

**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 October 15, 2015)**

October 8, 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:

(a) an order (the "**Approval and Vesting Order**") substantially in the form of the draft order attached as Tab 3 of the Motion Record:

(i) approving the sale transaction (the "**Transaction**") contemplated by the agreement of purchase and sale (the "**Sale Agreement**") between the Kenton Group and Avcon Construction Inc. (in such capacity, the "**Purchaser**"), dated September 25, 2015, and vesting in the Purchaser the Kenton Group's right, title and interest in and to the Purchased Assets (as

defined herein), free and clear of any claims and encumbrances, other than certain permitted encumbrances;

- (b) an order (the "**Order**") substantially in the form of the draft order attached as Tab 4 of the Motion Record:
  - (i) extending the time within which a proposal must be filed with the Official Receiver pursuant to s. 50.4(9) of the BIA (the "**Proposal Period**") to and including November 16, 2015;
  - (ii) approving the execution by the Kenton Group of the Supplement to the Interim Financing Facility Terms and Conditions among the Kenton Group, as borrowers, and The Bank of Nova Scotia, as lender, dated as of October 5, 2015 (the "**Supplement to the DIP Term Sheet**") and providing that, in addition to the interim financing terms and conditions approved by the Order of Justice Newbould dated June 26, 2015 (the "**Original DIP Facility**"), such credit facility shall be on the terms and subject to the conditions set forth in the Supplement to the DIP Term Sheet;
  - (iii) sealing the confidential supplement to the Third Report until further Order of this Court; and
- (c) such other relief as the Court may deem appropriate.

## PART II - THE FACTS<sup>1</sup>

### A. BACKGROUND

3. Kenton and BBH are not-for-profit corporations that are not registered charities under the *Income Tax Act* (Canada), R.S.C. 1985, c.1 (5th Supp).

Affidavit of Michael Mostyn, sworn October 8, 2015 (the "**Third Mostyn Affidavit**") at para. 5, Motion Record, Tab 2.

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<sup>1</sup> Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the affidavit of Michael Mostyn, sworn October 8, 2015.

4. The Kenton Group owns (in the case of BBH) and operates (in the case of Kenton) a 13,344 square foot retirement home for early stage Alzheimer's patients, containing 44 bedrooms with 45 beds (the "**Home**") at 1 and 3 Kenton Drive, Toronto, Ontario (the "**Properties**").

Third Mostyn Affidavit at para. 6.

5. 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. The Bank's security includes a mortgage over the Properties and a first charge over all of BBH's present and future personal property. Interest and fees continue to accrue on the Bank debt.

Third Mostyn Affidavit at para. 7.

6. A second mortgage is also registered on title in favour of Avcon Construction Inc., Claude Ayache and Norel Electric Inc., dated May 1, 2014 (the "**Second Mortgage**") on the Properties. The amount claimed to be outstanding under the Second Mortgage as at June 15, 2015 was approximately \$1.6 million, including accruing interest.

Third Mostyn Affidavit at para. 8.

7. 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 not willing to do so given that the Home is not financially viable and has no prospects of repaying its debts.

Third Mostyn Affidavit at para. 9.

8. In this context, each of Kenton and BBH filed the NOIs on June 23, 2015. The NOIs were filed for the purposes of providing the Kenton Group with an opportunity (i) to 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) to negotiate and make a viable proposal to its creditors.

Third Mostyn Affidavit at paras. 2 & 9.

9. On June 26, 2015, the Honourable Mr. Justice Newbould granted an order (the "**June 26 Order**") which, among other things:

- (a) administratively consolidated the estate and proposal proceedings of Kenton and BBH (collectively, "**Proposal Proceedings**") under one title of proceedings;
- (b) approved the interim financing of the Kenton Group by the Bank (in such capacity, the "**DIP Lender**") substantially in accordance with the interim financing terms and conditions (the "**Original DIP Facility**") and granted the DIP Lender's Charge (as defined in the June 26 Order);
- (c) approved the sale solicitation process (the "**Sale Process**"); and
- (d) extended the time within which a proposal must be filed with the Official Receiver to September 4, 2015.

Third Mostyn Affidavit at para. 10.

10. On September 2, 2015, the Honourable Mr. Justice Newbould granted an Order (the "**September 2 Order**") which, among other things, further extended the time within which a proposal must be filed with the Official Receiver to and including October 19, 2015.

Third Mostyn Affidavit at para. 12.

11. On July 2, 2015, August 12, 2015, and September 30, 2015, the Proposal Trustee and the Kenton Group held meetings with families of residents of the Home in order to provide updates on the NOI proceedings, the Sale Process and other issues relating to the ongoing management of the Home and care of the residents. Since the filing of the NOIs, the Home has continued to operate in the ordinary course.

