Estate/Court File No. 32-2594575

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF STAR NAVIGATION SYSTEMS GROUP LTD.**

# BOOK OF AUTHORITIES
# (RETURNABLE JANUARY 8, 2020)


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TO: THE SERVICE LIST

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**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF STAR NAVIGATION SYSTEMS GROUP LTD.**

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[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**
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
**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 11 th 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 16 th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20 th of January 2005 and perhaps in response to that, but in any event, on the 1 st 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
# 2

2015 ONSC 5139
Ontario Superior Court of Justice

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.

2015 CarswellOnt 12962, 2015 ONSC 5139, 257 A.C.W.S. (3d) 520, 30 C.B.R. (6th) 315

# NS United Kaiun Kaisha, Ltd., Moving Party (Respondent in the Proposal) and Cogent Fibre Inc., Responding Party (Applicant in the Proposal)

Penny J.

Heard: August 12, 2015
Judgment: August 17, 2015
Docket: 31-2016058

Counsel: Doug Smith, Roger Jaipargas for NS United Kaiun Kaisha, Ltd.
Ken Kraft, Sara-Ann Van Allen for Cogent Fibre Inc.
Sam Babe for Proposal Trustee

Subject: Civil Practice and Procedure; Evidence; Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
II Assignments in bankruptcy
II.4 Procedure on assignment
**Headnote**
Bankruptcy and insolvency --- Assignments in bankruptcy — Procedure on assignment
Debtor was woodchipping business and had five year shipping contract with creditor — Creditor was successful in arbitration, and next day debtor made notice in bankruptcy — Debtor had assets of approximately $261,000 and no operations, revenues or cash flow — Creditor was only significant non-contingent current creditor, although arbitration proceedings were in progress with another business — Debtor brought motion for extension of 30-day stay, creditor brought motion to terminate stay — Debtor's motion dismissed, creditor's motion granted — Debtor not acting in good faith, not using due diligence, and was not likely to make viable proposal — Unlikely that stay would allow for acceptable proposal to be put forth — Evidence of debtor was vague and there was no evidence of what it would be able to offer creditors in proposal — Debtor had not put forth outline of any plan or proposal despite no business being conducted — There was no attempt being made to rehabilitate business — Creditor had veto over proposal and refused to negotiate with debtor.
**Table of Authorities**
**Cases considered by *Penny J.*:**
*Cantrail Coach Lines Ltd., Re* (2005), 2005 BCSC 351, 2005 CarswellBC 581, 10 C.B.R. (5th) 164 (B.C. Master) — considered
*Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered
*Enirgi Group Corp. v. Andover Mining Corp.* (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — considered
*Janodee Investments Ltd. v. Pellegrini* (2001), 2001 CarswellOnt 1232, 25 C.B.R. (4th) 47 (Ont. S.C.J.) — considered
**Statutes considered by *Penny J.*:**
*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

MOTION by debtor for extension of 30 day bankruptcy stay, MOTION by creditor to terminate order.

***Penny J.*:**

1 In a brief handwritten endorsement of August 12, 2015, I dismissed the motion of the debtor, Cogent Fibre Inc., for an extension of the 30- day stay under s. 50.4(9) of the *Bankruptcy and Insolvency Act* and allowed the motion of the judgment creditor, NS United Kaiun Kaisha, Ltd. for an order terminating the 30-day stay under s. 50.4(11) of the BIA, with reasons to follow. These are those reasons.

2 Cogent is in the woodchip business. It had a five-year shipping contract with NS United. There was a dispute which became the subject of an arbitration commenced in February 2012. An arbitral award was made against Cogent for Cdn$15.3 million in January 2015. In July 2015, the District Court for the Southern District of New York confirmed the award. The day after the release of the confirming judgment, Cogent filed its NOI.

3 In an affidavit sworn in collateral bankruptcy proceedings in New York, Mr. Montrop, a director of Cogent, deposed that Cogent's management decided to wind down Cogent's business well before the release of the arbitral award or confirming judgment. It did so, he said, on the basis not only of pending maritime arbitrations but other factors including a "hostile market."

4 Mr. Montrop's evidence is, however, that Cogent was prompted to file its NOI on the basis of its "belief" that NS United "will expeditiously seek to record the judgment and proceed with collection actions."

5 The evidence is that Cogent currently has assets of approximately $261,000 and has no operations, revenues or cash flow. The professional fees of these proceedings are being paid by its parent corporation.

