

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.**

FACTUM OF THE APPLICANTS
(Returnable June 26, 2015)

June 24, 2015

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PART I - INTRODUCTION

1. On June 23, 2015, each of One Kenton Alzheimer Center For Excellence (Non-Profit) Inc. ("**Kenton**") and B'nai Brith Hillel Of Toronto Inc. ("**BBH**", and together with Kenton, the "**Kenton Group**") filed Notices of Intention to Make a Proposal ("**NOIs**") under section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"). A. Farber & Partners Inc. was named as proposal trustee in connection with each of the NOIs (in such capacity, the "**Proposal Trustee**").
2. This Motion is brought by the Kenton Group seeking an order substantially in the form of the draft Order included at Tab 3 of the Motion Record:
 - (a) administratively consolidating the proposal proceedings of Kenton and BBH (collectively, the "**Proposal Proceedings**") under one title of proceedings;
 - (b) approving the sale solicitation process ("**Sale Process**") attached as Schedule "**A**" to the draft Order;
 - (c) granting an Administration Charge (as defined below) in favour of the Proposal Trustee (including in its capacity as trustee in bankruptcy, if applicable), counsel

for the Proposal Trustee (including as counsel to the trustee in bankruptcy, if applicable), and counsel for the Kenton Group;

- (d) approving the interim financing of the Kenton Group by The Bank of Nova Scotia (in such capacity, the "**DIP Lender**") substantially in accordance with the terms of the DIP Term Sheet (defined below), and granting the DIP Lender's Charge (as defined below); and
- (e) extending the time within which a Proposal must be filed with the Official Receiver to September 4, 2015.

3. The purposes of the Proposal Proceedings are to provide the Kenton Group with an opportunity to (i) determine, through the appropriate process, whether there is one or more persons interested in becoming a purchaser of the business and/or assets of the Kenton Group, which will lead to a sale transaction, and (ii) negotiate and make a viable proposal to its creditors. The requested relief is integral to achieving those goals and maintaining stability for the benefit of all of the Kenton Group's stakeholders. The Kenton Group is particularly focused on maintaining stability in order to ensure continued care for its vulnerable patients.

Affidavit of Michael Mostyn, sworn June 23, 2015 (the "**Mostyn Affidavit**") at para. 7.

PART II - THE FACTS¹

A. BACKGROUND

1. Kenton

4. Kenton was incorporated on July 31, 2013 pursuant to the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23, and has its registered office located at 15 Hove Street, Toronto, Ontario M3H 4Y8. Kenton is a not-for-profit corporation that is not a registered charity under the *Income Tax Act* (Canada), R.S.C. 1985, c.1 (5th Supp.), as amended from time to time (the "**ITA**").

¹ Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the affidavit of Michael Mostyn, sworn June 23, 2015 (the "**Mostyn Affidavit**").

Mostyn Affidavit at paras. 8-9 and Exhibits "D" and "E", Motion Record, Tabs D and E.

2. BBH

5. BBH was incorporated on November 19, 1970 under the *Canada Corporations Act*, R.S.C. 1970, c. C-32, and has its registered head office located at 15 Hove Street, Suite 100, Toronto, Ontario, M3H 4Y8. Although BBH previously held charitable status with the Canada Revenue Agency, BBH is currently a not-for-profit corporation that is not a registered charity under the ITA.

Mostyn Affidavit at paras. 10-11 and Exhibits "F" and "G", Motion Record, Tab F and G.

3. The Home

6. In the past few years, BBH's sole role has been as a holding company for the properties known as 1 and 3 Kenton Drive, Toronto, Ontario. These properties are the site of a retirement home for early stage Alzheimer's patients (the "**Home**") that began operating at the end of 2013.

Mostyn Affidavit at para. 12.

7. The Home is owned by BBH and operated by Kenton. At the present time, the Home is 13,344 square feet in size, containing 44 bedrooms with 45 beds.

Mostyn Affidavit at paras. 14-19 and Exhibit "H", Motion Record, Tab H.