Third Mostyn Affidavit at paras. 13-14.



12. Since the filing of the NOIs, the Proposal Trustee, with the assistance of the Kenton Group, has been actively engaged in conducting the Sale Process with a view to achieving the key milestones.

Third Mostyn Affidavit at para. 15.

13. By close of business on September 17, 2015 – the deadline for submission of offers under the Sale Process – the Proposal Trustee had received 5 offers from parties interested in a transaction involving the business and/or assets of the Kenton Group. An additional offer was received on September 18, 2015, increasing the total number of offers received to 6 (collectively, the "**Offers**").

Third Mostyn Affidavit at para. 19.

14. The Proposal Trustee, in consultation with the Kenton Group and the DIP Lender, reviewed the Offers and determined that the offer submitted by Avcon Construction Inc. was the highest and best offer. As previously noted, Avcon Construction Inc. is a mortgagee under the Second Mortgage registered on the Properties.

Third Mostyn Affidavit at para. 20.

15. In accordance with the Sale Process approved in the June 26 Order, the Proposal Trustee, with the assistance of the Kenton Group and in consultation with the DIP Lender, took the necessary steps to finalize and complete a binding agreement of purchase and sale with Avcon Construction Inc. Those steps culminated in the Kenton Group and Avcon Construction Inc. entering into the Sale Agreement on September 29, 2015.

Third Mostyn Affidavit at para. 21.

### **PART III - ISSUES**

16. The issues on this motion are whether the Court should:

- (a) approve the Sale Agreement and the Transaction contemplated thereby;
- (b) extend the Proposal Period to November 16, 2015;

- (c) approve the Supplement to the DIP Term Sheet and grant certain related relief; and
- (d) seal the confidential supplement to the Third Report until further Order of this Court.

#### **PART IV - LAW AND ARGUMENT**

### **A. THE COURT SHOULD APPROVE THE SALE AGREEMENT AND THE TRANSACTION CONTEMPLATED THEREIN.**

#### **1. The Court has the jurisdiction to approve the Sale Agreement.**

17. Section 65.13(1) of the BIA prohibits a debtor in respect of whom a notice of intention or a proposal is filed from selling or otherwise disposing of assets outside the ordinary course of business unless authorized by a court to do so. This Court has the jurisdiction to grant an order requested under s. 65.13 of the BIA.

BIA, s. 65.13(1)

*Re Outdoor Broadcast Networks, Inc.*, 2010 ONSC 5647 (Ont. S.C.J. [Commercial List]), Tab 1 of the Applicant's Book of Authorities (the "BOA") and *Re Hypnotic Clubs Inc.*, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]), Tab 2 of BOA.

18. Under s. 65.13 of the BIA, the court's jurisdiction to authorize the sale of assets outside of the ordinary course of business is not limited to cases where the debtor is capable of presenting a proposal to its creditors.

*Re Komtech Inc.*, 2011 ONSC 3230 (Ont. S.C.J. [Commercial List]) at paras. 25 & 33, Tab 3 of BOA.

#### **2. The factors for approval of sale outside the ordinary course of business are met.**

19. In deciding whether to authorize the sale or disposition of assets outside of the ordinary course of business, the court is to consider, among other things, the following factors:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

BIA, s. 65.13(4).

20. As the Purchaser under the Sale Agreement is an arm's length party that is unrelated to the debtor, the additional factors enumerated in section 65.13(5) of the BIA are not applicable.

BIA, s. 65.13(5).

21. It is respectfully submitted that each of the factors listed in section 65.13(4) of the BIA have been met as described herein:

*(a) The proposed sale or disposition was reasonable in the circumstances*

22. The Sale Agreement is the culmination of an open and transparent Sale Process, conducted in accordance with its Court-approved terms, which included efforts to broadly canvass the market for any and all potential purchasers of the business and/or assets of the Kenton Group.

Third Mostyn Affidavit at para. 18.

23. The Proposal Trustee, with the assistance of the Kenton Group, has been actively engaged in conducting the Sale Process since the filing of the NOIs. A total of 82 interested parties were contacted and provided with a solicitation letter and Confidentiality Agreement ("CA"). A total of 41 interested parties signed and returned executed CAs and were provided access to the electronic dataroom. The Proposal Trustee also conducted 21 site tours of the Properties.

Third Mostyn Affidavit at paras. 15-16.