6 Cogent currently has one material, non-contingent creditor — NS United. There are no secured creditors. Another maritime shipping company, NYK, also instituted arbitration proceedings against Cogent. NYK alleges it is owed about $10.9 million. There has been no hearing and there is, obviously, no decision or award. Those proceedings are currently stayed. The NYK claim is entirely contingent. There is no evidence that NYK it at all interested in whatever it is that Cogent has discussed. I was advised that NYK takes no position on the motions before me. It is conceded by Cogent that NS United has a veto over any proposal.

**The Cogent Motion to Extend**

7 Section 50.4(9) sets out a three-part, conjunctive test for the grant of an extension of the 30-day stay. The court may grant an extension, not to exceed 45 days, if satisfied on the evidence tendered in the application that:

> (i) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (ii) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (iii) no creditor would be materially prejudiced if the extension being applied for were granted

8 There is no doubt that the intent of the BIA proposal sections is to give the insolvent person an opportunity to put forward a plan. The purpose of the legislation is rehabilitation, not liquidation. Insolvent companies should have the chance to put forward their proposal.

9 I am not satisfied, however, on the evidence provided by Cogent that it has acted and is acting in good faith and with due diligence. I am also not satisfied on the evidence provided by Cogent that it would likely be able to make a viable proposal if the extension being applied for were granted.

  

10 I say this principally of the basis of the vague, somewhat vacuous, affidavit evidence of Mr. Montrop filed in support of the Cogent motion and in response to the NS United motion.

11 His evidence amounts to this:

(a) Cogent has engaged in settlement discussions with NYK with a view to making a proposal to NYK;

(b) Cogent has offered to meet with NS United;

(c) Cogent is working towards a proposal; and

(d) Cogent requires additional time to continue discussions with NYK and NS United.

12 There is not a hint of what Cogent has to offer NYK and not a hint of what kind of proposal Cogent has in mind. Counsel for Cogent argues that because the settlement discussions are without prejudice, it cannot disclose them. I do not find that argument persuasive. Nothing prevents Cogent from describing its plan or what it hopes to achieve in a proposal.

13 Although Cogent has offered to meet with NS United, NS United has no interest in meeting with Cogent and has not done so.

14 Cogent says it is working towards a proposal but, in the face of this motion, has not provided even a hint of what that proposal might look like. At its highest, it involves talking to the two shipping companies and hoping to make a deal. Counsel made submissions about possible tax losses which may have value but there was not a mote of evidence to this effect.

15 In this case, the 30-day stay expires at midnight on August 14, 2015. Cogent has taken the position, on these motions, that if its request for an extension is denied, it will file a proposal of some kind on Monday, August 17, 2015. That, it suggests, would automatically extend the stay for another 21 days.

16 I find it difficult to understand how Cogent could plan to file a proposal on Monday, August 17 but was unable to provide at least the outline of this proposal on Wednesday, August 12. There was no explanation given for this apparent contradiction.

17 In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

18 In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

19 Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.

20 The 30-day stay (or any extension thereof) is meant to give the debtor time to deal with multiple parties, many moving pieces and potentially complex business and financial arrangements. Here, there is no active business. There are no complex financial arrangements. There are no assets. There are only two material creditors, at least one of which, NS United, has a veto over any proposal. There are, in effect, almost no moving pieces. In the face of a motion to terminate the stay, one would have thought the debtor would be motivated to come up with the best evidence it could of what its proposal might be and, specifically, why an extension is necessary to further the development of that proposal. Yet the debtor has chosen to put forward no concrete evidence but to rely on vague, conclusory assertions.

21 It is this failure to give even a hint of what a proposal might look like, or to provide any content for the bald and conclusory statement that more time is needed to further negotiations (particularly where it is unclear that there are any negotiations), which

  

leads me to the conclusion that Cogent has not met its onus of proving, on a balance of probabilities, that it has acted in good faith and with due diligence and that it is likely to be able to make a viable proposal if only it is given more time.

22 I am also driven to the conclusion that Cogent's emphasis on so-called "rehabilitation" is empty rhetoric in this case. The evidence filed by Cogent in the New York bankruptcy court makes it clear that there is no ongoing effort to "rehabilitate" this company. Management had already decided to wind down its operations before the NS United arbitration award was granted. The summary balance sheets filed by the proposal trustee indicate that Cogent is already well under way with its "wind-down." It went from $3.27 million in assets in 2013 to $5.024 million in 2014 to $261,476 in 2015.

