s) with whom the Company seeks to pursue a transaction on the terms set out in the applicable LOI shall be deemed to be a qualified bidder(s) (the "**Qualified Bidder**"). Prospective Bidders will be advised by the SISP Team on or before February 17, 2014, if they have been selected as a Qualified Bidder, and will thereafter be provided an opportunity to complete due diligence and submit a binding offer to purchase the property of the Company or invest in the Company.

Submissions of Offers

14. Under the offer procedure (the "**Offer Procedure**") all offers for purchase and/or investment must be submitted in writing by a Qualified Bidder to the Financial Advisor at the address set out in the Teaser Letter and received on or before 5:00 p.m. Toronto Time on February 21, 2014 (the "**Offer Deadline**").

Qualified Offers

15. An offer will be considered a "**Qualified Offer**" only if (i) it is submitted by a Qualified Bidder on or before the Offer Deadline, (ii) the requirements of paragraph 15 above are satisfied to the satisfaction of the Company and the Proposal Trustee, and (iii) the offer complies with the following requirements:

    (a) it includes a letter stating that the bidder's offer is irrevocable and open for acceptance until at least 11:59 p.m. Toronto Time on the business day after the Closing Date;

    (b) it includes proof of financial ability to close the transaction (as may be requested by

the SISP Team), and shall not be conditional upon financing;

(c) in the case of a proposed purchase of the Company's property, it includes the following: an acknowledgement and representation that the bidder: (a) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its bid; and (b) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the property to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, except as expressly stated in the purchase and sale agreement;

(d) in the case of an investment in the Company's business, it includes the following: an acknowledgement and representation that the bidder: (a) has relied solely upon its own independent review, investigation and/or inspection of any documents in making its bid; and (b) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the businesses of the Company or the completeness of any information provided in connection therewith, except as expressly stated in the investment agreement;

(e) it will not contain any material conditions to closing other than Court approval or other statutorily required consents or approvals;

(f) it is, in the reasonable opinion of the SISP Team, likely to close on or prior to March 14, 2014 (as may be extended by the Company with the prior written approval of the DIP Agent, the "**Closing Date**"); and

(g) it does not request or entitle the Qualified Bidder to any break-fee, termination fee, expense reimbursement or other type of compensation or payment.

16. Each Qualified Offer will be considered by the Company with the assistance of the Financial Advisor and the Proposal Trustee. The SISP Team may seek clarifications to any Qualified Offers following the Offer Deadline, and the Proposal Trustee may grant extensions to any deadline set out herein if consented to by the DIP Agent in writing or ordered by the Court.

Post-Offer Procedure

17. If one or more Qualified Offers are received in accordance with the Offer Procedure, the Company, in consultation with the Proposal Trustee and subject to the prior written approval of the DIP Agent, may choose to:

    (a) accept one Qualified Offer (the "**Successful Bid**" and the Qualified Bidder making the Successful Bid being the "**Successful Bidder**") and take such steps as are necessary to finalize and complete an agreement for the Successful Bid with the Successful Bidder; or

    (b) continue negotiations with a selected number of Qualified Bidders (collectively, the "**Selected Bidders**") with a view to finalizing an agreement with one of the Selected Bidders.

18. The Company shall be under no obligation to accept the highest or best offer and the selection of the Successful Bid and/or the Selected Bidders shall be entirely in the discretion of the Company, after consultation with the Proposal Trustee and the written approval of the DIP Agent.

19. The Company shall be under no obligation to accept any offer if, after consultation with the Proposal Trustee and prior written approval of the DIP Agent, the Company determines that no suitable offers have been received and rejects all such offers.

Other Terms

20. The Company will apply to the Court (the "**Approval Motion**"), on at least four days' notice to the Service List in these proceedings, for an order approving the Successful Bid and authorizing the Company to enter into any and all necessary agreements with respect to the Successful Bid and to undertake such other actions as may be necessary or appropriate to give effect to the Successful Bid.

21. Before the Company serves and files the application for the Approval Motion, the Successful Bidder will provide a deposit of at least 10% of the purchase price in the case of an acquisition of the property of the Company or 10% of the investment amount in the case of an investment in the Company (the "**Deposit**"). The Deposit will be paid to and held in escrow by the Proposal Trustee and otherwise will be treated as set out in the Successful Bid.

22. If the Deposit is forfeited to the Company, it shall be forfeited as liquidated damages and not as a penalty. The Company shall apply and use any forfeited Deposit in the manner agreed upon by the Company and the Proposal Trustee and as approved in writing by the DIP Agent.

23. The Approval Motion will be held on a date to be scheduled by the Court, upon request by the Company. At the initial return date of the Approval Motion, with the written approval of the DIP Agent, the Company or the Proposal Trustee may request an adjournment of the Approval Motion. If such adjournment is granted by the Court, no further notice or announcement of any such adjournment will be required.

24. All Qualified Offers (other than the Successful Bid) will be deemed rejected on the date of approval of the Successful Bid by the Court.

25. For the avoidance of doubt, the approvals required pursuant to the terms hereof (including the prior approval of the DIP Agent) are in addition to, and not in substitution for, any other approvals required by the BIA or any other statute or as otherwise required at law in order to implement a Successful Bid.

26. There will be no amendments to this SISP without the consent of the Company, the DIP Agent and the Proposal Trustee or, in the absence of such consent, the approval of the Court.

This SISP does not, and will not be interpreted to, create any contractual or other legal relationship among the Company, the Financial Advisor or the Proposal Trustee or between any of them and any bidder, other than as specifically set forth in a definitive agreement that any such bidder may enter into with the Company. At any time during the SISP, the Proposal Trustee may, upon reasonable prior notice to the Company, apply to the Court for advice and directions with respect to the discharge of its power and duties hereunder.

Court File No. CV14-10401-00CL.

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced in Toronto

ORDER

FASKEN MARTINEAU DuMOULIN LLP
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Solicitors for the Applicant, Colossus Minerals Inc.

TAB

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Court File No. CV13-10034-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

THE HONOURABLE MR.	)	FRIDAY, THE 15th
JUSTICE NEWBOULD	)	DAY OF MARCH, 2013

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION OF STARFIELD RESOURCES INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

~~INITIAL ORDER~~

THIS APPLICATION, made by Starfield Resources Inc. (the "Debtor") pursuant to, *inter alia*, sections 64.1 and 64.2 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended (the "BIA"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Philip S. Martin sworn March 8, 2013 and the exhibits thereto, the First Report of PricewaterhouseCoopers Inc., in its capacity as Proposal Trustee (the "Proposal Trustee") dated March 8, 2013 and the appendices thereto (the "First Report"), and on hearing the submissions of counsel for the Debtor, the Proposal Trustee and the directors of the Debtor, no one appearing for any other party although duly served as appears from the affidavit of service of Tasha Boyd sworn March 8, 2013, and on being advised that there are no secured creditors of the Debtor:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF SALES PROCESS

2. **THIS COURT ORDERS** that the Sale Process, as set out and defined in the First Report, be and is hereby approved and that the Debtor and the Proposal Trustee are hereby authorized and empowered take such steps as are necessary or desirable to carry out the Sale Process, provided that any definitive agreement executed by the Debtor in respect of the sale of all or any part of the Property (as defined herein) shall require the further approval of this Court.

EXTENSION OF STAY PERIOD

3. **THIS COURT ORDERS** that, pursuant to subsection 50.4(9) of the BIA, the time within which a proposal must be filed with the Official Receiver under section 62(1) of the BIA be and is hereby extended to April 26, 2013.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

4. **THIS COURT ORDERS** that the Debtor shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Debtor from and after the filing of the Debtor's notice of intention under section 50.4 of the BIA, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

5. **THIS COURT ORDERS** that the directors and officers of the Debtor shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceed thereof (the "Property"), which charge shall not exceed an aggregate amount of $100,000, as security for the indemnity provided in paragraph 4 of this Order. The Directors' Charge shall have the priority set out in paragraphs 11 and 13 herein.

6. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Debtor's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any

directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 4 of this Order.

ADMINISTRATION CHARGE

7. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee, counsel to the Debtor and counsel to the directors of the Debtor shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Debtor as part of the costs of these proceedings. The Debtor is hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel for the Proposal Trustee, counsel for the Debtor and counsel for the directors of the Debtor as such accounts are rendered and, in addition, the Debtor is hereby authorized to pay to the Proposal Trustee, counsel to the Proposal Trustee, counsel to the Debtor and counsel to the directors of the Debtor, retainers in the amounts of $50,000, $15,000, $25,000, and $20,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time

8. **THIS COURT ORDERS** that the Proposal Trustee and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Proposal Trustee and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

9. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee, counsel to the Debtor and counsel to the directors of the Debtor shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $100,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Proposal Trustee and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 11 and 13 hereof.

EMPLOYEE RETENTION PAYMENTS

10. **THIS COURT ORDERS** that the Retention Payments, as described and defined in the First Report, are hereby approved and that the Debtor is hereby authorized and empowered to make the Retention Payments in accordance with the terms set out in the First Report.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

11. **THIS COURT ORDERS** that the priorities of the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – Administration Charge; and

Second – Directors' Charge.

12. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge and the Administration Charge (collectively, the "Charges") shall not be required, and that the Charges 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 such failure to file, register, record or perfect.

13. **THIS COURT ORDERS** that each of the Directors' Charge and the Administration Charge (each as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

14. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Debtor shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge or the Administration Charge, unless the Debtor also obtains the prior written consent of the Proposal Trustee, the beneficiaries of the Directors' Charge and the Administration Charge or further Order of this Court.

15. **THIS COURT ORDERS** that the Directors' Charge and the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, 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 (expressly or impliedly) herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) any assignment for the general benefit of creditors made or deemed to have been 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, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Debtor, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the payment of the Retention Payments shall create or be deemed to constitute a breach by the Debtor of any Agreement to which it is a party;

(b) none of the Key Employees (as defined in the First Report) or the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Debtor paying the Retention Payments, the creation of the Charges, or the execution, delivery or performance of any related documents; and

(c) the payments made by the Debtor pursuant to this Order, 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.

16. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Debtor's interest in such real property leases.

SERVICE AND NOTICE

17. **THIS COURT ORDERS** that the Debtor and the Proposal Trustee be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

18. **THIS COURT ORDERS** that the Debtor, the Proposal Trustee, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Proposal Trustee may post a copy of any or all such materials on its website at www.pwc.com/car-starfield.

GENERAL

19. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Debtor, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtor and to the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding, or to assist the Debtor and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

20. **THIS COURT ORDERS** that each of the Debtor and the Proposal Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, including the enforcement of any Charge established hereby.

21. **THIS COURT ORDERS** that any interested party (including the Debtor and the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
MAR 15 2013

Court File No. CV13-10034-00CL

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION OF STARFIELD RESOURCES INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced in Toronto

ORDER

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Aubrey E. Kauffman (LSUC#: 18829N)
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Solicitors for the Applicant, Starfield Resources Inc.

TAB

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2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Miscellaneous

Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant's property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant's directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without

indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — referred to

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

4 First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

6 Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

7 Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

8 Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

9 Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

10 For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

11 Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

12 Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

13 First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

14 Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

15 Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

17 The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

18 First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

19 Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

20 Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

21 Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

22 The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

23 First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

24 Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

25 Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

26 Lastly, the Proposal Trustee supports the proposed SISP.

27 Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run

the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

TAB

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Court File No. 31-1813900

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 19th
	)	
JUSTICE NEWBOULD	)	DAY OF DECEMBER, 2013

IN THE MATTER OF THE PROPOSAL OF TRUE NORTH HARDWOOD PLYWOOD INC. OF THE TOWN OF COCHRANE IN THE PROVINCE OF ONTARIO

ORDER

THIS MOTION, made by the True North Hardwood Plywood Inc. (the "**Debtor**"), pursuant to the *Bankruptcy and Insolvency Act,* R.S.C 1985, c B-3, as amended (the "**BIA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Michael Breen sworn December 13, 2013 and the Exhibits thereto (the "**Breen Affidavit**"), the First Report of Dodick & Associates Inc., (the "**Proposal Trustee**") dated December 13, 2013 (the "**First Report**") and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Debtor, the Proposal Trustee (as defined below), for 2277315 Ontario Inc. ("**227**"), ~~for EACOM Timber Corporation ("EACOM") and~~ for Century Services LP, no one appearing for Xerox Canada Ltd. ("**Xerox**"), Caisse Populaire de Cochrane Limitee ("**Caisse**"), RPG Receivables Group Inc. ("**RPG**"), Nick Carter and Robert Lassandrello ("**Lassandrello**") or any of the other parties on the service lists, although duly served as appears from the affidavit of service of Shallon Garrafa sworn December 16, 2013;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Debtor's Notice of Motion and Motion Record and the First Report is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.