4. Assets and Liabilities

8. Kenton's liabilities very clearly exceed its assets. As at April 30, 2015, Kenton's total assets had a book value of approximately \$160,000. As at that same date, Kenton's total liabilities exceeded \$830,000.

Mostyn Affidavit at paras. 21-23.

9. As at April 30, 2015, BBH's single largest asset was the Home, which had a book value of approximately \$11,900,000. BBH's total assets had a book value of approximately \$14,100,000. As at that same date, BBH's total liabilities exceeded \$14,300,000. Therefore, the

book value of BBH's liabilities exceed its assets, and although the book value of BBH's liabilities provides a reasonable estimation of the fair market value, the fair market value of its assets could in fact be materially lower.

Mostyn Affidavit at paras. 24-26.

5. Employees

10. As at June 22, 2015, Kenton employed 12 full time and 23 part time staff. Kenton's employees are not unionized and Kenton does not offer a pension plan.

Mostyn Affidavit at paras. 27 and 29.

6. Creditors

(a) *The Bank of Nova Scotia (The First Mortgage)*

11. BBH is indebted to The Bank of Nova Scotia (the "**Bank**") in amounts that totaled \$7,134,332.42 including accrued interest and costs, up to May 31, 2015. Pursuant to a Terms and Conditions Sheet dated October 24, 2014, the Bank made credit facilities available to BBH, which was accepted by BBH on November 5, 2014 (collectively, the "**Commitment Letter**").

Mostyn Affidavit at paras. 31-32 and Exhibit "M", Motion Record, Tab M.

12. Security provided by BBH in favour of the Bank to secure the indebtedness pursuant to the Commitment Letter and earlier credit arrangements includes a mortgage in the amount of \$8,000,000 over the properties at 1 and 3 Kenton Drive, Toronto, Ontario and a General Security Agreement providing a first charge over all of BBH's present and future personal property, among others.

Mostyn Affidavit at para. 33 and Exhibit "N", Motion Record, Tab N.

13. On February 23, 2015, the Kenton Group sent a letter to the Bank (the "**Disclosure Letter**") which, among other things, confirmed that the Kenton Group had disclosed to the Bank that (i) the Home was operating at an ongoing deficit, (ii) the Kenton Group would not be able to repay the indebtedness under the Commitment Letter, (iii) the Kenton Group anticipated that it

would deplete its cash within 6-8 weeks, and will thereafter be without funds, and (iv) once cash is depleted, the Kenton Group will be unable to continue operating the Home unless the Bank funds the ongoing operating deficit.

Mostyn Affidavit at para. 34 and Exhibit "O", Motion Record, Tab O.

14. On March 16, 2015, the Bank sent a letter to BBH confirming that the Disclosure Letter indicated an adverse change had occurred in the financial condition of BBH, and, as a result, the Bank was under no obligation to make any further credit available to BBH. Since that time, the Kenton Group and the Bank have worked together to develop a path forward whereby the Bank will not be required to fund the Kenton Group's losses indefinitely, but one which will also avoid an immediate shut-down of the Home.

Mostyn Affidavit at paras. 35-36 and Exhibit "P", Motion Record, Tab P.

(b) *The Second Mortgage*

15. A second mortgage was registered on title in favour of Avcon Construction Inc., Claude Ayache and Norel Electric Inc., dated May 1, 2014 (the "**Second Mortgage**") on the security of the properties located at 1 and 3 Kenton Drive, Toronto, Ontario. The amount claimed to be outstanding under the Second Mortgage as at June 15, 2015 is approximately \$1.6 million, including accrued interest.

Mostyn Affidavit at para. 37 and Exhibit "Q", Motion Record, Tab Q.