23 Counsel for the debtor submitted in oral argument that perhaps the company could be restarted. There is no evidence whatsoever to support such a contention - indeed, all of the evidence is very much to the contrary.

24 For these reasons the debtor's motion to extend the stay under s. 50.4(9) is dismissed.

**The NS United Motion to Terminate**

25 Section 50.4(11) of the BIA provides that where a debtor files a notice of intention to make a proposal, a creditor can apply to the court to terminate the initial 30-day stay on one or more of four disjunctive grounds:

> (i) the insolvent person has not acted, or is not acting, in good faith and with due diligence;
>
> (ii) the insolvent person will not likely be able to make a viable proposal before the expiration of the 30-day period;
>
> (iii) the insolvent person will not likely to be able to make a proposal, before the expiration of the 30-day period that will be accepted by the creditors; or
>
> (iv) the creditors as a whole would be materially prejudiced if the application to terminate was rejected by the court.

26 NS United took the position that Cogent had not discharged its onus of proving it was acting in good faith and with due diligence on the motion to extend but did not positively assert this ground on the motion to terminate. NS United relies on the second and third grounds of s. 50.4(11).

27 It is clear from the very existence of s. 50.4(11), as well as judicial authority, that while an insolvent debtor is entitled to an automatic stay simply by filing a notice of intention to make a proposal, the BIA does not guarantee an insolvent person a stay without review. There is no absolute immunity from creditors. Section 50.4(11) of the BIA empowers the court to terminate the 30-day stay where the statutory conditions for doing so are met.

28 With respect to the probability of filing a viable proposal at all, I again refer to the paucity of evidence about what a proposal might look like. The debtor has utterly failed to provide even a hint of its plan for a proposal. The facts before the court, from Cogent management's own sworn statement, are that Cogent was already being "wound down" before the arbitral award prompted its filing of a NOI. The evidence before the court, therefore, is that management's plan is not to "rehabilitate" this company.

29 As mentioned earlier, Cogent's stated intention to file a proposal of some sort on the last day, in order to buy another 21 days, seems to me not only disingenuous but to highlight the lack of any concrete proposal. There is simply no evidence to suggest there is any plan in the offing at all, much less one that would probably appear reasonable to a reasonable creditor.

30 Cogent's gambit boils down to this: its proposal depends on negotiating a compromise with its only material, non-contingent creditor. That creditor, however, will not, and is under no obligation to, negotiate any compromise with Cogent.

31 On the second ground, likely to be acceptable to creditors, I agree with Cogent that the mere fact that NS United has a veto power over any proposal is not dispositive on a motion to terminate under s. 50.4(11). It is, however, one factor to be taken into account.

  

32 What adds credibility to NS United's position that it will, under no circumstances, agree to any proposal is the complete paucity of evidence that any plan is even possible, much less viable and likely to be accepted by creditors.

33 Counsel for Cogent sought to distinguish between the "harsher" line taken by the Ontario courts in cases such as *Cumberland Trading Inc., Re* [1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List])] and the more "liberal" approach taken in B.C. and other provinces in cases like *Cantrail Coach Lines Ltd., Re* [2005 CarswellBC 581 (B.C. Master)] and *Enirgi Group Corp. v. Andover Mining Corp.* [2013 CarswellBC 3026 (B.C. S.C.)] Counsel argued that the more liberal approach is more in keeping with the rehabilitative purpose of the proposal sections of the BIA and current views of how these provisions should be applied.

34 I am not convinced these cases are in conflict. The exercise of the discretion under ss. 50.4(9) and (11) of the BIA is highly fact dependent. *Cumberland*, for example, was a case where a proposal had already been filed; the issue was whether to terminate the 21-day stay. The facts of *Cantrail* and *Enirgi* can also be readily distinguished from the present case. In *Cantrail*, the debtor presented evidence of a pending proposal under which the objecting creditor might be paid out in full. In *Enirgi*, likewise, there was evidence that the debtor had significant assets - in other words, the debtor had something to work with.

35 Here, the debtor has essentially nothing to work with, which might explain why it has been so reluctant to come forward with anything concrete. Cogent has no active business, no revenue, no cash flow and effectively no assets. The inference to be drawn from the complete absence of any hint of a concrete proposal is, in these circumstances, that there is no basis for a viable plan and certainly no basis for a conclusion, on a balance of probabilities, that there is likely to be any proposal that would be acceptable to the veto-empowered creditor NS United.

36 Lax J. said in *Janodee Investments Ltd. v. Pellegrini* [2001 CarswellOnt 1232 (Ont. S.C.J.)] (April 12, 2001), "the proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors."