SUBSTITUTED SERVICE AND CASE WEBSITE

2. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/#Commercial_List) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL "www.dodick.ca".

3. **THIS COURT ORDERS** that the E-Service List Keeper and the WebHost (as such terms are defined in the Protocol) for the purpose of this proceeding shall be the Proposal Trustee.

EXTENSION OF TIME TO FILE PROPOSAL

4. **THIS COURT ORDERS** that the time for filing of the Proposal, and the stay of proceedings herein, are extended in accordance with Section 50.4(9) of the BIA for a period of 45 days, to and including February 8, 2014.

DIP FINANCING

5. **THIS COURT ORDERS** that the Debtor is hereby authorized and empowered to obtain and borrow under one or more credit facilities (collectively, the "**DIP Facility**") granted by Century Services LP (the "**DIP Lender**") to be used to finance the Debtor's working capital requirements and other general corporate purposes, provided that borrowings under such credit

facility shall not exceed the amount specified in the DIP Commitment Letter (as defined below) unless permitted by further Order of this Court.

6. **THIS COURT ORDERS** that the DIP Facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Debtor and the DIP Lender dated as of December 13, 2013 (the "**DIP Commitment Letter**"), filed.

7. **THIS COURT ORDERS** that the Debtor, or the Proposal Trustee on behalf of the Debtor, are authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Commitment Letter or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Debtor is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

8. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Debtor's current and future properties, assets and undertakings of every nature and kind whatsoever and wheresoever situate including all proceeds thereof, including the real property of the Debtor (the "**Property**"), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 16 to 20 hereof, including the subordination provisions to existing charges in paragraph 18.

9. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order or the BIA (including sections 69 and 69.1):

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Commitment Letter, the Definitive Documents or the DIP Lender's Charge, the DIP Lender with leave of the Court obtained upon three (3) days' notice to the Debtor and to the Proposal Trustee,

may exercise any and all of its rights and remedies against the Debtor or the Property under or pursuant to the DIP Commitment Letter, the Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Debtor and set off and/or consolidate any amounts owing by the DIP Lender to the Debtor against the obligations of the Debtor to the DIP Lender under the DIP Commitment Letter, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Debtor and for the appointment of a trustee in bankruptcy of the Debtor; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Debtor or the Property.

10. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any proposal filed by the Debtor under the BIA or in any plan of compromise or arrangement filed by the Debtor under the *Companies' Creditors Arrangement Act* with respect to any advances made pursuant to the DIP Commitment Letter or the Definitive Documents.

11. **THIS COURT ORDERS, AUTHORIZES AND DIRECTS**, subject to the terms of the DIP Commitment Letter and the Definitive Documents, the Debtor to pay the amounts payable to 227 under its loan and security documents that are described on **Schedule "A"** to this Order out of advances made by the DIP Lender under the DIP Facility, forthwith after such advances are made by the DIP Lender, in full satisfaction of all debts, obligations and security interests owed to 227 by the Debtor, including under 227's loan and security documents.

12. **THIS COURT ORDERS** that (a) pending expiry of the time for filing a notice of appeal or application for leave to appeal in respect of this Order and the disposition of any motions to review, rescind or vary this Order, applications for leave to appeal or appeals from this Order (collectively, "**Challenges**"), the Debtor be and is hereby authorized to borrow funds under the DIP Facility in the amounts necessary to implement its restructuring plan and the SISP and approved by the Proposal Trustee, (b) irrespective of the disposition of any Challenges the DIP Lender shall have the benefit of the DIP Charge and all other provisions of this Order in respect

of all amounts so advanced, and (c) this Order is subject to provisional execution to the extent necessary to give effect to the foregoing.

PROPOSAL TRUSTEE'S FEES AND ADMINISTRATION CHARGE

13. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Debtor shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Debtor as part of the costs of these proceedings. The Debtor is hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel for the Proposal Trustee and counsel for the Debtor on a weekly basis.

14. **THIS COURT ORDERS** that the Proposal Trustee and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Proposal Trustee and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

15. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee, if any, and the Debtor's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Proposal Trustee and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 16 to 20 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

16. **THIS COURT ORDERS** that the priorities of the Administration Charge and the DIP Lender's Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $200,000); and

Second – DIP Lender's Charge;

17. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges 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 such failure to file, register, record or perfect.

18. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any individual, firm, corporation, governmental body or agency (except statutory deemed trusts that, at law, rank in priority to all other charges), or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), provided that the Charges shall be subordinate to the Encumbrances listed in the attached **Schedule "B"** in respect only of the property identified as collateral in said **Schedule "B"**.

19. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Debtor shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Debtor also obtains the prior written consent of the Proposal Trustee, the DIP Lender and the beneficiaries of the Administration Charge, or further Order of this Court.

20. **THIS COURT ORDERS** that the Charges, the DIP Commitment Letter and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder 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 applications; (c) the filing or deemed 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, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Debtor, 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 DIP Commitment Letter or the Definitive Documents shall

create or be deemed to constitute a breach by the Debtor of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Debtor entering into the DIP Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Debtor pursuant to this Order, the DIP Commitment Letter or 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.

21. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Debtor's interest in such real property leases.

ENHANCED POWERS OF THE PROPOSAL TRUSTEE

22. **THIS COURT ORDERS** that, in addition to the powers and duties set out in the BIA and this Order (or any other Order of this Court in these proceedings), the Proposal Trustee is hereby fully and exclusively authorized and empowered, but not required, to take any and all actions and steps, and execute any and all documents and writings, on behalf, and in the name of the Debtor in order to carry out its duties under this Order or any other Order of the Court, including to execute all documents relating to the SISP (as defined below) as well as to execute and deliver any documents on behalf of the Debtor to implement transactions under the SISP approved by the Court.

23. **THIS COURT ORDERS** that the Proposal Trustee is authorized and empowered, but not required, to operate on behalf of the Debtor any of the Debtor's existing accounts at any financial institution (the "**Debtor's Accounts**"), in such manner as the Proposal Trustee, in its sole discretion, deems necessary or appropriate to assist with the exercise of the Proposal Trustee's powers and duties set out herein, including the ability to add or remove persons having signing authority with respect to any of the Debtor's Accounts.

24. **THIS COURT ORDERS** that all employees of the Debtor shall remain the employees of the Debtor until such time as the Proposal Trustee, on the Debtor's behalf, may terminate the employment of such employees. Nothing in this Order shall, in and of itself, cause the Proposal Trustee to be liable for any employee-related liabilities or duties, including, without limitation, wages, severance pay, termination pay, vacation pay and pension or benefit amounts.

25. **THIS COURT ORDERS** that the enhancement of the Proposal Trustee's powers as set forth herein, the exercise by the Proposal Trustee of any of its powers, the performance by the Proposal Trustee of any of its duties, or the use or employment by the Proposal Trustee of any person in connection with its appointment and the performance of its powers and duties shall not constitute the Proposal Trustee the employer, successor employer or related employer of the employees of the Debtor within the meaning of any provincial, federal or municipal legislation or common law governing employment, pensions or labour standards or any other statute, regulation or rule of law or equity for any purpose whatsoever or expose the Proposal Trustee to liability to any individuals arising from or relating to their previous employment by the Debtor.

26. **THIS COURT ORDERS** that the Proposal Trustee is not, and shall not be or be deemed to be, a director, officer or employee of the Debtor.

27. **THIS COURT ORDERS** that the Debtor shall continue to have the benefit of all of the protections and priorities as set out in the BIA, or this Order, and any such protections and priorities shall apply to the Proposal Trustee in fulfilling its duties and exercising any of its powers under this Order or any other Order of this Court.

28. **THIS COURT ORDERS** that the Debtor, its management and advisors shall cooperate fully with the Proposal Trustee and any directions it may provide pursuant to this Order or any other Order of this Court and shall provide the Proposal Trustee with such assistance as the Proposal Trustee may request from time to time to enable the Proposal Trustee to carry out its duties and powers as set out in this Order or any other Order of this Court.

29. **THIS COURT ORDERS** that nothing in this Order shall constitute or be deemed to constitute the Proposal Trustee as a receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of the Debtor within the meaning of any

relevant legislation and that any distribution made to creditors of the Debtor by the Proposal Trustee will be deemed to have been made by the Debtor itself.

30. **THIS COURT ORDERS** that the Proposal Trustee shall not take possession of the Property, and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the business or Property of the Debtor, or any part thereof.

31. **THIS COURT ORDERS** that nothing herein contained shall require the Proposal Trustee to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Proposal Trustee from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Proposal Trustee shall not, as a result of this Order or anything done in pursuance of the Proposal Trustee's duties and powers under this Order, be deemed to be in possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

32. **THIS COURT ORDERS** that the Proposal Trustee shall provide any creditor of the Debtor and the DIP Lender with information provided by the Debtor in response to reasonable requests for information made in writing by such creditor addressed to the Proposal Trustee. The Proposal Trustee shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Proposal Trustee has been advised by the Debtor is confidential, the Proposal Trustee shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Proposal Trustee and the Debtor may agree.

33. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Proposal Trustee under the BIA or as an officer of this Court, the Proposal Trustee shall incur no

liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Proposal Trustee by the BIA or any applicable legislation.

SALE AND INVESTMENT SOLICITATION PROCESS

34. **THIS COURT ORDERS** that the Sale and Investment Solicitation Process (the "**SISP**"), attached as **Schedule "C"** to this Order, is approved.

35. **THIS COURT ORDERS** that the Debtor and the Proposal Trustee are authorized and directed to perform their obligations under and take such steps as they consider necessary or desirable in carrying out the SISP.

36. **THIS COURT ORDERS** that the Proposal Trustee shall have no personal or corporate liability in connection with the SISP, including, without limitation:

(a) by advertising the SISP, including, without limitation, the opportunity to invest by way of equity or debt in the Business of the Debtor or acquire all or a portion of the Property;

(b) by exposing the Property to any and all parties;

(c) by responding to any and all requests or inquiries regarding due diligence conducted in respect of the Debtor or the Property;

(d) through the disclosure of any and all information regarding the Debtor or the Property arising from, incidental to or in connection with the SISP;

(e) pursuant to any and all offers received by the Debtor in accordance with the SISP; and

(f) pursuant to any agreements entered into by the Debtor in respect of the investment in or financing of the Business or sale of any of the Property.

37. **THIS COURT ORDERS** that, in connection with the SISP and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the

Debtor and the Proposal Trustee are authorized and permitted to disclose personal information of identifiable individuals to prospective investors, financiers, purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more investment, finance or sale transactions (each, a "**Transaction**"). Each prospective investor, financier, purchaser, or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Debtor or the Proposal Trustee, as applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Debtor or the Proposal Trustee, as applicable, or ensure that all other personal information is destroyed.

GENERAL

38. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Debtor, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtor and to the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding, or to assist the Debtor and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

39. **THIS COURT ORDERS** that each of the Debtor and the Proposal Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Proposal Trustee is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

40. **THIS COURT ORDERS** that any interested party (including the Debtor and the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

DEC 19 2013

SCHEDULE "A" – AMOUNTS PAYABLE TO 227

Principal	$348,747.00
Interest	$2,439.00
Fees of 1045256 Ontario Inc.	$ 11,865.00
Fees and disbursements of Aird & Berlis LLP and prior counsel	$ 15,016.64
Fees and disbursements of PricewaterhouseCoopers Inc.	$9,254.70
Professional fees and disbursements to close	$2,000.00
Total	$389,322.34

SCHEDULE "B" – SECURED ASSETS NOT PRIMED BY ADMINISTRATION CHARGE

SCHEDULE B
True North Hardwood Plywood Inc.
Secured Assets Not Primed by Administration Charge and DIP Loan Charge

Name	Collateral	PPSA Registration #
Xerox Canada Ltd.	Photocopier	20090305100214621318
Caisse Populaire De Cochrane Limitee	2010 Dodge RPC - VIN# 1D7RV1CTXAS243198	20120830144815301656
RPG Receivables Purchase Group Inc.	Accounts receivable factored to December 18, 2013 (Factoring will cease effective December 19, 2013)	20130227145215308805
Eacom Timber Corporation	Certain logs or timber of True North Hardwood Plywood Inc. identified in registered claim for lien	No PPSA Registration. Claim for lien dated November 15, 2013 filed by EACOM Timber Corporation with the Ontario Superior Court of Justice on November 15, 2013

SCHEDULE "C" - SISP

True North Hardwood Plywood Inc. ("True North")
Sale and Investment Solicitation Process Summary

The purpose of the Sale and Investment Solicitation Process (the "SISP") is to identify one or more purchasers of, or investors in, the business and assets of True North with a projected completion date of a transaction or transactions by March 31, 2014.