(c) *Other Secured Creditors*

16. The other parties who have PPSA registrations against the Kenton Group (in addition to those discussed above) are:

- (a) Multisource Capital Corporation (PPSA File Number 689365962);
- (b) National Leasing Group Inc. (PPSA File Number 689466591) in respect of all refrigerator, washer extractors, drying tumbler, LED HDTVs, DVD Players, LCD

Projector, Screen, Audio System, Digital Camera, Wii Game, Karaoke Machine, Sound Systems, AV Sets of every nature and kind;

- (c) Blue Chip Leasing Corporation (PPSA File Number 689488983);
- (d) Blue Chip Leasing Corporation (PPSA File Number 689488992);
- (e) Enable Capital Corporation (PPSA File Number 689488992); and
- (a) Northstar Leasing Corporation (PPSA File Number 690811785).

Mostyn Affidavit at paras. 39-40 and Exhibits "R" and "S", Motion Record, Tabs R and S.

17. Each of the foregoing registrations are by equipment lessors and relate to certain specific equipment.

Mostyn Affidavit at para. 41.

(d) *Unsecured Creditors*

18. As of June 22, 2015, Kenton's unsecured creditors had claims totaling \$90,664.05. As of that same date, BBH's creditors had claims totaling \$10,949,092.24 including secured creditors. In addition to secured creditors and ordinary trade creditors, BBH has an unsecured tax debt in an amount equal to approximately \$650,000.

Mostyn Affidavit at paras. 42-44 and Exhibits "K" and "L", Motion Record, Tabs K and L.

B. CURRENT FINANCIAL POSITION OF THE KENTON GROUP

19. The Kenton Group is presently facing a liquidity crisis and, absent further funding, it will be unable to continue its operations and meet its obligations in the ordinary course. As at June 23, 2015, the Kenton Group had approximately \$75,000 of cash and a monthly cash burn rate of approximately \$50,000, excluding the costs of this proceeding.

Mostyn Affidavit at para. 45.

20. Numerous factors have materially contributed to the Kenton Group's financial situation over the past several years. Chief among such factors is the financial difficulty resulting from an insufficient level of occupancy within the Home. The number of residents for the first several months after the Home (which contains 44 bedrooms with 45 bedrooms) commenced operations in 2013 was only 4, and there were not more than 17 permanent residents for any extended period of time in 2014. At the present time, the Home still only has 20 residents. These figures are problematic given that break-even projections were estimated by the Kenton Group's previous Chief Financial Officer as approximately 33 or 34 residents.

Mostyn Affidavit at paras. 46-47.

21. The Kenton Group's financial prospects and ability to raise additional capital are contingent solely on the willingness of its existing secured lenders to advance funds, and the Bank is no longer willing to do so given the Home is not financially viable and has no prospects for repaying its debt.

Mostyn Affidavit at para. 48.

C. SALE SOLICITATION PROCESS

22. The Kenton Group has developed, in consultation with the Proposal Trustee and subject to the approval of this Court, the proposed Sale Process. Given the critical role that the Kenton Group plays in providing care and services for its patients, the Kenton Group believes that, rather than simply running out of money, the Kenton Group's business, assets, properties and undertaking (including the land and the building comprising the Home) should be properly marketed within the context of a transparent, results-oriented and court-sanctioned Sale Process conducted by the Proposal Trustee with the assistance of the Kenton Group. The purpose of the Sale Process is to provide an opportunity for a sale to be effected for the benefit of the Kenton Group's stakeholders and/or to make a viable proposal to its creditors.

Mostyn Affidavit at paras. 49-50.

D. THE DIP TERM SHEET

23. As discussed above, the Kenton Group currently has approximately \$75,000 of cash and a monthly net "burn rate" of approximately \$50,000, including debt service amounts but not including the costs of the proceedings. At this rate, the Kenton Group is expected to deplete its working capital shortly. The Kenton Group has insufficient liquidity and presently has no ability to raise additional capital.

Mostyn Affidavit at para. 53.

24. In order to address the short term liquidity crisis of the Kenton Group, the Bank, in its capacity as the DIP Lender, has agreed to provide interim funding for the Kenton Group (the "**DIP Loan**") by way of a Debtor-In-Possession Interim Financing Facility Terms and Conditions Term Sheet between the DIP Lender and the Kenton Group dated June 2, 2015 (the "**DIP Term Sheet**").

Mostyn Affidavit at para. 55 and Exhibit "C", Motion Record, Tab "C".