24. The Proposal Trustee received a total of 6 offers (the "**Offers**"). Following a review of the Offers by the Proposal Trustee, in consultation with the Kenton Group and the DIP Lender, it was determined that the offer submitted by Avcon Construction Inc. (a mortgagee under the Second Mortgage) was the highest and best offer.

Third Mostyn Affidavit at paras. 19-20.

*(b) The Proposal Trustee approved the process leading to the sale*

25. The Proposal Trustee ran the Court-approved Sale Process, which process ultimately resulted in the Transaction contemplated by the Sale Agreement. Furthermore, the Proposal Trustee supports the Transaction with the Purchaser contemplated by the Sale Agreement.

Third Mostyn Affidavit at para. 26.

*(c) The Proposal Trustee will file with the Court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy*

26. The Kenton Group understands that the Proposal Trustee will file with the Court a report stating that in its opinion the sale contemplated by the Sale Agreement will be more beneficial to the creditors than a sale or disposition under a bankruptcy.

*(d) The creditors were adequately consulted*

27. At all relevant times, the Bank was kept apprised of all developments with regards to the Sale Process. Specifically, the Bank (in its capacity as first mortgagee and DIP Lender), which is

the secured creditor with the largest economic interest in the Kenton Group, was consulted extensively throughout the Sale Process and it is supportive of the Sale Agreement. In addition, the Purchaser is one of the second mortgagees.

Third Mostyn Affidavit at paras. 26 & 29.

(e) *The sale has a positive effect on the stakeholders*

28. The Sale Agreement represents the best possible transaction in the circumstances for the Kenton Group and its stakeholders, including its creditors, employees, contractual counterparties and, crucially, for the patients currently residing in the Home and their families.

Third Mostyn Affidavit at para. 28.

29. The Purchaser will assume all of the Kenton Group's leases with its patients, and it is excepted that the Purchaser will offer employment to some or all of the Kenton Group's employees. In addition, the fact that Transaction will keep the Home operating in the ordinary course as a going concern will be beneficial to the Kenton Group's creditors and contractual counterparties.

Third Mostyn Affidavit at para. 25.

30. As previously noted, the Bank (in its capacity as first mortgagee and DIP Lender) is the secured creditor with the largest economic interest in the Kenton Group. The Bank is supportive of the Transaction.

Third Mostyn Affidavit at para. 26.

(f) *The consideration to be received is reasonable and fair taking into account their market value*

31. In the judgment of the Kenton Group's management, the purchase price contemplated by the Sale Agreement is fair and reasonable, and represents the highest price realizable through the Sale Process. The Sale Process extensively canvassed market and accordingly represents the best and higher consideration in the circumstances. The purchase price also provides certainty and exceeds the projected value in a liquidation scenario.

Third Mostyn Affidavit at para. 28.

**3. Additional criteria for approval under Section 65.13 of the BIA are satisfied.**

32. Subsection 65.13(8) of the BIA sets out the following restrictions on disposition of assets within NOI proceedings:

The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 60.13(a) and (1.5)(a) if the court had approved the proposal.

BIA, s. 65.13(8).

33. The Kenton Group can and will make the payments (or satisfactory arrangements thereof), if any, required under section 60(1.3)(a) and (1.5)(a) of the BIA.

Third Mostyn Affidavit at para. 30.

**B. THE COURT SHOULD EXTEND THE PROPOSAL PERIOD**

34. The Kenton Group's Proposal Period is set to expire on October 19, 2015. The Kenton Group is requesting that the Proposal Period be extended to and including November 16, 2015 in order to allow the sale transaction to be completed.

Third Mostyn Affidavit at para. 32.

35. The Court has authority to grant the requested extension of the Proposal Period 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).

36. It is respectfully submitted that, in this case, each of the factors enumerated in BIA s. 50.4(9) have been satisfied:

*(a) Good faith and due diligence*

37. 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 patients, employees, key suppliers, and lenders.

*Re Cosgrove-Moore Bindery Services Ltd.* (2000), 17 C.B.R. (4th) 203 (Ont. C.A.) at para. 2 [*Cosgrove*], Tab 4 of BOA.

*Re H&H Fisheries Ltd.* (2005), 2005 NSSC 346 (N.S.S.C.) at para. 18. [*H&H Fisheries*], Tab 5 of BOA.

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

- (a) working with the Proposal Trustee to prepare cash flow forecasts;
- (b) working with its legal counsel to prepare motion materials;
- (c) communicating with the Bank regarding restructuring activities and other matters;
- (d) consulting with, and assisting, the Proposal Trustee with respect to the Sale Process;
- (e) communicating with other stakeholders in a timely manner;
- (f) operating the Home in the ordinary course; and
- (g) finalizing and completing the Sale Agreement with the Purchaser.