All capitalized terms used but not otherwise defined herein have the meaning given to them in the Order granted by the Ontario Superior Court of Justice (the "Court") on December 19, 2013 (the "December Order") in respect of the proposal proceedings commenced by True North under the *Bankruptcy and Insolvency Act* (the "BIA").

The SISP details are provided below.

- The Proposal Trustee has compiled, and with the assistance of True North may continue to compile, a list of interested parties ("Interested Parties") and will distribute to them an interest solicitation letter detailing this opportunity. The Proposal Trustee will contact all parties identified as well as any additional parties that come to its attention. A confidentiality agreement ("CA") will be attached to the interest solicitation letter;

- The Proposal Trustee, with the assistance of True North, will prepare a confidential information memorandum ("CIM") which will be made available to Interested Parties that execute the CA. The CIM will provide an overview of True North's business, property and financial results;

- Interested Parties who execute the CA will have an opportunity to perform diligence, including reviewing information in a virtual data room;

- A notice will be published in the national edition of *The Globe and Mail* newspaper and, at the discretion of the Proposal Trustee, in trade publications;

- The Proposal Trustee, with the assistance of True North, will facilitate diligence efforts by, among other things, responding to questions and coordinating meetings between Interested Parties and True North's management and such other parties as the Proposal Trustee may arrange. All meetings with management will be convened in the presence of a representative of the Proposal Trustee;

- Prospective investors shall be required to identify all material terms of their proposed investment to permit evaluation of such proposal but will not be required to submit the terms and structure of their proposed investment in a predetermined prescribed format;

- Parties interested in acquiring assets will be able to refer to a template asset purchase agreement ("APA") that will be posted in the data room. Interested Parties will be

encouraged to submit offers substantially in the form of the APA, with any changes black-lined against the APA;

- Interested Parties will be entitled to submit offers for True North's business and assets on an individual basis or *en bloc*, Subject to the value of the consideration to be paid, preference will be given to *en bloc* offers;

- The deadline for submission of offers ("Offer Deadline") will be 5:00 pm EST on March 3, 2014;

- Offers are to be submitted to the Proposal Trustee with a refundable cash deposit in the form of a wire transfer (to a bank account specified by the Proposal Trustee) or such other form of deposit as is acceptable to the Proposal Trustee, payable to the order of the Proposal Trustee, in trust, in an amount equal to 10% of the purchase price or investment amount. Offers are to be supported by evidence, satisfactory to the Proposal Trustee, of financing sufficient to close a transaction within the timelines detailed in these procedures. All offers are to be irrevocable until 45 days after the date of the Offer Deadline;

- The Proposal Trustee will evaluate the offers and may seek clarification and/or a re-bidding of certain offers. Copies of all offers received shall be provided to the DIP Lender on a confidential basis provided that the DIP Lender is not a bidder in the SISP;

- True North's senior management and the DIP Lender, along with their respective legal counsel, will be consulted on a timely basis during the different phases of the SISP provided that they confirm to the Proposal Trustee that they are not bidders in the SISP; and

- Upon completion of definitive documentation, the Proposal Trustee will apply to the Court for an order approving one or more offers ("Transaction"), with a transaction projected to be completed as soon as possible following approval of the Transaction by the Court. The Proposal Trustee will provide its recommendation to the Court with respect to the Transaction.

Other attributes of the SISP:

- The Proposal Trustee shall have the right to extend by up to 2 weeks any deadline in the SISP in order to facilitate the SIP. Further extensions will require Court approval;

- True North's management and employees are required to assist and support the efforts of the Proposal Trustee as provided for herein;

- Any transaction will be consistent with insolvency principles, including without material representations and warranties and shall be on an "as is, where is" basis;

- The Proposal Trustee, after consultation with the DIP Lender (provided it is not a bidder), reserves the right to accept one or more offers on behalf of True North and to take such steps as are necessary to finalize and complete an APA or investment agreement or to continue negotiations with a selected number of Interested Parties with a view to finalizing an agreement(s) with one or more of them;

- The Proposal Trustee, after consultation with the DIP Lender, shall be under no obligation to accept the highest offer, the best offer, or any offer, and the selection of any offer(s) shall be at the discretion of the Proposal Trustee;

- Acceptance of any transaction is subject to the approval of the Court. Neither True North nor the Proposal Trustee shall be bound by the terms of any transaction(s) until approval of the Court is obtained;

- The Proposal Trustee may consider transactions involving a restructuring or investment in True North if, in the opinion of the Proposal Trustee, the resulting transaction is in the best interests of True North and maximizes value for the benefit of its stakeholders and such transactions are in form and substance acceptable to the DIP Lender;

- The Proposal Trustee reserves the right to apply to the Court at any time to modify or terminate the SISP if it considers it appropriate in the circumstances or to apply to the Court for advice and directions with respect to the discharge of its powers and duties hereunder; and

- The Proposal Trustee may, after consultation with the DIP Lender, extend the period between execution of an APA and Court approval of a transaction should the successful bidder require time to obtain regulatory or other approvals.

IN THE MATTER OF THE PROPOSAL OF TRUE NORTH HARDWOOD PLYWOOD INC. OF THE TOWN OF COCHRANE IN THE PROVINCE OF ONTARIO

Court File No.31-1813900

Dec 19/13

December 19, 2013

This matter is unopposed. I am satisfied that the disclosure and security notes these tests set out in the BIA and that the SSP proposed is reasonable. Order to go which I have signed.

[signature] J.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

MOTION RECORD

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Lawyers for True North Hardwood Plywood Inc.

TAB

10

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act*[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully

later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign

currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*[6]and *Lehndorff General Partner Ltd., Re*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Anvil Range Mining Corp., Re*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive,

it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect

extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re*[15], I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it

outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

End of Document

TAB

11

2011 ONSC 7641
Ontario Superior Court of Justice

P.J. Wallbank Manufacturing Co., Re

2011 CarswellOnt 15300, 2011 ONSC 7641, [2011] O.J. No. 5922, 211 A.C.W.S. (3d) 17, 88 C.B.R. (5th) 281

In the Matter of the Proposal of P.J. Wallbank Manufacturing Co. Limited

D.M. Brown J.

Heard: December 21, 2011
Judgment: December 21, 2011
Docket: CV-11-0123-OTCL

Counsel: J. Fogarty, S.-A. Wilson for Applicant
G. Moffat for General Motors LLC
T. Slahta for TCE Capital Corporation

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors

Bankrupt was manufacturer of springs and was key supplier to GM LLC (GM) — On December 12, 2011, bankrupt filed Notice of Intention (NOI) under Bankruptcy and Insolvency Act (BIA) — GM provided immediate funding to bankrupt pursuant to accommodation agreement — GM agreed to provide additional DIP financing pursuant to DIP credit facility (proposed facility) and interim financing charge (proposed charge) — Bankrupt brought motion under s. 50.6 of BIA for authorization to borrow under proposed facility and to grant proposed charge — Motion granted — Bankrupt likely would not be subject to NOI proceedings past end of February, 2012 — Although current management would continue to operate bankrupt, accommodation agreement placed significant restrictions on company's operations — Absent approval of proposed facility, bankrupt would close its doors — Report of proposal trustee supported proposed facility — Certain customers supported bankrupt's proposal efforts — As to creditors, GM supported motion at bar, and other creditors did not oppose it — Terms of proposed charge's priority minimized prejudice to other creditors — Given that immediate cessation of bankrupt's activities would result from failure to approve proposed facility and charge, benefit to all stakeholders significantly outweighed any prejudice — Proposed treatment of professional fees advanced by GM under accommodation agreement was consistent with s. 50.6(1) of BIA — GM confirmed that amounts advanced to date under accommodation agreement would not be subject to proposed charge.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

MOTION by bankrupt corporation for authorization to borrow under DIP credit facility and to grant interim financing charge.

***D.M. Brown J.*:**

I. Overview of motion for approval of DIP financing

1 P.J. Wallbank Manufacturing Co. Limited, a manufacturer of springs and wireforms for automotive and other industrial customers, filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* on December 12, 2011. Doyle Salewski Inc. was appointed as Proposal Trustee. Wallbank moves under section 50.6 of the *BIA* for authorization to borrow under a DIP credit facility from General Motors LLC, as well as the granting of an Interim Financing Charge against its property in favour of GM.

2 This motion was brought on less than 24 hours notice. From the affidavits of service filed, I am satisfied that notice was given to interested parties in accordance with my directions of yesterday.

II. The Debtor and its creditors

3 Since 2008 Wallbank has experienced a downturn in its business linked, in part, to a slowdown in the automotive sector and, more recently, to the loss of a major customer this past summer.

4 Wallbank has several secured creditors. It owes Danbury Financial Services Inc. about $720,000.00 under a credit facility. Until September, 2011, TCE Capital Corporation factored Wallbank's accounts receivable, but stopped as a result of a default on that facility. Wallbank owes TCE approximately $700,000.00. Both Danbury and TCE have registered financing statements against Wallbank over all classes of collateral except "consumer goods". Wallbank owes P. & B. W. Holdings Inc., the trustee of a family trust, $724,500; the Trust has subordinated its interest in Wallbank's property to each of Danbury and TCE. Wallbank owes $74,180.53 to three remaining secured creditors: Xerox Canada Inc., Anthony Wallbank and

Edward Wallbank. All three have subordinated their security in favour of Danbury and TCE.

5 As of the date of the NOI Wallbank owed Canada Revenue Agency $132,467.28 for unpaid source deductions, as well as approximately $1.22 million to unsecured creditors.

III. The proposed DIP Facility

6 Danbury has terminated its credit facility with Wallbank, and TCE has ceased factoring the company's receivables. Neither firm is prepared to advance further funds to Wallbank.

7 Wallbank is a key supplier to GE for springs. GE has agreed to provide immediate funding to Wallbank pursuant to the terms of an Accommodation Agreement dated December 12, 2011 and a DIP Facility Term Sheet.

8 The Accommodation Agreement offers two types of interim financing. First, GE agreed to provide Initial Financing of up to $160,450.00 to cover professional fees and to cover Wallbank's post-filing operations until a DIP order was obtained. According to the affidavit from Mr. Anthony Wallbank, the company's President, to date GE has advanced $193,850 under this facility.

9 GM is also prepared to make available additional DIP Financing up to a maximum of $500,000.00, including the amounts advanced under the Initial Financing.[1] Such further advances are conditional on (i) an agreement between GM and Wallbank on a budget for the company's continued operations up until February 26, 2012 and (ii) obtaining an interim financing order consistent with the terms of the Accommodation Agreement. Under the proposed Interim Financing Charge, all advances made by GM under the Accommodation Agreement would be secured by (i) a first priority charge on Wallbank's inventory and postfiling accounts receivable and (ii) a lien on Wallbank's other pre-filing assets junior only to the liens of Danbury, TCE and Xerox, but senior to any other liens.

10 Wallbank seeks an order that the DIP Facility would be on the terms, and subject to the conditions, set forth in the Accommodation Agreement and the DIP Facility Term Sheet, subject to some amendments reflected in a revised draft order, including certain provisions TCE wished included in the order. The Accommodation Agreement contains several important terms concerning Wallbank's operations:

> (i) absent an event of default, GM agrees to refrain from re-sourcing the component parts made by Wallbank for up to 60 days;
>
> (ii) GM agrees to pay for post-filing orders on a "net 7 days prox" basis;
>
> (iii) Wallbank agrees to build an inventory of GM-ordered component parts in accordance with an inventory bank production plan to be agreed upon with GM;
>
> (iv) The parties have identified which tools used by Wallbank belong to GM and to other parties; and,
>
> (v) Wallbank agrees not to manufacture products for other Large or Medium Customers without GM's prior

consent and without those customers agreeing to abide by all or some of the terms of the Accommodation Agreement, including terms governing the time for the payment of receivables and the price of the products

11 Under the DIP Facility Term Sheet, the Facility will:

(i) have a term of up to 60 days, mirroring the No Resource Period agreed to by GM under the Accommodation Agreement;

(ii) bear interest at a rate of 13%, with interest payable monthly in arrears; and,

(iii) be repaid upon the sale of any property of Wallbank out of the ordinary course of business.