PART III - ISSUES

25. The issues on this motion are whether the Court should:
- (a) approve the administrative/procedural consolidation of the proposal proceedings of Kenton and BBH;
 - (b) approve the Sale Process;
 - (c) grant the Administration Charge;
 - (d) approve the DIP Term Sheet and grant the DIP Lender's Charge; and
 - (e) extend the time within which a Proposal must be filed with the Official Receiver.

PART IV - LAW AND ARGUMENT

1. The Court Should Approve the Administrative/Procedural Consolidation

26. The Kenton Group seeks an order administratively consolidating Kenton's and BBH's NOI proceedings in order to, among other things, avoid a multiplicity of proceedings and the need to file two sets of motion materials over the course of these Proposal Proceedings. For greater certainty, the Kenton Group is only seeking to administratively consolidate the proceedings; it is not seeking substantive consolidation.

27. Insolvency proceedings 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. As noted by D.M. Brown J. (as he was then) in the BIA proposal proceedings of Electro Sonic of America LLC, one application of this general principle occurs when two closely-related insolvency proceedings are joined by the courts so that they can proceed and be managed together. Administrative/procedural consolidation does not entail a substantive merger of the bankruptcy estates, but merely their procedural treatment together by the court. As such, administrative consolidation is analogous to bringing two separate civil actions under common case management.

Bankruptcy and Insolvency General Rules, C.R.C., c.368, s. 3.

Courts of Justice Act, R.R.O. 1990, Reg. 194. *Ontario Rules of Civil Procedure*, Rule 1.04(1).

Electro Sonic Inc. (Re), 2014 ONSC 942 at para. 4 (Ont. S.C.J. [Commercial List]) [*Electro Sonic*], Book of Authorities of the Applicants, Tab 1.

28. This Court has previously granted administrative/procedural consolidation of BIA proposal proceedings in similar circumstances many times. For example, in *Re Electro Sonic Inc.*, this Court consolidated two proposal proceedings on the basis that the two applicants were highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions. D.M. Brown J. also held that, given the possibility of the

applicants applying together at future dates for relief such as stay extensions and sale approvals, it made sense to consolidate for the purposes of future steps.

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 [*XS Cargo Order*], Book of Authorities of the Applicants, Tab 2.

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, Book of Authorities of the Applicants, Tab 3.

Electro Sonic, supra at paras. 5-6.

29. In the case at hand, the Kenton Group submits that the administrative/procedural consolidation of the Kenton Group's proposal proceedings is appropriate under the circumstances for various reasons, including:

- (a) the affairs of Kenton and BBH are highly integrated and closely intertwined such that it would be difficult to disentangle their affairs. The Kenton Group operates under common ownership and management, sharing common accounting, finance and other management functions;
- (b) BBH is the holding company for the properties known as 1 and 3 Kenton Drive, Toronto, Ontario, which are the site of the Home that is operated by Kenton. Given the integration of assets and operations, Kenton and BBH effectively operate as a single enterprise;
- (c) the Sale Process contemplates that the assets of Kenton and BBH will be marketed together and may be subject to a single purchase transaction;
- (d) the DIP Lender required that both BBH and Kenton be borrowers in respect of the DIP Loan pursuant to the DIP Term Sheet;
- (e) consolidation of the proposal proceedings will avoid duplication of efforts by eliminating the need to file and maintain two separate sets of motion materials during the proposal proceedings, which, in turn, will reduce the costs associated

with the proposal proceedings and will ultimately be beneficial for the Kenton Group's creditors; no creditor will be prejudiced by the administrative/procedural consolidation of Kenton's and BBH's proposal proceedings; and

- (f) the Proposal Trustee and the Bank support the requested administrative consolidation.

2. The Court Should Approve the Sale Process

30. Although section 65.13 of the BIA requires the approval of this Court for the sale of an insolvent person's assets outside of the ordinary course of business in the context of an NOI, there is no statutory obligation to obtain court-approval of a sale process.