37 Cogent admits that its only hope for a proposal is to negotiate a compromise with NS United; yet NS United has no interest, and no obligation to engage, in that negotiation.

38 Even applying what counsel for Cogent describes as the more "liberal" or debtor-friendly approach, on the evidence, NS United has discharged its burden under s. 50.4(11). NS United has, I find, proven on a balance of probabilities that it is not likely that Cogent will be able to make a viable proposal and, even if that were likely, the proposal will not likely be accepted by the requisite level of creditor support.

39 For these reasons, NS United's motion to terminate the 30-day stay is granted.

40 No order as to costs.

*Motion by creditor granted, motion by debtor dismissed.*

# TAB
# 3

2019 ONSC 5793
Ontario Superior Court of Justice [Commercial List]

FT ENE Canada Inc. (Re)

2019 CarswellOnt 16581, 2019 ONSC 5793, 311 A.C.W.S. (3d) 25

# IN THE MATTER OF THE PROPOSAL OF FT ENE CANADA INC., of the City of Brantford, in the Province of Ontario

Penny J.

Heard: September 26, 2019
Judgment: October 7, 2019
Docket: 31-OR-208344-T, CV-18-61369

Counsel: Alexander Ilchenko, for Proposal Trustee
Mervyn Abramowitz, Alexandra Teodorescu, for FT ENE Canada Inc.
Michael Nowina, for Finetex ENE Inc.
Timothy R. Dunn, for JC Park
Patrick Shea, for Yoonjun Park

Subject: Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors

**Headnote**

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

FT Canada Inc. was wholly owned subsidiary of F Inc. — FT Canada Inc. operated manufacturing facility in nanofibre business — P was owner of principal technology used by F Inc. and FT Canada Inc. — P had falling out with F Inc. and was removed as director — P purported to terminate licencing agreement with F Inc. — P remained as director of FT Canada Inc., which continued to use P's technology — F Inc., as 100 per cent shareholder of FT Canada Inc., passed shareholders resolution to remove P as director of FT Canada Inc. — Proposal was made by proposal trustee of FT Canada Inc. — F Inc. was largest creditor of FT Canada Inc. — All creditors apart from F Inc. voted in favour of proposal — Proposal trustee disregarded vote of F Inc. as non-arm's-length party under s. 109(6) of Bankruptcy and Insolvency Act — Proposal trustee brought motion for approval of proposal — Motion granted — Section 109(6) of Act was designed to prevent insider from determining acceptance or rejection of proposal to detriment of ordinary, unrelated creditors — Permitting F Inc. vote would result in bankruptcy of FT Canada Inc. with F Inc. receiving vast majority of proceeds of liquidation — Proposal trustee was not demonstrably wrong in disregarding F Inc.'s vote — Proposal was reasonable and was calculated to benefit general body of creditors — There was no evidence that proposal was made in bad faith — Proposal, as approved by voting creditors, was approved — Activities of proposal trustee and payment of fees and disbursements as well as those of counsel were also approved.

**Table of Authorities**

**Cases considered by *Penny J.*:**

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

  

*Innovative Coating Systems Inc., Re* (2017), 2017 ONSC 3070, 2017 CarswellOnt 7607, 2017 ONSC 3237, 48 C.B.R. (6th) 278 (Ont. S.C.J.) — referred to

*Juhasz (Trustee of) v. Cordeiro* (2015), 2015 ONSC 1781, 2015 CarswellOnt 4744, 24 C.B.R. (6th) 69 (Ont. S.C.J.) — referred to

*Kitchener Frame Ltd., Re* (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — considered

*McLarty v. R.* (2008), 2008 SCC 26, 2008 CarswellNat 1380, 2008 CarswellNat 1381, *(*sub nom. *R. v. McLarty)* 2008 D.T.C. 6354 (Eng.), *(*sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), [2008] 4 C.T.C. 221, *(*sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, *(*sub nom. *McLarty v. Canada)* 293 D.L.R. (4th) 659, 46 B.L.R. (4th) 1, *(*sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79 (S.C.C.) — referred to

*Piikani Nation v. Piikani Energy Corp.* (2013), 2013 ABCA 293, 2013 CarswellAlta 1567, 5 C.B.R. (6th) 185, [2013] 12 W.W.R. 436, 86 Alta. L.R. (5th) 203, *(*sub nom. *Piikani Energy Corp. (Bankrupt), Re)* 556 A.R. 200, *(*sub nom. *Piikani Energy Corp. (Bankrupt), Re)* 584 W.A.C. 200, 367 D.L.R. (4th) 173 (Alta. C.A.) — considered