IV. Analysis

A. The statutory provisions

12 Section 50.6 of the *BIA* provides, in part, as follows:

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(*a*) or 50.4(2)(*a*), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

. . .

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

. . .

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(*b*) or 50.4(2)(*b*), as the case may be.

B. Consideration of the various factors

B.1 Likely duration of NOI proceedings

13 The evidence indicates that Wallbank likely will not be subject to NOI proceedings past the end of February, 2012. It requires the DIP Facility to continue operating, and by its terms that facility has a maximum term of 60 days from the date of filing the NOI. The cash-flow statement filed by Wallbank projects that it will have drawn fully on the DIP Facility by the middle of next February.

B.2 Management of Wallbank's affairs

14 Although current management will continue to operate Wallbank, as described above the Accommodation Agreement places significant restrictions on the company's operations. Simply put, GM wants to use the next 45 days or so to build up an inventory of needed component parts and is insisting that any other customer who wishes to order product from Wallbank must do so on the credit and pricing terms set out in the Accommodation Agreement. Those terms require very prompt payment of receivables and an agreement to pay a higher price for Wallbank's products.

15 The materials do not disclose how many employees presently work at Wallbank. Some employees are members of the Canadian Auto Workers. The Proposal Trustee reports that a dispute currently exists whereby the CAW is not permitting Wallbank to ship product to Gates Corporation, a result of which could be a reduction by $40,000.00 in the opening accounts receivable forecast in the cash-flow statement.

B.3 Enhancement of prospects of a viable proposal

16 According to the Proposal Trustee Wallbank is developing a restructuring plan which would involve either (i) identifying a strategic partner, (ii) restructuring its debts, or (iii) an orderly liquidation of its assets.

17 Wallbank filed a cash-flow projection for the period ending February 26, 2012. The projection was vetted by a DIP advisor appointed by GM. The cash-flow supports Mr. Wallbank's statement that without the proposed DIP Facility the company will be unable to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with that assessment:

> In the event that the DIP Loan is not approved by the Court, the Company may have no choice but to immediately cease operations, and the Company's ability to make a proposal to its creditors will be severely compromised.

18 The evidence is clear that absent approval of the DIP Facility, Wallbank will close its doors and turn off its lights.

B.4 Report of the Proposal Trustee

19 In its December 20, 2011 report the Proposal Trustee stated that it was satisfied that Wallbank is proceeding in good faith with its proposal, supported the need for interim financing, and concluded that "the benefits of granting such an Order far outweigh the prejudice to the Company, the creditors, employees and customers that these stakeholders would experience if the Order were not granted."

B.5 Nature and value of Wallbank's property

20 Although Wallbank filed evidence about its current indebtedness, it did not file any detailed historical evidence about balance sheet or profit/loss position. The current value of its assets is unclear; the evidence suggests that Wallbank has operated at a loss for at least the past two years.

B.6 Confidence of major creditors

21 According to the Proposal Trustee certain customers support Wallbank's proposal efforts: GM, Omex, Dayco, Magna Corporation, Stacktole, 3M, Bontaz and Admiral Tool.

22 As to creditors, GM, of course, supports Wallbank's motion. The Trust has indicated that it does not oppose the order, but without prejudice to its right to move to vary the order at some later date. In light of changes made to the proposed DIP Order as a result of negotiations amongst the parties, Danbury does not oppose the order sought. Xerox was served earlier today with the motion materials, but has not communicated any position to Wallbank's counsel.

23 TCE does not oppose the order sought, as revised, provided the order is made subject to three conditions:

> (i) The order would be without prejudice to TCE's asserted position with respect to its ownership of factored receivables;
>
> (ii) Wallbank, TCE and GM will agree on a process for the collection and remittance of accounts receivable; and,
>
> (iii) GM waives its rights of set-off relating to pre-November 30, 2011 accounts receivable purchased by TCE, save and except for Allowed Set-Offs as defined in section 2.4(B) of the Accommodation Agreement.

Both Wallbank and GM are amenable to those conditions. I accept those conditions and make them part of my order.

B.7 Prejudice to creditors as a result of the Interim Financing Charge

24 Although, like any charge, the Interim Financing Charge will impact all creditors' positions to some degree, the terms of the charge's priority have been negotiated to minimize the prejudice to Danbury and TEC. As well, given the immediate cessation of Wallbank's activities would result from the failure to approve the DIP Facility and Interim Financing Charge, on balance the benefit to all stakeholders of the proposed DIP Facility significantly outweighs any prejudice.

25 Sections 2.1 and 2.2 of the Accommodation Agreement contemplated that both components of the Initial Financing advanced by GM — professional fees and the funding of operations — would be secured by the Interim Financing Charge. Section 50.6(1) of the *BIA* provides that a charge "may not secure an obligation that exists before the order is made". Wallbank advised that all funds made available by GM for professional fees are unspent and remain in counsel's trust account. Wallbank intends to return those funds to GM which plans, in turn, to advance similar amounts to Wallbank in the event a DIP Order is made. GM confirmed that the amounts advanced to date under section 2.1(C) of the Accommodation Agreement would not be subject to the Interim Financing Charge, but would be secured by the security described in the opening language of section 2.1 of the Accommodation Agreement. In my view the proposed treatment of the funds relating to professional fees is consistent with the intent of section 50.6(1) of the *BIA* and I approve it.

B.8 Conclusion

26 For these reasons I am satisfied that it is appropriate to authorize Wallbank to enter into the DIP Facility agreement and to grant the proposed Interim Financing Charge. Accordingly, an order shall go in the form submitted by the applicant, which I have signed.

Motion granted.

Footnotes
[1] DIP Facility Term Sheet.

TAB

12

2013 ONSC 1794
Ontario Superior Court of Justice

OVG Inc., Re

2013 CarswellOnt 3289, 2013 ONSC 1794, 228 A.C.W.S. (3d) 26

In the Matter of the Bankruptcy of OVG Inc. of the Town of Renfrew in the Province of Ontario

Stanley J. Kershman J.

Heard: March 12, 2013
Judgment: March 25, 2013
Docket: Ottawa BK-33-1718184

Counsel: J. Fogarty, P. Masic, for Debtor
M. Rouleau, for Proposal Trustee
C. Peddle, for Royal Bank of Canada

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Practice and procedure

Bankrupt was glazing and glass manufacturing company which filed notice of intention to make proposal ("NOI") on February 22, 2013 — Bankrupt brought motion for authorization to borrow under credit facility from W Inc., as well as granting of interim financing charge against its property in favour of W Inc. — Bankrupt further sought order to extend time to file its proposal to May 8, 2013 — Motion granted — Evidence established that if DIP financing was not approved, bankrupt would not be able to fund its ongoing business operations and restructuring efforts during NOI proceedings, and would close its doors — While bank would be prejudiced by advance of $100,000, prejudice would be minimal — It was appropriate to authorize bankrupt to entering into DIP facility with W Inc. to extent of first tranche of $100,000 and to grant proposed interim financing charge to extent of $100,000 — Closing fee of $25,000 was payable by $15,000 upon drawdown of first tranche of $100,000, and $10,000 if there was second tranche under primary facility and provided that second tranche drawdown was allowed by court — In event there would be drawdown of secondary facility of $250,000 as contemplated by letter, court approval would have to be obtained — Time to file proposal was extended based on information contained in proposal trustee's report and based on submissions.

Table of Authorities

Cases considered by *Stanley J. Kershman J.*:

Dessert & Passion inc. (Faillite) c. Banque Nationale du Canada (2009), 58 C.B.R. (5th) 224, 2009 QCCS 4669, 2009 CarswellQue 10378, [2009] R.J.Q. 2822 (C.S. Que.) — followed

P.J. Wallbank Manufacturing Co., Re (2011), 2011 CarswellOnt 15300, 2011 ONSC 7641, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

MOTION by bankrupt for authorization to borrow under credit facility, granting of interim financing charge against its property, and order to extend time to file proposal.

***Stanley J. Kershman J.*:**

Introduction

1 OVG Inc., ("Company" or "OVG") is a glazing and glass manufacturing company that was established in 1978. The Company filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") on February 22, 2013. Doyle Salewski Inc. ("DSI") was appointed as the proposal trustee. OVG moves under section 50.6 of the BIA for authorization to borrow under a credit facility from Waygar Capital Inc. ("Waygar") as well as the granting of an Interim Financing Charge ("IFC") against its property in favour of Waygar.

2 It also seeks an order to extend the time to file its Proposal to May 8, 2013.

3 The motion was brought on short notice. Based on the affidavit of service filed, the Court is satisfied that notice was given to the interested parties.

Debtor and its Creditors

4 The Company was established 1978 and is located in Renfrew, Ontario and employs approximately 60 people.

5 According to the affidavit of Shawn McHale, president of OVG Inc., the Company has struggled to maintain workflow while financing 10% construction lien holdbacks on larger projects.

6 In addition, the Company has suffered significant losses on 2 projects in the fiscal years 2011 and 2012, further constraining cash flow. These constraints in cash flow have caused the Company difficulty in maintaining sufficient levels of materials to complete work in process.

7 OVG has one secured creditor namely the Royal Bank of Canada ("RBC") which is owed in the range of between $3,200,000.00 and $3,400,000.00. The Bank opposes the granting of a DIP lending facility. It does not oppose the extension of time for filing for the proposal.

8 Based on the creditor list prepared by DSI, secured creditors are owed in excess of $3,400,000.00. CRA is owed approximately $55,000.00 for source deductions. In addition, CRA is owed other monies for HST of approximately $250,000.00. The claims of unsecured creditors, while not totaled on the list of creditors, are approximately $6,800,000.00.

9 The Company has prepared cash flow statements for the period of February 25, 2013 to May 24, 2013, in conjunction with Welch and Co. Business Advisors.

The Proposed DIP Facility

10 The RBC is no longer providing credit to OVG. The Company's account was transferred to the Special Loans Division on May 1, 2012. On May 24, 2012 the Bank entered into a letter agreement wherein it changed the rate of interest on the operating and demand loans to RBC Prime + 4.5%. On September 21, 2012 the Bank retained the services of Ernst and Young Inc. to assist in the analysis of the viability of the Company.

11 In his affidavit, Peter Gordon of the Bank states that he met and spoke with representatives of the Company numerous times to discuss its financial difficulties. According to the Bank, financial reporting provided by the Company shows that it is losing substantial amounts of money and is projected to lose even more money in the future.

12 On February 12, 2013 demand letters and Notices of Intent to Enforce Security were sent by email to counsel for the Company and the guarantors. As of that date, the Company was indebted to RBC in the amount of $3,454,155.81.

13 The Bank claims that based on the information provided by Ernst and Young Inc., that there will be a substantial

shortfall to the Bank after collection of the accounts receivable and sale of the assets. The Court notes that the document of the estimate of realizable assets provided by Ernst and Young Inc. in the motion of record did not include the accompanying notes and assumptions mentioned therein.

14 The Bank does not believe that the Company can be viably restructured.

The Proposed DIP Facility

15 By a letter dated March 11, 2013 prepared by Waygar to OVG and signed by OVG, there is an offer of DIP financing. The Court notes that the letter specifically states that it is not a commitment letter. It has not been signed by Waygar. The Court believes that it has not been signed by Waygar due to the short timeframes involved. The letter includes a primary lending facility of $250,000.00 including $100,000.00 to "fund payroll this Thursday March 14, 2013."

16 The letter also provides for a secondary lending facility of $250,000.00 as necessary to finance additional working capital requirements.

17 The interest rate for the primary facility is 18%. The standby rate for the secondary facility is 9%, which increases to 18% once it is drawn down. There is a closing fee of $25,000 payable when the first funds are drawn down.

18 Furthermore, two deposits are required to be paid by the Company to Waygar. The first is for $12,500.00 and is chargeable against the lender's field examination, financial analysis and appraisal expenses.

19 The second deposit is for $12,500.00 which will be required to apply against legal and closing expenses.

20 At the hearing of the motion, Company counsel indicated that $12,500.00 worth of the deposit was already in hand. This would mean that out of the initial $100,000.00 advance, $25,000.00 would be held back for the closing fee and $12,500.00 would be held back for the deposit described above. This would mean that there would be $62,500.00 available to the Company ($100,000.00 - $25,000.00 - $12,500.00),

21 The Court is aware that the March 11, 2013 letter is not a commitment letter but it is satisfied that on the basis of the oral representations made by Mr. Fogarty at the motion, that Waygar is committed to the DIP Facility.