31. However, the Kenton Group is seeking this Court's approval of the Sale Process at this time to ensure that the Court is aware of and approves of the proposed Sale Process, and to ensure that the Kenton Group's creditors and other stakeholders are made aware of the Sale Process at an early stage.

32. In *Re Brainhunter*, this Court considered the criteria to be applied on a motion to approve a sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA") and the application of section 36 of the CCAA which mirrors the provisions of section 65.13 of the BIA. In that case, Justice Morawetz distinguished between the criteria to be considered on a motion to approve a sale process and a motion to approve a sale. Citing his decision in *Nortel*, Justice Morawetz confirmed that the following four factors should be considered by the Court in determining if the proposed sale process should be approved:

- (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?

Re Brainhunter, 2009 CarswellOnt 8207 at paras. 16 and 17 (Ont. S.C.J. [Commercial List]), Book of Authorities of the Applicants, Tab 4.

Re Nortel Networks Corp. (2009), 55 C.B.R.(5th) 229 at paras. 34-40 and 49 (Ont. S.C.J. [Commercial List]), Book of Authorities of the Applicants, Tab 5.

33. The Kenton Group submits that the Nortel criteria enumerated above apply on a motion to approve a sale process in a proposal proceeding under the BIA.

34. Under the circumstances, implementing the proposed Sale Process in the context of these BIA proposal proceedings will provide for a means of testing the market, gauging interest in the assets of the Kenton Group and optimizing (i) recoveries for the Kenton Group's creditors, and (ii) the likelihood that a purchaser that is prepared to continue to operate the Home as an Alzheimer's centre or similar facility will emerge. As such, the proposed Sale Process will provide an opportunity for the Kenton Group to make a viable proposal to its creditors and/or to see a sale effected for the benefit of the stakeholders, including the Home's patients and employees. A sale will benefit the whole "economic community".

Mostyn Affidavit at paras. 50 and 57.

35. Given that it is not financially viable for the Kenton Group to continue to operate the Home in the long-term, the Sale Process is the best and only option to create an opportunity for purchasers to come forward who might be interested in continuing the operation of the property as a home for Alzheimer's patients of similar facility.

Mostyn Affidavit at para. 57

36. In addition, Court approval and the implementation of the Sale Process are conditions of the DIP Term Sheet, and the Kenton Group will not be able to maintain operations or fund these proceedings without the financing contemplated by the DIP Term Sheet.

Mostyn Affidavit at paras. 55-56 and Exhibit "C", Motion Record, Tab "C".

37. The Sale Process is similar in format to many sale processes that have been approved by the Court in similar circumstances, and does not require that the Proposal Trustee accept the highest, best or any offer received. This Court will retain its jurisdiction to approve any proposed sale under 65.13 of the BIA.

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, Book of Authorities of the Applicants, Tab 6.

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 [*Starfield Resources Order*], Book of Authorities of the Applicants, Tab 7.

XS Cargo Order, supra.

38. The Proposal Trustee and the Bank are supportive of the Sale Process. No other creditor has a *bona fide* reason to object to a sale, and there is no better viable alternative available.

Mostyn Affidavit at para. 59.

First Report of the Proposal Trustee ("**First Report**") at para. 19.

3. The Court Should Grant the Administration Charge

39. The Kenton Group is seeking a charge on the assets, rights, undertakings and properties of the Kenton Group, in priority to all other charges in the maximum amount of \$100,000 (the "**Administration Charge**") to secure the full and complete payment of the reasonable fees and expenses of the Proposal Trustee (including in its capacity as trustee in bankruptcy, if applicable), counsel to the Proposal Trustee (including as counsel to the trustee in bankruptcy, if applicable), and counsel to the Kenton Group.

Mostyn Affidavit at para. 62.

40. Section 64.2 of the BIA provides statutory jurisdiction to grant an administration charge and to grant super-priority status to such charge:

64.2(1) 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 a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.

64.2(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[...]

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, at s. 64.2 [BIA].

41. Administrative charges have previously been approved in BIA proposal proceedings, where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful proceeding under the BIA as well as for the conduct of a sale process.