*(b) Likelihood of a viable proposal*

39. 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 held that "viable" means "reasonable on its face" to a reasonable creditor, and that "likely" does not require certainty. 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, Tab 6 of BOA.

*Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S. S.C.) [*Scotia Rainbow*] at paras. 17-18, Tab 7 of BOA.

40. The proposed extension of the Proposal Period will give the Kenton Group an opportunity to contemplate the terms of a proposal (if any) for the benefit of the Kenton Group's creditors.

Third Mostyn Affidavit at para. 34.

41. The requested extension is appropriate in the circumstances because November 13, 2015 is the earliest day on which the Purchaser is prepared to close the Transaction. Therefore, the requested extension is required to allow the Kenton Group, the Proposal Trustee and the Purchaser, and their advisors, to close the Transaction, deal with employees, customers and other stakeholder issues, and otherwise advance these NOI proceedings.

Third Mostyn Affidavit at para. 33.

42. The Proposal Trustee has assisted the Kenton Group in preparing and filing cash flow projections which indicate that, subject to the relief requested herein being granted, the Kenton Group will have sufficient liquidity to continue funding its operations and the costs associated with the ongoing proceedings for the duration of the requested extension of the Proposal Period.

Third Mostyn Affidavit at para. 36.

43. 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, Tab 8 of the BOA.

44. 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*

45. The third requirement under section 50.4(9)(b) is that no creditor would 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 Coach Lines Ltd.* (2005), 10 C.B.R. (5th) 164 (B.C. Master) at para. 21, Tab 9 of BOA.

46. 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."

*H&H Fisheries, supra* at para. 37.

47. The Bank, which is the secured creditor with the largest economic interest in the Kenton Group, is supportive of the requested extension of the Proposal Period. 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.

Third Mostyn Affidavit at paras. 36-37.

**C. THE COURT SHOULD APPROVE THE SUPPLEMENT TO THE DIP TERM SHEET AND GRANT THE RELATED RELIEF**

48. In order to address the liquidity crisis faced by the Kenton Group at the time of the NOIs, the Bank agreed to provide an interim financing facility for the Kenton Group by way of the Original DIP Facility.

Third Mostyn Affidavit at para. 38.

49. Given that the Transaction contemplated by the Sale Agreement is not expected to close prior to November 13, 2015, the Original DIP Facility is insufficient to fund the cash requirements of the Kenton Group for the time period after October 30, 2015. Accordingly, the Kenton Group is seeking approval of the Supplement to the DIP Term Sheet.

Third Mostyn Affidavit at para. 42.

50. 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).

51. 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)

52. 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]), Tab 10 of BOA.

*OVG Inc., Re*, 2013 ONSC 1794 at paras. 22-23 (Ont. S.C.J. [Commercial List]), Tab 11 of BOA.

53. The Kenton Group submits that approval of the Supplement to the DIP Term Sheet is justified under the circumstances. The Supplement to the DIP Term Sheet provides, among other things, as follows:

- (a) the Outside Date is extended to November 16, 2015;
- (b) the amount available to the Borrowers as the DIP Facility (as defined in the Original DIP Facility) is increased from CDN \$400,000 to CDN \$500,000;
- (c) the Availability Schedule is amended such that the Kenton Group is permitted to request advances under the Original DIP Facility of an aggregate amount up to

\$500,000 on and after October 30, 2015 on the terms set out for advances in the Original DIP Facility; and

- (d) the Approved Cash Flow Forecast is deemed to be the weekly cash flow forecast through to November 16, 2015 delivered to the DIP Lender on October 7, 2015.

Third Mostyn Affidavit at para. 43.

54. Approval of the Supplement to the DIP Term Sheet, and the changes contemplated thereby, is critical for the following reasons:

- (a) Absent the funds available pursuant to the Supplement to the DIP Term Sheet, the Kenton Group will be unable to meet its obligations and will be forced to shut down its operations, which will result in significant deleterious effects for the Kenton Group's stakeholders, and in particular the Home's patients.
- (b) The advances facilitated by way of the Supplement to the DIP Term Sheet are expected to provide sufficient liquidity to allow the Kenton Group to operate as a going concern during the extended Proposal Period.
- (c) The Kenton Group is not aware of any creditors that would be materially prejudiced if this Court authorizes the Supplement to the DIP Term Sheet.
- (d) The Bank, which is the Kenton Group's major secured creditor and the DIP Lender, is supportive of the Supplement to the DIP Term Sheet.
- (e) The Proposal Trustee supports the Supplement to the DIP Term Sheet, as detailed in the Third Report to be filed prior to this motion.