22 As to the primary DIP amount, it is set up for two tranches, one for $100,000.00 and the second for $150,000.00. The Court notes that the purpose for the money set out in the letter is for payroll. In reality, based on the information provided at the hearing, $42,000.00 is for payroll and the balance is for purchase of equipment. The Court has advised of a case in Ontario dealing with DIP financing: *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.).

23 The case has been reviewed by the Court and the Court bases its analysis in part on the *Wallbank* case.

Analysis

Statutory provisions

24 Section 50.6 of the BIA, in part, provides as follows:

> 50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> (...)
>
> **Priority**
>
> (3) The court may order that the security or charge rank in priority over t he claim of any secured creditor of the debtor.
>
> (...)
>
> **Factors to be considered**
>
> (5) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Consideration of the Various Factors

1) Likely Duration of the NOI Proceedings

25 The evidence does not show when the Proposal will be filed. The Court has been asked for an extension of the Proposal to May 8, 2013. The Company requires the DIP facility to continue operating.

2) Management of OVG's Affairs

26 The current management will continue to operate OVG.

27 There are 60 employees at OVG in Renfrew, Ontario which is an economically depressed area.

3) Report of the Proposal Trustee

28 In its March 8, 2013 report, the Proposal Trustee stated that it was satisfied that OVG is proceeding in good faith with its proposal, and supported the need for DIP financing.

4) Would the Loan Enhance the Prospects of a Viable Proposal

29 According to the Proposal Trustee, OVG is developing a restructuring plan which may either involve:

1) identifying a strategic partner,

2) restructuring its debts, or

3) an orderly liquidation of its assets.

30 OVG has filed cash flow projections for the period ending May 24, 2013. The cash flow projections support Mr. McHale's statement that without the proposed DIP financing, the Company will not be able to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with this assessment saying as follows:

> In the event that the DIP loan is not approved by the Court, the Proposal Trustee is of the view that this may result in a material adverse change and furthermore, that the Company may be required to cease operations which will severely compromise the Company's ability to complete its proposal to its Creditors.

31 The evidence is clear that if the DIP financing is not approved, OVG will close its doors.

4) Nature and Value of OVG's Property

32 While OVG filed evidence about its current indebtedness, it did not file any detailed historical evidence about its balance sheet or profit and loss position. The current value of its assets is unclear. The evidence suggests that OVG has been operating at a loss for at least 2011-2012.

5) Confidence of Major Creditors

33 The only major creditor in attendance at the motion was the Bank who opposed the DIP financing. There is no evidence that any other creditors either opposed or approved of the DIP financing request. The Court notes that only 4 or 5 creditors were advised of the motion.

6) Prejudice to Creditors as a Result of the Interim Financing Charge

34 Like any DIP financing, the Interim Financing Charge will impact all of the creditors' positions to some degree and will potentially reduce the amount recoverable by the RBC. In the event that OVG's business would close because of the failure to approve the DIP financing and the Interim Financing Charge, on balance, the benefit to stake holders of the proposed DIP facility significantly outweighs any prejudice to the Bank.

35 While the Bank would be prejudiced by the advance of $100,000.00, the Court considers the prejudice to be minimal.

Conclusion

36 Having considered all of the factors involved with the DIP financing, the Court is satisfied that it is appropriate to authorize OVG to enter into the DIP Facility with Waygar Capital Inc. to the extent of the first tranche of $100,000.00 and to grant the proposed Interim Financing Charge to the extent of $100,000.00.

37 This Court orders that the closing fee of $25,000.00 should be payable as follows:

1) $15,000.00 upon the drawdown of the first tranche of $100,000.00;

2) $10,000.00 if there is a second tranche under the primary facility and provided that the second tranche drawdown is allowed by the Court.

38 The authority for dividing the payment of the closing fee is the case of *Dessert & Passion inc. (Faillite) c. Banque Nationale du Canada*, 2009 QCCS 4669, 58 C.B.R. (5th) 224 (C.S. Que.).

39 In addition, in the event that there would be a drawdown of the secondary facility of $250,000.00 as contemplated by the March 11, 2013 letter, Court approval would have to be obtained.

40 The time to file the Proposal is extended to May 8, 2013 based on the information contained in the Proposal Trustee's report and based on the submissions made at the motion.

41 The following documents will be sealed as they contain information prepared by Ernst and Young Inc. that may be prejudicial to the Company if it becomes public record.

1) Affidavit of Peter Gordon Sworn, paras 18-21;

2) Exhibit P of the Affidavit of Peter Gordon Sworn, March 5, 2013;

3) Respondent's Factum dated March 8, 2013, paras 10-12.

42 I will remain seized of this matter.

43 The matter will be brought back on next week on a date, time and place to be advised.

44 Motion materials for the motion next week are to be served on all of the parties set out in the notice of motion brought by the Company.

45 Order accordingly.

Motion granted.

TAB

13

2005 BCSC 351
British Columbia Master

Cantrail Coach Lines Ltd., Re

2005 CarswellBC 581, 2005 BCSC 351, [2005] B.C.W.L.D. 2533, [2005] B.C.J. No. 552, 10 C.B.R. (5th) 164, 138 A.C.W.S. (3d) 1010

IN THE MATTER OF THE PROPOSAL OF CANTRAIL COACH LINES LTD.

Master Groves

Heard: March 1, 2005
Judgment: March 1, 2005
Docket: Vancouver B050363

Counsel: H. Ferris for Petitioner
R. Finlay for Creditor (Volvo)

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Petitioner company was tour bus operation with 25 years experience — Petitioner suffered serious drop-off in business in recent years — Petitioner missed payment to secured creditor in January 2005 — Petitioner filed notice of intention to make bankruptcy proposal — Petitioner brought application for extension of time in filing proposal — Secured creditor opposed application — Application granted — Extension of time would allow petitioner to make viable proposal — It was disingenuous for secured creditor to oppose proposal even before proposal was made — No evidence existed that extension would substantially prejudice secured creditor — Although circumstances of petitioner clearly prejudiced secured creditor to some degree, minor prejudice did not jeopardize their security.

Table of Authorities

Cases considered by *Master Groves*:

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162, 1993 CarswellOnt 208 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

APPLICATION for extension of time for filing bankruptcy proposal.

***Master Groves*:**

1 This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

2 Cantrail applies to the Court pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* for extension of time for filing a proposal.

3 VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

4 The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

5 Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as September 11th and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.

6 Cantrail was apparently able to meet its obligations up until the 16th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20th of January 2005 and perhaps in response to that, but in

any event, on the 1st of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81 creditors of Cantrail who have been notified of this application and only Volvo objects.

7 I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

8 As indicated, Cantrail is applying purport to s. 50.4(9) of the *Bankruptcy and Insolvency Act*. That reads and I will take out some of the language that is not necessary:

> The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned in subsection (8), if satisfied on each application that:
>
> (a) the insolvent person has acted and is acting in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

9 Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

> The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned subsection (8) or any extension thereof granted under subsection (9) if the Court is satisfied that:
>
> (a) the insolvent person has not acted or is not acting in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiry of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

10 The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

11 I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the *Act* and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

12 I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

13 Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

14 If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

15 If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.

16 If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

17 Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buyout of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout — a proposal which if they voted against they would probably be viewed as irrational businesspeople.

18 In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

19 I note the words in the legislation are "a viable proposal". According to the *Concise Oxford Dictionary* viable means

feasible. Viable also means practicable from an economic standpoint.

20 I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

21 Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

22 There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The *Act* in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

23 That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3rd of March 2004.

24 It stands to reason from this analysis that the applications of Volvo are dismissed.

Application granted.

End of Document

TAB

14

2000 CarswellOnt 1625
Ontario Court of Appeal

Cosgrove-Moore Bindery Services Ltd., Re

2000 CarswellOnt 1625, 17 C.B.R. (4th) 203

The Matter of the Proposal of Cosgrove-Moore Bindery Services Limited

Lane J.

Judgment: March 31, 2000
Docket: Toronto 31-372219

Counsel: *Harvey G. Chaiton*, for Applicant.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Proposal — Practice and procedure

Trustee brought motion to extend time for filing proposal under Bankruptcy and Insolvency Act for 45 days — Time was required to obtain commitment for financing — Motion granted — Debtor's financial situation had improved over recent months and production had increased — Bank, which held security over receivables, could be prejudiced by erosion of security but new production was generating new receivables — Extension did not materially prejudice creditors — Debtor acted in good faith in developing proposal — Debtor's alleged bad faith actions prior to notice were not material in decision to grant extension — It was likely that viable proposal could be made — Debtor's refusal to consent to receivership was act of bad faith but was not sufficient to exclude debtor from benefiting from Act's proposals — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50.4(9).

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — referred to

MOTION by trustee to extend time for filing proposal in bankruptcy.

Endorsement. ***Lane J.*:**

1 The Trustee of the Proposal money to extend the time for filing the Proposal for 45 days. There is a commitment for part of the financing required and time is asked to enable a letter of intent from another financier to the firmed up to a commitment. There is also some evidence that problems with certain new equipment which contributed to the Company's problems have been overcome and the Company is able to produce at a better rate. It is clear that the Company is still in financial trouble but the picture is not as bleak as some months ago. Several creditors oppose. The Bank is the holder of security over receivables and argues it will be prejudiced by erosion of the security. On the other hand, new production is generating new receivables. The Bank's position in effect requires a company seeking such an extension to have a positive cash flow so that there is no erosion of security. With respect, that cannot be regarded as a practical definition of material prejudice as referred to in s. 50.4(9). It is rare indeed that debtors in this situation present with positive cash flow. It is the prejudice caused by the extension itself that is to be measured and I do not find that any of the creditors is materially prejudiced. The objections of the landlord as to the rent on an occupation basis from March 4th can be brought forward by motion to resolve the legal issue. There seems to be no doubt it is entitled to rent for April and onwards. The problem about March exists; it will not be made worse by the extension. Similarly, Westcoast's position will not be worsened by the extension.

2 So far as the good faith of the debtor is concerned, think the primary focus is on whether it is proceeding in good faith towards developing a proposal and not on whether it acted in good faith during its pre-notice dealings. There is evidence, in the form of the commitment and the letter of intent that there is progress. I can see no lack of good faith or of diligence since the Notice. I am also satisfied that, given the resolution of the production problems, the commitment and letter of intent and the long history of profitable operation, it is likely that a viable proposal can be made.

3 There is one matter raised that I should address. It was submitted that the Company's refusal to consent to the receivership even though it has agreed to consent, was an act of bad faith. No doubt it was a breach of contract, but in my view it is not such an act as ought to disqualify the Company from taking advantage of the B1A provisions for Proposals. They are remedial in nature and often have the beneficial effect of keeping a business alive for the benefit not only of creditors, but of employees, shareholders and the community generally. Given the prevalence in security documents of consent to receivership clauses, it would gut the BIA proposal provisions to hold that refusal to consent was an act of such bad faith as to prevent any extension of time.

4 The motion to extend for 45 days is allowed.

5 No costs are sought.

Motion granted.

End of Document

TAB

15

2005 NSSC 346
Nova Scotia Supreme Court

H & H Fisheries Ltd., Re

2005 CarswellNS 541, 2005 NSSC 346, [2005] N.S.J. No. 513, 144 A.C.W.S. (3d) 407, 18 C.B.R. (5th) 293, 239 N.S.R. (2d) 229, 760 A.P.R. 229

In the Matter of H & H Fisheries Limited

Goodfellow J.

Heard: December 14, 2005
Judgment: December 19, 2005
Docket: SH B259148

Counsel: Victor J. Goldberg, Martha L. Mann for H & H Fisheries Limited
Stephen J. Kingston, Bob Mann (articled clerk) for Bank of Nova Scotia

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Debtor agreed to maintain all operating accounts with bank as condition of financing — Debtor breached agreement by depositing funds with other bank — Debtor had net loss of nearly $600,000 for fiscal year ending June 30, 2005 — Debtor applied for 45-day extension to file proposal — Application granted — Debtor met requirements of s. 50.4(9) of Bankruptcy and Insolvency Act — Debtor acted in good faith notwithstanding breach of agreement — Debtor acted to stay in operation as bank would have used funds to pay down debt — Debtor's good faith was supported by respected trustee — Debtor was likely to make viable proposal in sense of reasonable one to reasonable creditor — Bank as largest secured creditor should not be able to veto proposal at this early stage — Bank would not be unduly prejudiced by extension given debtor's current receivables of nearly $1 million were double its indebtedness to bank.