Colossus Minerals Inc.(Re), 2014 ONSC 514 at paras. 11 to 15 (Ont. S.C.J. [Commercial List]), Book of Authorities of the Applicants, Tab 8.

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, Book of Authorities of the Applicants, Tab 9.

Starfield Resources Order, *supra*.

42. Section 11.52 of the CCAA is substantially similar to section 64.2 of the BIA. Cases that have considered section 11.52 of the CCAA have identified certain additional factors that a court may consider in determining whether to approve an administration charge:

- (a) the size and complexity of the business 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 charges 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.

Canwest Publishing Inc., 2010 ONSC 222 at para. 54 (Ont. S.C.J. [Commercial List]), Book of Authorities of the Applicants, Tab 10.

43. In the case at hand, the proposed Administration Charge is supported by the following factors:

- (a) the proposed beneficiaries will provide essential financial and legal services throughout these Proposal Proceedings and the continued participation of each of the insolvency professionals is critical to the success of the Sale Process and the restructuring of the Kenton Group;
- (b) the Sale Process will be run (and not just overseen) by the Proposal Trustee;
- (c) there is no unwarranted duplication of roles;
- (d) the Kenton Group has very limited cash and the Administration Charge is necessary to secure the full and complete payment of the reasonable fees and expenses of the beneficiaries, incurred in connection with the Proposal Proceedings;
- (e) the quantum of the proposed Administration Charge is both fair and reasonable given the size and complexity of the Kenton Group's business, the Sale Process proposed to be undertaken, and other aspects of these Proposal Proceedings; and
- (f) the Bank (including in its capacity as DIP Lender) has consented to the proposed Administration Charge; and
- (g) the Administration Charge was determined in consultation with the Proposal Trustee and the Proposal Trustee has indicated that the Administration Charge is appropriate.

First Report at para. 27.

4. The Court Should Approve the DIP Term Sheet and DIP Lender's Charge

44. Section 50.6 of the BIA provides statutory jurisdiction to approve interim financing and, on notice to the secured creditors who are likely to be affected by the security or charge, order a priority charge as security for amounts advanced to a debtor pursuant to said interim financing:

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.

[..]

50.6(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[..]

BIA, s. 50.6(1), (3).

45. Section 50.6(5) of the BIA sets out the factors to be considered by the Court in deciding whether to grant an order approving DIP financing and a DIP financing charge:

- 50.6(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.

BIA, s. 50.6(5)

46. As was the case in *P.J. Wallbank Manufacturing Co., Re*, where it is evident that absent approval of interim financing the debtor would close its doors, the proposal trustee is satisfied that the debtor is proceeding in good faith, and on balance the benefit of the granting of the priority charge outweighs the prejudice to the various creditors, the interim financing and charge should be approved.

P.J. Wallbank Manufacturing Co., 2011 ONSC 7641 at paras. 13-25 (Ont. S.C.J. [Commercial List]), Book of Authorities of the Applicants, Tab 11.

OVG Inc., Re, 2013 ONSC 1794 at paras. 22-23 (Ont. S.C.J. [Commercial List]), Book of Authorities of the Applicants, Tab 12.

47. The Kenton Group submits that the following factors support the approval of the DIP Term Sheet and the DIP Lender's Charge in these proposal proceedings:

- (a) Likely duration of NOI proceedings. As evidenced by the Cash Flow Statement, the amounts to be advanced to the Kenton Group as contemplated in the DIP Term Sheet are both necessary and sufficient to fund the Kenton Group's operations and these restructuring proceedings. The Kenton Group intends on diligently pursuing the Sale Process and a BIA proposal with a view to maximizing value for its stakeholder in a timely fashion;
- (b) Management of the Kenton Group's affairs. The current management will continue to manage the operations of the Kenton Group with a view to assisting with the proposed Sale Process and a potential BIA proposal to implement an acceptable sale and/or restructuring of the Kenton Group;
- (c) Report of the Proposal Trustee. The Proposal Trustee has indicated at paragraph 25 of the First Report that it is supportive of the DIP Term Sheet and the DIP Lender's Charge;
- (d) Enhancement of prospects of a viable proposal. It is clear from the Cash Flow Statement that the Kenton Group is facing an imminent liquidity crisis. In the event that the DIP Term Sheet is not approved by the Court, the Kenton Group will be unable to fund its ongoing operations and restructuring efforts. This would cause the Kenton Group to terminate the Proposal Proceedings and become bankrupt, and it would seriously jeopardize the realizable value of the Kenton Group's assets and the care of the Home's vulnerable patients;
- (e) Confidence of major creditors. The Bank, in its capacity as DIP Lender, has agreed to provide interim financing under the DIP Term Sheet;
- (f) Prejudice to Creditors as a Result of the Interim Financing Charge. Like any charge, the DIP Loan coupled with the DIP Lender's Charge will impact creditors'

positions to some degree and potentially reduce the amount recoverable to them. However, given the near-term cessation of the Kenton Group's activities that would result from the failure to approve the DIP Term Sheet and DIP Lender's Charge, on balance the benefit to all stakeholders of the proposed DIP Loan significantly outweighs any prejudice.

5. The Court Should Grant an Extension of time to file the Proposal

48. The Kenton Group filed the NOIs on June 23, 2015. By operation of section 50.4(8) of the BIA, the Kenton Group is required to file a proposal within 30 days of June 23, 2015 unless it otherwise obtains an extension of time from the Court within that 30 day period. The Kenton Group is seeking to extend the time within which a proposal must be filed to and including September 4, 2015.

49. The Court has authority to grant the requested extension under section 50.4(9) of the BIA, which provides as follows:

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension 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, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to 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.

BIA, s. 50.4(9).

50. The proposal sections of the BIA are rehabilitative and remedial in nature. In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis:

Re Cantrail Coach Lines Ltd. (2005), 10 CBR (5th) 164 at para. 11 (B.C. Master) [*Re Cantrail*], Applicant's Book of Authorities, Tab 13.

Re Cosgrove-Moore Bindery Services Ltd. (2000), 17 C.B.R. (4th) 203 at para. 3 (Ont. C.A.) [*Cosgrove*], Applicant's Book of Authorities, Tab 14.

(a) *Good Faith and Due Diligence*

51. Section 50.4(9) requires the Court to consider whether the insolvent person has acted, and is acting, in good faith and with due diligence. Since filing the NOI, the Kenton Group has acted, and is continuing to act, in good faith and with due diligence in dealings with all of its stakeholders, including patient, employees, and key suppliers.

Cosgrove, supra at para. 2.

Re H&H Fisheries Ltd. (2005), 2005 NSSC 346 (N.S.S.C.) at para. 18. [*H&H Fisheries*], Applicant's Book of Authorities, Tab 15.

First Report at para. 34.

52. The Kenton Group's activities since the date of the NOI filing have included, among other things:

- (i) working with the Proposal Trustee to prepare the Cash Flow Forecast;
- (ii) working with its legal counsel to prepare motion materials for this motion;
- (iii) communicating with the Bank regarding restructuring activities and other matters in connection with these Proposal Proceedings; and
- (iv) consulting with the Proposal Trustee with respect to the Sale Process.

(b) *Likelihood of a Viable Proposal*

53. Section 50.4(9)(b) requires consideration of whether the Kenton Group would likely be able to make a viable proposal if the extension being applied for were granted. In *Baldwin Valley*

Investors Inc., Re (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]), Justice Farley was of the opinion that "viable" means "reasonable on its face" to a reasonable creditor, and that "likely" does not require certainty but means "might well happen", "probable" or "to be reasonably expected". The Kenton Group is not required to prove certainty, nor must it cater to the possible idiosyncrasies of any specific creditor.

Re Baldwin Valley Investors (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) at para. 4, Applicant's Book of Authorities, Tab 16.

Scotia Rainbow Inc. v. Bank of Montreal (2000), 18 C.B.R. (4th) 114 (N.S. S.C.) [*Scotia Rainbow*] at paras. 17-18, Applicant's Book of Authorities, Tab 17.