*Swiss Bank Corp. v. Minister of National Revenue* (1972), [1972] C.T.C. 614, 72 D.T.C. 6470, 31 D.L.R. (3d) 1, [1974] S.C.R. 1144, 1972 CarswellNat 176, 1972 CarswellNat 417 (S.C.C.) — referred to

**Statutes considered:**

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

Generally — referred to

s. 4(4) — referred to

s. 50(14) — considered

s. 54(3) — considered

s. 59(2) — considered

ss. 95-101.1 — referred to

s. 109(6) — considered

s. 178 — considered

*Debtor Rehabilitation and Bankruptcy Act*, 2009

Generally — referred to

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

MOTION by proposal trustee for approval of proposal.

***Penny J.*:**

**Overview**

1 This is a motion by the proposal trustee of FTE Canada, MNP Ltd., for an order approving FTE Canada's proposal. The proposal was approved by100% of the creditors permitted to vote.

2 Finetex is the parent of FTE Canada. It has by far the largest monetary claim of FT Canada's creditors. Its vote against the proposal was disregarded by the chair of the creditors' meeting by virtue of ss. 54(3) and 109(6) of the BIA.

3 Finetex opposes the motion, as is its right under s. 109(6) of the BIA. Its principal objection is the scope of the release being granted to JC Park under the proposal. JC Park is the sole director of FTE Canada.

4 For the reasons that follow, the motion is granted.

  

**Background**

5 Finetex ENE Inc. (Finetex) and FT ENE Canada Inc. ("FTE Canada") are in the nanofibre business. FTE Canada is a wholly-owned subsidiary of Finetex, which is a Korean company. FTE Canada operates a manufacturing facility in Brantford which employs 13 people.

6 JC Park is the founder of this business. He has had a falling out with Finetex. Park has been removed from office as a "representative director" of the parent Finetex.

7 Park is the owner of the principal technology/IP necessary to this business. He granted a license to Finetex to use that technology. Finetex is itself embroiled in insolvency proceedings in Korea under the *Debtor Rehabilitation and Bankruptcy Act*.

8 As a result of his falling out with Finetex and Finetex's insolvency proceedings, Park has purported to terminate the licence agreement with Finetex. He has an agreement with FTE Canada, however, which enables FTE Canada to continue to use the technology. Finetex has taken the position that the termination is ineffective.

9 Finetex has also made serious allegations of wrongdoing against Park, which include fraud, breach of fiduciary duty and various forms of self-dealing.

10 FTE Canada filed an NOI to avoid being drawn into and controlled by Finetex's Korean insolvency proceedings. The proposal trustee is MNP. The NOI was filed in February 2019.

11 As is apparent from this summary, FTE Canada's NOI proceedings are taking place in the context of a larger corporate commercial/shareholder dispute between the shareholders of the Korean parent, Finetex. This circumstance has had profound implications for the conduct of the NOI proceedings and the positions taken by FTE Canada, Park and Finetex in these proceedings.

12 In June 2019 I dismissed a motion by Finetex to remove Park as the director of FTE Canada. I did so in part because Finetex had not attempted to avail itself of its prerogative, as 100% shareholder of FTE Canada, to remove Park by shareholder resolution at a properly constituted meeting of FTE Canada's shareholders.

13 In August 2019 (that is, shortly after the release of my decision dismissing the Finetex motion), Finetex called a special meeting of shareholders of FTE Canada and, as 100% shareholder, passed a resolution which, among other things, removed Park as a director of FTE Canada.

14 FTE Canada and Park have taken the position that the shareholder meeting was improperly held and that the resolution is of no force or effect. That issue remains outstanding as Finetex has taken no further steps to enforce its purported resolution and removal of Park.

15 A proposal was made to the proposal trustee by FTE Canada on August 2, 2019. Notice was given to all creditors of a meeting to consider the proposal. The proposal trustee ultimately concluded that Finetex, being the 100% shareholder of FTE Canada, was "related" to FTE Canada. Finetex claimed to be owed about $7.5 million by FTE Canada. Its claim vastly overwhelms all other debts, which are essentially trade creditors owed about $46,000. Finetex's claim was accepted for voting purposes at $3.5 million. However, at the meeting, the chair concluded, under section 109(6) of the BIA, that the outcome of the vote was determined by the Finetex vote against the proposal and, as a non-arm's-length party, its vote should be disregarded. The remaining creditors, all trade creditors who, under the proposal, would recover 100 cents on the dollar, voted in favour of the proposal and the proposal was accepted.