Table of Authorities

Cases considered by *Goodfellow J.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) — referred to

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc. (1997), 1997 CarswellOnt 1524, 46 C.B.R. (3d) 280, 36 O.T.C. 76 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 1 [rep. & sub. 1992, c. 27, s. 2] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 54(2.2) [en. 1992, c. 27, s. 22] — considered

s. 54(3) — considered

s. 62(1.2) [en. 1992, c. 12, s. 39] — considered

s. 62(2) — considered

Interpretation Act, R.S.C. 1985, c. I-21
Generally — referred to

s. 10 — considered

s. 12 — considered

APPLICATION by debtor for extension of time for filing proposal under Bankruptcy and Insolvency Act.

***Goodfellow J.*:**

Backgound

1 H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

2 Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

3 HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS "to finance trade receivables and inventory". It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including "for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank". There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

4 In November 2004 HHFL applied to increase its limit on its operating credit line from $400,000 to $1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

5 In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of $1,100,000 to January 31, 2005 when the limit was reduced to $750,000.

6 In February 2005, HHFL again requested access to the $1,100,000 credit limit to February 28, 2005 when again it would be reduced to $750,000 and this was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of $200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with $100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

7 In June 2005 HHFL advised that as part of its 2005 fiscal year ending June 30, 2005, the company would write off the Emporio account which would give it an operating loss of $300,000 which would be partially set off by an SR&ED refund of $200,000, leaving a net loss of $100,000 for the fiscal year 2005.

8 In September 2005 BNS received a copy of HHFL's unaudited financial statement for the year ending June 30, 2005 which showed a net loss of $596,043. This compared with a net loss of $21,003 for the year ending June 30, 2004.

9 HHFL had problems with cash flow and operating and contrary to the letter of commitment started to deposit funds to its accounts with CIBC and this was acknowledged by the director of finance of the company in September 2005. There followed innumerable meetings, correspondence between the parties and Mark S. Rosen, a licensed trustee in bankruptcy, who has consented to act as trustee for any proposal in this matter.

Legislation

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Ss. 50.4(9)

Extension of Time for Filing Proposal

In order to obtain an extension, the debtor must establish the following three items

(a) that it is acting in good faith and with due diligence;

(b) that it would likely be able to make a viable proposal if an extension were granted; and

(c) that no creditor would be materially prejudiced.

S. 54(2.2)(3)

Related creditor — A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

62(1.2)(2)

On whom approval binding — A proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) All unsecured claims, and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal.

but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto. (S.C. 1992, c. 27, s. 26).

Interpretation Act, R.C.C. 1985, c. I-21

Law Always Speaking

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Enactments Remedial

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Application

10 HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005. Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14th I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

Onus

11 The court, as directed by s. 50.4(9) above, must be satisfied on each application that:

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

12 The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

13 This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

14 **Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?**

15 There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protects its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

16 Does a breach of contract automatically constitute bad faith? The answer is, "not necessarily", but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating funds and at one point a signed invoice or record which was somewhat misleading with respect to the possibility of some relatively minor accounts having been directed to the CIBC in error.

17 The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to ones family or a pay-down on a mortgage or judgment on ones home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of "survival". Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than as I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

18 It is argued by HHFL that only its conduct since the filing of the Notice of intention November 3, 2005 should be considered and with respect, I am inclined to disagree. The manner in which a party conducts itself in the past, particularly the immediate past, is often an indicator of likely conduct in the immediate future. In addition, what you have here is a breach of the contract/commitment letter which occurred before November 3, 2005 and continued and overlapped the date of the filing of the Notice of intention.

19 The court does have the opinion of a respected trustee whose sworn testimony by affidavit has not been challenged and Mark S. Rosen, LLB, FCIRP, has been involved for some time and very active in endeavouring to come to grips with the challenge and has met with and communicated with officials of BNS, BDC and many of the unsecured creditors. After reciting in detail the extent of such activity he deposes in paragraph 14 of his affidavit of December 1, 2005 as follows:

> 14. I have been working with and receiving information from Messrs. Hartlen and Limpert as well as Harley Hiltz, the director of marketing and production for the Company, who at all times have been fully co-operative. From my experience and dealings with the Company, I believe that the Company has acted and is acting in good faith and with due diligence in working towards formulating a viable proposal. I believe that the Company would likely be able to make a viable proposal if the extension is granted.

My finding on this prerequisite is that by a relatively small margin HHFL has satisfied the court on a balance of probabilities that it has been and is likely to act in good faith. In reaching this conclusion I have not taken into account the representation made in oral argument that Mr. Hartlen has probably advanced $90,000 to $95,000 to HHFL recently because I do not recall seeing anything in the evidence, particularly documentation confirming this infusion and therefore I am unable to give it any weight.

20 The second wing of subparagraph (a) is in relation to due diligence and while the company has not acted in quite the timely manner it ought to have acted its deficiency in this regard is not severe and the cumulative evidence before me including the summary contained in Mr. Rosen's affidavit of December 1, 2005 and the volume of response which has been made to the BNS's requests and entitlement for documentation, combined with the efforts being made by the trustee in bankruptcy, Mark S. Rosen, to address a resolution constitutes satisfaction on a balance of probabilities of due diligence to this date.

21 **Would HHFL likely to be able to make a viable proposal if the extension being applied for were granted?**

22 "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (*Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List])). Again, the court must be satisfied on a balance of probabilities that HHFL **would likely**. This at the very least means that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for.

23 Lack of detail and assurance of this kind was considered in *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863 (Ont. Bktcy.). In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):

> ...[T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future.

24 The BNS points to a number of specifics of what it considers a lack of effort that should result in a finding that there is little likelihood of HHFL making a viable proposal. BNS notes the fact that it has stated clearly that it no longer has any interest of being involved in the affairs of HHFL which will necessitate, in all probability, an alternate financial institution and to date no inquiries have been made by HHFL or the Trustee of any financial institution. The absence of this step will take on weight depending upon the totality of the circumstances that exist at the time of the Notice of intention and that have developed since the Notice of intention was filed.

25 There has been a considerable degree of activity before and since the Notice of intention was filed November 3, 2005. It seems in the total evidence available to the court through the affidavits filed that it is a reasonable inference to draw that it is highly unlikely that any financial institution would show any interest in filling the shoes of BNS until a determination is made with respect to this application for an extension of time to January 30, 2006. Since the Notice of intention has been filed the evidence is that HHFL has made a profit for November 2005 greater than that was anticipated. It had been anticipated that the profit would have been $7,000 and it appears to be approximately $19,600. There is an indication that the company is operating a new business model as a processing facility and there is evidence of the projected sales. In addition, there is evidence of a company, Pesca Pronta, having entered into a contract which by now would have had two substantial deliveries of lobster and in response to my inquiry during argument it appears that the first delivery has been paid for. HHFL advances the affidavit of Francesco Amoruso of Rome, Italy as to a possible solution and substitution by financial injection from that company, however, at this stage all that affidavit establishes is that an effort is being made by HHFL to address their situation. It further confirms that this is a busy, crucial period for HHFL but it does not at this point provide any comfort

to be BNS or the court as to being a probable element of a viable proposal.

26 Paragraph 5 of Francesco Amoruso's affidavit merely states:

> I have had discussions with Mr. Hartlen with respect to a potential share investment in H & H by Pesca Pronta in the approximate amount of $400,000.00 Cdn. I am very interested in pursuing the investment opportunity but will require 30 days to discuss the situation with my brothers/partners. I am hopeful that the transaction can be finalized. In the meantime, my company will continue to deal with H & H.

27 To this point the court has not been advised nor has BNS of any further developments, inquiries or progress with respect to Amoruso's affidavit which can only be classified as a statement of interest.

28 HHFL has made a concerted effort to secure government financing by way of a grant. The company has spent $6,000 for the services of a consultant in the preparation of its grant application and on December 9, 2005 a science officer who is preforming the due diligence for the grant indicated her satisfaction with the scientific basis of the claim and that she would be making a positive recommendation. The only weight that can be given at this stage to the grant application is that it is another example of the efforts being made by HHFL and its proposed trustee but until the grant reaches the stage of being a balance sheet item it can be given no further weight.

29 BNS raises an objection to a determination that HHFL can satisfy the requirement pointing out that BNS and BDC as one class of secured creditor represent a substantial majority position of the secured claims. R. Hartlen Investments Inc. is bound by s. 54.2.2(3) as noted above.

30 BNS takes the position that it has a clear veto over any proposal that may be advanced and that it will not be supporting any proposal to secured creditors that might be filed by HHFL.

31 In *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]), wherein Farley J. stated at para. 4:

> Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis, Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly, Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under BIA regime, one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-a-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality of a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

32 In that case Farley, J. held that Skyview's position was satisfactory proof that the company would not likely be able to make a proposal that would be accepted by the creditors. In that case Skyview had 95% in value of Cumberland's admitted

secured creditors and here the math appears to give BNS a virtual veto. HHFL counters that when you look at the funds in the company's bank accounts at the end of November 2005 of approximately $170,000 that such reduces the debt outstanding of BNS and again reiterates that BNS has since the Notice of intention being filed received approximately $90,000 U.S. on its account. BNS is correct in that the mere presence of money in a debtor's bank account does not reduce indebtedness unless it is applied to the indebtedness. Since the notice of intention was filed HHFL has paid the required interest to BNS for November 2005. In this case, it is clear from the evidence before me and particularly the affidavit of the Trustee that there is a recognition of the proposal providing either alternate financing, such as speculated in Mr. Amoruso's affidavit or approaching alternate financial institutions. It would seem reasonable to assume that the proposal that will be advanced *if* it has a means of essentially paying out by substitution injection of capital of BNS indebtedness then the proposal presumably would be acceptable. It is inconceivable that if the BNS indebtedness were satisfied that BNS should retain the right to apply a guillotine effect to the extreme prejudice of itself and all other interested parties including the probable closure of the plant. The second largest secured creditor is the Business Development Corporation and they are in agreement to the granting of an extension to HHFL.

33 In these circumstances, again by the a fairly narrow margin, I conclude that HHFL has met this prerequisite on a balance of probabilities. In doing so, I am not overlooking the considerable debt of HHFL that, while the projections for the next couple of months are favourable, clearly, the proposal will require addressing BNS.

34 The third step is: **Will any creditor be materially prejudiced if the extension being applied for were granted?** As noted, there has been some improvement in the position of BNS since the Notice of intention was filed in that it has received approximately $95,000 U.S. which the Bank's solicitor points out came direct to it and not through any exercise of direction by HHFL. BNS has also received the November 2005 interest. In this case there are only two significant unrelated secured creditors, BNS and BDC. BDC consents to the extension of time but I am mindful of the fact that its security is a first charge over the fixed assets which are by themselves not likely to significantly decrease in value but on the other hand would probably have some measure of increased value by virtue of an operating going concern and also there is an indication of additional land being acquired from government by HHFL. I do agree with BNS that additional land, even if the obtaining of it is imminent, does not by itself provide any comfort to the Bank which has as its security a first charge on trade receivables and inventory. What does come through from the totality of the evidence is that this is a busy and likely profitable time for the industry and Mr. Rosen, in his affidavit, deposes at paragraphs 11 and 12:

> 11. I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
>
> 12. In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

35 I struggle with what constitutes material prejudice and there is some guidance in *Cumberland Trading Inc., Re* above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

> Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — ie., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *quo* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. ...

36 In the case before the court, the accounts receivables as of November 31, 2005 amounted to $956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.

37 This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

Conditions

38 During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

Application granted.

TAB

16

1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Farley J.

Judgment: February 3, 1994*
Docket: Doc. 32-65038

Counsel: *Frank Bennett* , for debtor companies.
Larry Crozier , for secured creditor, Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Proposal — General

Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.

Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.

The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act* .

The companies appealed.

Held:

The appeal was dismissed.

The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).

Table of Authorities

Cases considered:

Cumberland Trading Inc., Re (1994), 23 C.B.R. (2d) 225 (Ont. Gen. Div. [Commercial List]) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 50.4(9)

s. 50.4(11)

Appeal from decision of Registrar in Bankruptcy [reported at 23 C.B.R. (3d) 219 at 223] dismissing second application for extension of time to file proposal under *Bankruptcy and Insolvency Act* .

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted;

and

(*c*) no creditor would be materially prejudiced if the extension being applied for were granted.

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question.

(*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period expired.