54. This is not a situation where there is "no hope" that the Kenton Group will be able to make a viable proposal to its creditors; rather, it is simply too early to say with definitive certainty whether a viable proposal will be presented by the Kenton Group to its creditors. Pursuant to the Proposal Trustee's ongoing efforts to identify one or more purchasers of the Kenton Group's assets, a proposal maximizing value for all of Kenton Group's creditors might well happen.

55. The requested extension is appropriate in the circumstances because it will provide the timeframe needed by the Kenton Group and the Proposal Trustee to meaningfully evaluate the restructuring options available to the Kenton Group. Specifically, the extension will afford the Kenton Group an opportunity to implement the Sale Process and establish whether there is a purchaser willing to acquire the Kenton Groups' assets on either a going concern basis or, at a minimum, on a basis superior to what might be generated in a forced liquidation / "go dark" scenario.

56. The DIP Loan provided by the Bank pursuant to the DIP Term Sheet will provide the Kenton Group with sufficient liquidity to fund its operations, the costs of undertaking the Sale Process, as well as other costs associated with the Proposal Proceedings, for the duration of the requested extension period.

Mostyn Affidavit at para. 68.

57. Additionally, the extension will have the effect of preserving the going concern value of the Kenton Group, whereas a wind-down of the operations and an immediate liquidation of the assets would likely result in substantial diminution in realization value for all creditors, and would have catastrophic consequences for the Home's patients. A reasonable unsecured creditor would prefer the prospect of recovery on its debt (enhanced by the proposed extension), as compared to the immediate liquidation that would result if the Kenton Group were to be condemned into bankruptcy.

Goldman Hotels v. Power Workers' Union (2007), 34 C.B.R. (5th) 25 (Ont. Sup. Ct. Jus.) at paras. 9-12, Applicant's Book of Authorities, Tab 18.

58. The Proposal Trustee and other professionals involved in this matter are sophisticated, competent and experienced parties capable of assisting the Kenton Group in these circumstances. According to Kennedy C.J.S.C. in *Scotia Rainbow Inc. v. Bank of Montreal*, when considering whether a proposal is viable or not "[i]t is relevant and proper for this Court to consider the quality, the experience and the expertise of the people attempting to accomplish the proposal."

Scotia Rainbow, supra at para. 32.

(c) *No Prejudice to Creditors*

59. The third requirement under section 50.4(9)(b) is that no creditor should be materially prejudiced if the extension being applied for were granted. A "materially prejudiced" creditor is one who will suffer loss in a substantial fashion.

Re Cantrail, supra at para. 21.

60. As held by the Nova Scotia Supreme Court in *Re H&H Fisheries Ltd.*:

"[t]his section of the [BIA] 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.*"
[emphasis added]

H&H Fisheries, supra at para. 38.

61. The Bank - the Kenton Group's largest and first ranking secured creditor supports the proposed extension. In addition, the Kenton Group is not aware of any creditors who are or would be prejudiced in any meaningful way by the requested extension. Ultimately, the extension will afford the Kenton Group further time to assess its options going forward as part of presenting a potentially viable proposal to creditors.

Mostyn Affidavit at paras. 73-76.

PART V - ORDER REQUESTED

62. The Kenton Group therefore requests an Order substantially in the form of the draft Order attached at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June 2015.

BENNETT JONES LLP
BENNETT JONES LLP

SCHEDULE "A"

LIST OF AUTHORITIES

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)

SCHEDULE "B"
RELEVANT STATUTES

1. ***Bankruptcy and Insolvency General Rules, C.R.C., c.368.***

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

2. ***Courts of Justice Act, R.R.O. 1990, reg. 194. Ontario Rules of Civil Procedure.***

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

3. ***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.***

Extension of time for filing proposal

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension 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, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to 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.

Order — interim financing

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 the 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.

Court may order security or charge to cover certain costs

64.2 (1) 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 a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

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

FACTUM
(Returnable June 26, 2015)

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