Third Mostyn Affidavit at paras. 44-47.

#### **D. THE CONFIDENTIAL SUPPLEMENT SHOULD BE SEALED**

55. The Kenton Group requests that the Court seal the confidential supplement to the Third Report, which contains detailed information regarding the Offers received by the Kenton Group and the Proposal Trustee during the Court-approved Sale Process.

Third Mostyn Affidavit at para. 48.

56. Pursuant to the Ontario *Courts of Justice Act*, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

*Courts of Justice Act*, R.S.O. 1990, Chapter C. 43, s. 137(2).

Confidential supplement to the Third Report of the Proposal Trustee.

57. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under R. 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) 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.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53 ["*Sierra Club*"], Tab 12 of the BOA.

58. This Court has applied the *Sierra Club* test in considering whether to seal a confidential supplement containing an unredacted asset purchase agreement. In *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, Morawetz J. found that an asset purchase agreement contained highly sensitive commercial information which, if disclosed prior to closing of the sale, could pose a serious risk to the sale process in the event that the proposed transaction did not close. As the sealing order was the only reasonable method of preventing the information from becoming publicly available, Morawetz J. granted the order.

*Elleway Acquisitions Ltd. v. 4358476 Canada Inc.*, 2013 ONSC 7009 (Ont. S.C.J. [Commercial List] at paras. 47-48, Tab 13 of the BOA.

59. In this case, the confidential supplement to the Third Report contains certain details regarding the Offers submitted as part of the Sale Process. Such information is both important to

the integrity of the Sale Process and commercially sensitive for the parties involved. Prudence requires that disclosure of such commercial information be prevented so as to preclude or minimize any future harm to the Kenton Group, its employees and other stakeholders involved, in the event that the Transaction contemplated by the Sale Agreement does not close as planned.

Third Mostyn Affidavit at para. 49.

60. The salutary effects of sealing the confidential supplement, namely the protection of commercially sensitive information that could detrimentally affect the Kenton Group and the Kenton Group's stakeholders if disclosed, outweighs any deleterious effect of restricting the accessibility of court proceedings.

61. The Proposal Trustee supports the sealing of the confidential supplement for substantially the same reasons noted above.

Third Mostyn Affidavit at para. 50.

#### **PART V - ORDER REQUESTED**

62. The Kenton Group therefore requests Orders substantially in the form of the draft Orders attached at Tabs 3 and 4 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of October, 2015.

  
BENNETT JONES/LLP

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Re Outdoor Broadcast Networks, Inc.*, 2010 ONSC 5647 (Ont. S.C.J. [Commercial List])
2. *Re Hypnotic Clubs Inc.*, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List])
3. *Re Komtech Inc.*, 2011 ONSC 3230 (Ont. S.C.J. [Commercial List])
4. *Re Cosgrove-Moore Bindery Services Ltd. (2000)*, 17 C.B.R. (4th) 203 (Ont. C.A.)
5. *Re H&H Fisheries Ltd. (2005)*, 2005 NSSC 346 (N.S.S.C.)
6. *Re Baldwin Valley Investors (1994)*, 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List])
7. *Scotia Rainbow Inc. v. Bank of Montreal (2000)*, 18 C.B.R. (4th) 114 (N.S.S.C.)
8. *Goldman Hotels v. Power Workers' Union (2007)*, 34 C.B.R.(5th) 25 (Ont. S.C.J)
9. *Re Cantrail Coach Lines Ltd. (2005)*, 10 CBR (5th)164 (B.C. Master)
10. *P.J. Wallbank Manufacturing Co.*, 2011 ONSC 7641 (Ont. S.C.J. [Commercial List])
11. *OVG Inc., Re*, 2013 ONSC 1794 (Ont. S.C.J. [Commercial List])
12. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.)
13. *Elleway Acquisitions Ltd. v. 4358476 Canada Inc.*, 2013 ONSC 7009 (Ont. S.C.J. [Commercial List])

## SCHEDULE "B"

### RELEVANT STATUTES

#### 1. *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*

**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.

##### *Factors to be considered*

**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.

*Restriction on disposition of assets*

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

*Factors to be considered*

**65.13 (4)** In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

*Additional factors — related persons*

**65.13 (5)** If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

*Restriction — employers*

**65.13 (8)** The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

**2. Courts of Justice Act, R.S.O. 1990, Chapter C. 43.**

**Sealing documents**

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

Applicants

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

Proceeding commenced at Toronto

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(Returnable October 15, 2015)

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