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in *The Concise Oxford Dictionary of Current English* , 7th ed. (1987; Oxford, The Claredon Press) means:

likely 1. such as *might well happen* , or turn out to be the thing specified; *probable* . 2. to be *reasonably expected* . [emphasis added]

I do not see the conjecture of the debtor companies' rough submission as being "*likely* ".

5 While one may well fault the Bank for its approach to this situation, one has to recognize that the onus is on the debtor companies to show that they have acted in good faith and with due diligence. I am satisfied that the Registrar correctly assessed the situation in that regard that the debtor companies could have and should have proceeded with laying the foundation for their proposal and in fact building on that foundation rather than relying on anything that may be forthcoming from the Bank. In particular, see Cohn, *Good Faith and the Single Asset Debtor* (1988) 62 Am. Bankr. L.J. 131 on which it appears the Registrar relied. However, it is noted that there was no examination of the jurisprudential principles therein.

6 I discussed the question of material prejudice in *Cumberland, supra* , at pp. 11-13 [pp. 231-232]. The debtor companies have provided no information in that regard for the 45 day extension period from February 28, 1994. The only information close to this is the cash-flow statement of the previous extension granted December 16, 1993. However, for this extension there was no information. It appears therefore, that the debtor companies did not even attempt to meet this condition.

7 I am therefore, of the view that on all three tests (one failure of a test being sufficient to disqualify a debtor company from being able to ask for an extension) the debtor companies have failed to overcome the onus on them. The Registrar was correct in the result on all counts, although I feel that he inadvertently used the wrong test in s. 50.4(9)(*b*), a quite understandable situation given the terminology used in the legislation.

8 I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(*c*).

9 The appeal is dismissed. Costs were agreed at $2,500 and are payable by the debtor companies jointly and severally to the Bank forthwith.

Appeal dismissed.

Footnotes

* This judgment is an appeal from the decision reported at 23 C.B.R. (3d) 219 at 223 .

End of Document

TAB

17

2000 CarswellNS 216
Nova Scotia Supreme Court

Scotia Rainbow Inc. v. Bank of Montreal

2000 CarswellNS 216, 186 N.S.R. (2d) 153, 18 C.B.R. (4th) 114, 581 A.P.R. 153, 98 A.C.W.S. (3d) 1156

Bankruptcy of Scotia Rain Bow Incorporated, Escasoni Fisheries Ltd., Saddle Island Fisheries, Liscot Enterprises Inc., Madam Isle Sea Farms Ltd., Loch Bras D'or Farms Ltd., Applicants and Bank of Montreal, Respondent

Kennedy C.J.S.C.

Heard: May 17 and 18, 2000
Judgment: May 19, 2000
Docket: B2257, B22611, B22610, B22602, B22603, B22604

Counsel: *Stephen Kingston* and *R. Cluney*, for Applicant, Deloitte Touche.
Gregory Cooper, for Trout Lodge.
R. Carmichael and *Craig McCrea*, for Ernst & Young.
Tom Boyne, for Farm Canadian Commercial.
George Khattar, for Scotia Group of Companies.
Joe Wild, for E.C.B.C.
Kevin Zych, for Shur Gain.
A. Douglas Tupper and *Anthony Tam*, for Respondent, Bank of Montreal.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Proposal — Practice and procedure

S.R. Inc. and affiliated companies carried on business in aquaculture industry, primarily in growing and selling trout and salmon — Interim receivership order was made against S.R. Inc., which then filed notice of intention to make proposal — Applicants hoped federal government agencies would provide substantial equity injection but government agencies decided not to do so — Applicants then pursued investment from private sources and sought extension of time to file proposal — Application for extension was supported by all of applicants' primary secured creditors except respondent bank — Bank claimed it would be materially prejudiced by extention since main asset was 8 million fish costing $200,000 per week to feed — Bank claimed such loss would continue to escalate as long as it was prevented from realizing on security — Application for extension granted — Given quality, experience and expertise of supporting creditors, it was likely reorganization would be successful — Also, time frame given by bank for marketing security was

greater than extension sought by applicants — Order granting extension was to permit bank to commence marketing security immediately — Order would allow applicants one further effort to save S.R. Inc. and permit such extension without material prejudice to bank — Extension to be granted until June 30, 2000.

Table of Authorities

Cases considered by *Kennedy C.J.S.C.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — applied

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47(1) [rep. & sub. 1992, c. 27, s. 16(1)] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — referred to

Words and phrases considered

viable proposal

. . . the phrase a viable proposal as set out in subsection (b) of s. 50.4(9) [of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] . . . should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. . . . this ignores the possible idiosyncrasies of any specific creditor.

APPLICATION by trustee for order for further extension of time for filing proposals.

***Kennedy C.J.S.C.*:**

1 This is an oral decision, I would ask counsel to bear with me. It is somewhat convoluted. I reserve the opportunity to add to, but not subtract from this decision, should I consider it to be necessary. I do that because of the time constraints that I have had to deal with in trying to get this decision done, so that a matter that needs to be addressed is addressed as quickly as possible.

2 This is an application brought on behalf of Scotia Rainbow and its affiliated companies. It is brought by its Trustee in bankruptcy, Deloitte Touche, seeking a further extension of time for filing proposals pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2 that further extension that they now wish is until June 30th, 2000.

3 The applicants are supported by the primary secured creditors of the company, with the notable exception of the Bank of Montreal (the Bank), which strongly opposes the application. I will review some of the facts that are not contested.

4 Scotia Rainbow is based in Arichat, Cape Breton. It and its five wholly owned subsidiary companies carry on business in the aquiculture industry. They are primarily active in growing and selling trout and salmon.

5 On March 2nd, 2000, Justice Moir of this Court issued an interim receivership order regarding Scotia Rainbow Incorporated, pursuant to s. 47(1) of the *Act*. The application was brought by the Bank. Ernst and Young was appointed Interim Receiver. Further orders were issued by the court on March 10th and 14th, 2000, extending the interim receivership to the subsidiary companies of Scotia Rainbow. The interim receivership continues in place and Scotia Rainbow continues to operate under it.

6 Scotia Rainbow filed a notice of intention to make a proposal under the *Act* on March 9th, 2000. Its subsidiary companies filed similar notices on March 17th, 2000, and Deloitte Touche was Trustee under these notices.

7 On April 10, 2000, I issued an order extending the time for Scotia Rainbow to file its proposal by 18 days to April 28th, 2000. Similar orders were issued with respect to the subsidiary companies on April 10th, 2000, extending the time for filing proposals in those cases by 11 days and to the same date, April 28th, 2000. The Bank did not oppose any of these applications to extend time. The Bank did not oppose any of the applications at that time.

8 On April 26th, 2000, pleadings were filed with this Court for an application to be heard on April 28th, 2000, for a further extension of time for filing proposals. The company sought to extend the time to May 29th, 2000.

9 The Bank, through its solicitors, advised that it now would be opposed to the application. Justice Goodfellow of this Court, who was to preside on April 28th, 2000, determined that the application should be adjourned to May 10, 2000, and ordered that such adjournment were deemed to be extensions pursuant to the *Act*.

10 On May 10th, 2000, Justice Stewart of this Court, adjourned the applications and extended the time until May 15th, when with the consent of all parties, I adjourned and extended the matter until May 17th, so that the consent in the case of the bank was only to extend it from May 15th to May 17th.

11 At the commencement of this hearing on May 17th, Scotia Rainbow indicated that because of recently changed circumstances, which I will speak of later, it was now asking the Court to extend the time for filing proposals to June 30th, 2000. In response, the Bank argued that they couldn't change that date from May 29th until June 30th, 2000, without notice, sufficient notice, the Bank suggested that they did not receive sufficient notice. I am satisfied that I have discretion in circumstances such as these, to allow such a change to be made and in the circumstances that it was requested, I am going to exercise my discretion and allow that to take place.

12 The creditors who are in support of the application have agreed to a memorandum of understanding, a copy of that memorandum is attached as schedule "A" to the supplementary affidavit of Karen Cram. The memorandum sets out the arrangements by which these primary secured creditors are prepared to work towards the reorganization of the principal secured debt of Scotia Rainbow and the finalization of the Scotia Rainbow proposal. If you will bear with me I will read s. 50.4(9) for the record, it provides as follows:

> The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under the subsection, apply to the court for an extension, or further extension as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding the aggregate of five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor will be materially prejudiced if the extension being applied for were granted.

13 The burden lies on the applicant, Scotia Rainbow to show that the three requirements set out in s. 50.4(9) are satisfied, if it is to succeed on this application. It is acknowledged that this burden is on the balance of probabilities.

14 As to subsection (a), that requirement, the requirement that the insolvent person has acted and is acting in good faith and with due diligence, this is a non issue in this matter.

15 The Bank, the creditor opposing, has not questioned the evidence that the applicant has been so acting and I find on sub (a) that the requirement is addressed and satisfied on the balance of probabilities.

16 There remain then, two main issues to be determined by this Court. Those being whether the applicant can satisfy the requirements of sub (b) and (c) on the balance of probabilities.

17 As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]). In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the

phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:

> Might well happen or turn out to be the thing specified.

18 Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

19 The applicant argues that it is likely to be able to make a viable proposal if the extension is granted. It does so, notwithstanding that one of its key suggestions in its brief, and then the memorandum of agreement, that is, that there was going to be support from federal agencies, no longer is going to happen.

20 Prior to the March 17th application date, the applicant expected that the federal government agencies would provide a substantial equity injection into Scotia Rainbow, in return for a majority of shares. The applicant has indicated, disclosed at the start of this hearing, that after more recent negotiation with the agencies involved, it now concludes that this is not going to happen, or at least it will not be a component of a proposal to the creditors, and it was this changed circumstance that caused the applicant to change the request with respect to the length of the extension.

21 Scotia Rainbow now says it is pursuing investment from private sources, but does so with the assistance of the secured creditors who are in support of the application. Ms. Karen Cramn, the senior vice-president of the Trustee, Deloitte Touche is able to tell this Court that she is "cautiously optimistic", that such funding from private sources will be available. Notwithstanding the changed circumstances, counsel for the applicant submits that the memorandum of agreement shows that the primary creditors are prepared to work with Scotia Rainbow to make significant monetary commitments as part of the accepted proposal, including the provision of a line-of-credit and the delay of the repayment of loans. This, says the applicant, is evidence that Scotia Rainbow is likely to be able to make a viable proposal if the extension is granted.

22 The Bank of Montreal, though, argues otherwise. It says that the applicant's submission is wishful thinking: For instance, the Bank of Montreal argues that the suggested proposal, the memorandum, understanding of agreement, refers to a new bank that will provide funds to pay out the Bank of Montreal's line-of-credit and obtain a release of the Bank of Montreal's security.

23 Counsel for the Bank of Montreal asks this Court the question, what new bank? Where is the bank that is prepared to go where the Bank of Montreal has been? The applicant has produced a letter from a bank, that at this time constitutes I guess what might be described as an expression of interest, but no more than that.

24 The Bank of Montreal says, where is the private source of money likely to come from when federal agencies mandated to support Cape Breton Industry won't commit to the proposal. If you can't get the feds involved, what is the likelihood of

getting private money?

25 The Bank of Montreal says the applicant has had both the time permitted by the *Act* and a number of extensions to put together a viable proposal and has not been able to do so. The Bank argues that there comes a time when reality must be faced and the Bank says that time is now and the reality is that no proposal of this nature is going to make it. The Bank says the time is now, that this is the time to face that reality because the Bank claims that it is materially prejudiced to the delay in realizing against its security. Which brings us to s. 50.4(9)(c), the requirement that the applicant show that no creditor would be materially prejudice if the extension being applied for is granted.

26 This issue of material prejudice, in this case is characterized by the unique nature of the Bank's security. Fish, 8 million fish, fish that have to be fed, fish that are subject to disease, fish that have been known at least in the Province of Alberta they tell me, to escape, fish that eventually have to be sold in a fluctuating market.

27 The Bank points out that, to protect and maintain this perishable and fragile asset, the Interim Receiver, on behalf of the Bank, has incurred substantial costs. The Interim Receiver has estimated the costs to continue to operate and protect the asset to be approximately $200,000.00 a week. $200,000.00 a week that the Bank covers and will be forced to continue to cover during any extension.

28 The Bank says that had the realization process been able to be commenced as early as April 13th of this year, the Interim Receiver has estimated that even back then the Bank had already lost approximately $800,000.00. A loss that the Bank says will continue to escalate as long as it is prevented from realizing on that security.

29 The Bank has argued that to allow the stay, the extension sought by the applicant, would increase the Bank's risk by approximately, approximately being the operative word, 2 million dollars.

30 I have listened to two days of hard numbers, of past and present fact, speculations, projections and counter projections. I do not intend to try to reconcile the contradictions or to recap or summarize that evidence at this time. I heard it all. It is the nature of this type of application that this Court is being asked to consider, both what will happen, what could happen. Also what is not ever likely to happen. The Court is asked to predict the future. Let me say that after having considered all of the evidence, and please understand that I mean all of the evidence, all of the arguments, it is the balance of probabilities that I attempt to get at, that I attempt to establish, that I attempt to discover. And I repeat, the onus is on the applicant.

31 I will address then, the requirement under s. 50.4(9) of the *Act* that the applicant show on the balance of probabilities that Scotia Rainbow would likely be able to make a viable proposal if the extension applied for was granted. I find that the applicant has met this requirement. I do so, mindful of the Bank's insistence that the applicant's predictions are unrealistic given Scotia Rainbow's inability to put together a viable proposal, despite the best efforts of these people for 11 weeks since the filing of the notice of intention. I am aware of that argument. I was though, impressed by the evidence of Karen Cramn on behalf of the Trustee and I find that her "cautious optimism" was a sincere statement of her belief, that were the process to be allowed to continue, the applicant and its supporting creditors would be able to reorganize the principle secured debt of the companies.

32 These creditors, in support have been described as sophisticated companies, understanding the reality of the task required to be accomplished over limited time. This is the essence. It is relevant and proper for this Court to consider the quality, the experience and the expertise of the people attempting to accomplish the proposal. It is proper for me to look at who is trying to do this, who are these people. And having done so, considering all of the various factors, I conclude that it is likely that they will, based on the framework of the memorandum of understanding, memorandum of agreement, succeed. I so find.

33 The Bank has argued that despite the best efforts of the applicant, it is in a position to veto any proposal made under the *Act*. The Bank cites *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]). which is another decision of Justice Farley of the Ontario Court of Justice (General Division). I am satisfied, however, that such claim to a veto is not established before me, because it is dependant upon an estimate of total Scotia Rainbow indebtedness to the Bank which includes a third party guarantee of 2.2 million referred to as the Viramair Guarantee. The viability of this guarantee is uncertain at this time. I am told by the applicant counsel, specifically Shur Gain, I remember counsel for Shur Gain and also Mr. Kingston, on behalf of Scotia, I am told by those counsel that the enforce ability of this guarantee is presently a live issue and they have explained why, and I believe it is a live issue. It would have to be established, the enforce- ability of that guarantee would have to be established to put the Bank in a veto position. It is not for this Court, on the evidence before me, to determine the quality of that guarantee. I cannot find that the Bank then, is in a position to veto at this time. I do not so find.

34 Let's then move on to the requirement that the applicant show that on the balance of probabilities, no creditor will be materially prejudice if the extension sought is granted, subsection (c). It is, of course, material prejudice that we speak of, not simple prejudice. While acknowledging the Interim Receiver's expenditures during the stay period, the applicant asks this Court to consider that the bulk of these expenditures actually do benefit the Bank, because they are directed to the maintenance and growth of the fish inventory over which the Bank claims first charge. The expenditures say the applicant not only keeps the company operating, which is a good thing, according to the applicant, but those expenditures increase the market value of the fish, and as a result, the quality of the Bank's security.

35 Central to the debate on this issue therefore, was the disagreement as to the effect that a further stay would have on the Bank and that was the issue that took much of the day and a half of the argument that was made before this Court. There is disagreement as to the effect that the stay has on the Bank. There is disagreement as to what the costs feeding the fish amounts to in the sense that who gets the benefit, what is the extent of the benefit to the various parties, there was debate as to the nature of the contract with the American/Japanese company, with respect to additional monies that might be forthcoming from that company, and how that situation was affected by the potential stay. There was the issue raised in relation to the Bank's agreement with C.C.C., the federal agency that is involved with supporting Canadian Exports. How a stay would affect the Bank's relationship with that agency, given the contract, the arrangement between the two, with respect to guarantees made by the agency, specific to the Bank.

36 A very significant question raised by the Bank was that, should the extension be accomplished, it would further set back the Bank's ability to realize on and market its security and that this delay, this further delay cause the Bank material prejudice.

37 The Bank estimated that it would take, should a proposal not succeed, it would take 10 to 12 weeks to realize on its assets from the date the extension had ended. It is, of course, a given that during that period of time the fish would continue to eat, cost would continue to rise.

38 The applicant offered a response to this suggestion of prejudice and I find that that response not only addresses the issue of delay in the commencement of the marketing process, but it addresses the entire suggestion of material prejudice to the Bank.

39 The applicant has pointed out that the time frame for marketing the security, that the Bank suggests, and that I repeat was 10 to 12 weeks from commencement, is greater than the extension sought by the applicant.

40 The applicant has suggested, I think it was initially counsel for Shur Gain and certainly joined in and further argued by Mr. Kingston on behalf of the applicant, has suggested that this Court draft an order for extension that allows the receiver to commence the marketing of the Bank's security immediately. An order that would allow both the applicant's effort to develop a viable proposal and the Bank's effort to market its security to be carried on simultaneously. Thus allowing the applicant one further effort to save this company, and at the same time addressing the Bank's suggestion of prejudice caused by a further stay, which prejudice of course the applicant does not admit.

41 The Bank countered by asking how the Interim Receiver could be expected to organize a sale of this nature when it had no authority to sell until such time as this process had ended; until the stay had expired. The Bank asked the question, who is going to deal with the Receiver who has no authority to sell? The response to that counsel, again on behalf of Shur Gain, said that just such orders, orders of this nature, have been crafted in other jurisdictions and it was his suggestion at least, that there are indeed people who would negotiate given that contingency, given that situation. Common sense tells me that there is likely to be. Frankly, notwithstanding the obvious compromise that has to be acknowledged in relation to the process, given the time frames involved, I am satisfied that it is possible that there would be people interested in negotiating under those circumstances. Possible purchaser. Although this marketing process would be imperfect, until the proposal possibility was exhausted, I am satisfied that the suggestion has merit and significantly, I am further satisfied that an order that allows the marketing process to take place during the term of the extension period, would permit such extension to be accomplished without material prejudice to the Bank.

42 The suggestion made by the applicant, therefore, in combination with all of the evidence, has satisfied this Court that an extension that allows the Bank this option would not materially prejudice the Bank on the balance of probabilities. Being satisfied that all of the prerequisite requirements as set out by s. 50.4(9) have now been shown to be true to be so on the balance of probabilities, I will grant the order sought, extending the period for the filing of proposal pursuant to s. 50.4(9) of the *Act* until June 30th, 2000. It will be a term of that order that the Interim Receiver will be permitted, at the request of the Bank, to market the Bank's security during that period of extension, seeking purchasers should the sale of that security become available to the Bank. I will review an order when drafted. Should there be costs requested I will receive briefs.

Application granted.

End of Document

TAB

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2007 CarswellOnt 3907
Ontario Superior Court of Justice

Goldman Hotels v. Power Workers' Union

2007 CarswellOnt 3907, 34 C.B.R. (5th) 25

GOLDMAN HOTELS (Applicant) and POWER WORKERS UNION (Defendant) and BUSINESS DEVELOPMENT BANK OF CANADA (3rd Party)

C. Campbell J.

Judgment: June 11, 2007
Docket: 31-454965

Counsel: Harvey Chaiton for Goldman Hotels
Massimo (Max) Starnino for Power Workers Union
Stephanie Fraser for Business Development Bank of Canada

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Hotel filed notice of intention to make proposal to creditors pursuant to Bankruptcy and Insolvency Act ("BIA") — Notice of intention was filed on May 14, 2007, and period for filing proposal was to expire on June 13, 2007 — Proposed purchaser made offer to interim receiver for hotel property — Court was advised that signing of agreement with proposed purchaser was imminent, and that conditions to agreement would require 45 days to complete — Union representing hotel workers opposed extending time for filing proposal — Hotel brought application for extension — Application granted — Extension was granted to July 26, 2007 — Criteria for extension under s. 50.4(9) of BIA were met — Hotel's proposal met definition of "viable" from leading case, which is proposal that seems reasonable on its face to reasonable creditors — There was no doubt that indebtedness owed to hotel's secured creditors absent viable proposal would leave no return for unsecured creditors — To deny extension would very likely condemn hotel into bankruptcy for no good purpose — Many issues raised by union were associated with labour relations rather than insolvency — Labour issues should not prevent reasonable unsecured creditor being in receipt of proposal which is only way such creditor would likely see any recovery.

Table of Authorities

Cases considered by *C. Campbell J.*:

Baldwin Valley Investors Inc., Re (1994), 1994 CarswellOnt 253, 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

Words and phrases considered

viable proposal

The leading case [on whether a proposal is "viable" for the purposes of granting an extension under s. 50.4(9) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] remains the decision of Farley J. in *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) (Ont. Gen. Div. [Commercial List]) 219. At paragraph 4 he said as follows:

It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditors."

[Counsel] on behalf of the debtor company recognizes that to be viable, it is most likely that the unsecured creditors, including the union members, will have to receive the prospect of recovering something. This is more than is likely in a bankruptcy.

APPLICATION by debtor company for extension of time to file proposal under *Bankruptcy and Insolvency Act*.

***C. Campbell J.*:**

1 On May 14, 2007 Goldman Hotels ("Hotels") filed a Notice of Intention to make a Proposal ("NOI") to its creditors pursuant to the BIA. The time period for filing a proposal currently expires on Wednesday, June 13/2007. This is the first request for extension, which is opposed by Power Workers Union Local 1000. The request for extension is supported by the Business Development Bank.

2 The issue is whether or not the applicant has met the criteria and the Court is satisfied pursuant to s.50.43(9) of the BIA that:

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were

granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

3 There is no issue that Hotels is insolvent. The Union takes the position that the actions of Hotels in the period leading up to and since the filing of the NOI demonstrate that it is unlikely that there will be a proposal forthcoming that will meet the approval of unsecured creditors in general and the Union members in particular.

4 The position of the company is that the Interim Receiver has received an unsolicited offer to purchase the Property, which is comprised of a Conference Centre located on approximately 200 acres of land in the hills of Hockley Valley, east of Orangeville. The Conference Centre has ceased to operate as a going concern. There is space on the property operated by a private school until June 22, 2007.

5 The employees were laid off on May 18, 2007 and the evidence is that several management personnel and employees have been retained on a contract basis to assist with the closure of the centre. There is no doubt that the indebtedness owed to secured creditors absent a viable proposal will leave no return for unsecured creditors.

6 The Court has been apprised that the signing of an agreement with the proposed purchaser is imminent and that the conditions attached to that agreement will require 45 days to complete and allow for a proposal to be put before the Court.

7 Counsel for the Union urges that on the material before the Court, there is nothing before the Court to suggest that there will be any benefit for his clients, and if there is to be, that can be contained in a proposal placed before the Court before Wed. June 13, 2007.

8 The Union submits that the material before the Court does not meet any of the requirements of s. 50.4(9) of the BIA.

9 The leading case in this area remains the decision of Farley J. in *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]). At paragraph 4 he said as follows:

> It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditors."

10 Mr. Chaiton on behalf of the debtor company recognizes that to be viable, it is most likely that the unsecured creditors, including the union members, will have to receive the prospect of recovering something. This is more than is likely in a bankruptcy.

11 It is urged that with this recognition the s. 50.4(9) criteria are met and that anything less than the 45 day period requested would materially interfere with the process of what is hoped be a viable proposal.

12 Having carefully considered the matter, I accept the submissions made on behalf of the debtor company. To do otherwise would, in my view, very likely condemn the debtor company into bankruptcy likely for no good purpose.

13 The s.50.4(9) criteria are met for extending purposes. I recognize that granting an extension does have some cost and expense associated therewith. In my view in this case it is justified. Many of the issues raised by Mr. Starnino on behalf of his clients are those associated with labour relations, not insolvency. To allow the use of labour issues to put undue pressure on the debtor should not prevent the "reasonable" unsecured creditor being in receipt of a proposal which is the only way they would likely see any recovery. For the above reasons an extension of the proposal of Goldman Hotels is granted to July 26, 1007.

Application granted.

Estate No.: 31-2008366
Court File No.: 31-2008366

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF ONE KENTON ALZHEIMER CENTER OF EXCELLENCE (NON-PROFIT) INC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES

(Returnable June 26, 2015)

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