16 A significant aspect of the proposal involves Park's removal as a director immediately upon the proposal being approved. Another significant aspect of the proposal is the grant of a release to FTE Canada's officers and directors. Significant attempts were made to negotiate the form of release before the creditor vote but, although significant progress was made, the parties were unable to achieve comprehensive agreement on this issue.

  

17 The proposal trustee brings this motion for an order:

(a) approving FTE Canada's proposal and the associated release of the officers and directors; and

(b) approving the activities of the proposal trustee and the payment of its fees and disbursements as well as those of its counsel.

18 Having had its vote disregarded, such that its otherwise deciding vote against the proposal was ineffective, Finetex has asserted its rights under s. 109(6) of the BIA to ask the *court* to include Finetex's vote and to determine another outcome, i.e., that the proposal has been rejected, triggering a bankruptcy of FTE Canada. Finetex also argues that the proposal should not be approved on other grounds.

19 Although Finetex made a number of arguments, the essential issue in dispute is the scope of the release that should be made available to the officers and the director of FTE Canada. Specifically, the issue is whether possible claims under ss. 95 to 101.1 of the BIA should be included in the release (the "95 - 101.1 release" issue).

***The Exclusion of the Finetex Vote***

20 The two issues, exclusion of the Finetex vote and the 95 - 101.1 release, are intertwined. This is because the importance to Finetex of its vote to reject the proposal was not really to assert its monetary claim in a bankruptcy. The liquidation value of FTE Canada is around $1.8 million. The consequence of the proposal, if approved, apart from costs, is a payment of $46,000 to trade creditors. Another important consequence of the proposal, if approved, is the resignation of Park as a director. Thus, although in a bankruptcy Finetex would receive the lion's share of available funds from a liquidation (while trade creditors would get a fraction of their claims), under the proposal Finetex regains control of FTE Canada without further litigation and, therefore, obtains indirect control of all FTE Canada's assets. Finetex wanted its vote to count because of the leverage it would gain in extracting a more limited release for Park, i.e., no 95 - 101.1 release.

21 Nevertheless, the Finetex vote having been excluded, Finetex maintains its position that its vote against the proposal should be counted, therefore triggering a bankruptcy.

22 The only authority on the issue of the Court's review of the chair's decision to disregard a vote is the decision of the Québec Superior Court in *Re Saargummi Quebec Inc.* (2006), EYB 2006-106495. As noted, the BIA provides that the vote as counted by the chair excluding a related party vote stands unless the court "considers it appropriate to include the creditor's vote and determines another outcome." In *Saargummi* the Québec Superior Court found that there was no established test for the exercise of this discretion. Dumas J., therefore, found that the exercise of the Court's discretion under s. 109(6) should be based on "the objectives sought by the legislator when drafting" the BIA. This involves a consideration of six factors:

(1) the rehabilitation of the debtor;

(2) rapid and orderly realization of the debtor's property;

(3) cancellation of preferential payments and revisable transactions;

(4) fair distribution of the debtor's assets;

(5) effective business reorganization of companies in financial difficulty;

(6) protection of the public interest; and

(7) the person asking for the exercise of judicial discretion must be acting in good faith and have "clean hands."

No one factor is determinative. Not all factors must be met but they all inform the exercise of judicial discretion.

  

23 This is a very unusual case. As noted in my June 2019 decision, the bankruptcy issues have been influenced by the strategic considerations of both parties in the larger corporate/shareholder dispute between Park and Finetex.

24 Finetex's main argument is that the chair of the creditors' meeting was wrong to conclude that just because Finetex was "related" to FTE Canada, it was not dealing "with the debtor at arm's length" within the prior year.

25 The term "arm's-length" is not defined in the BIA. Whether the parties were at arm's-length is a question of fact, BIA, s. 4(4).

26 The leading case on the meaning of arm's length in the BIA is *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293 (Alta. C.A.). In *Piikani*, the Alberta Court of Appeal held that jurisprudence under the *Income Tax Act* provides the most appropriate guidance for determining whether two parties deal at arm's-length in connection with the BIA. The court came to this conclusion for essentially four reasons: 1) the terms 'related persons' and 'arm's-length' are similar in both statutes; 2) when these terms were incorporated into the BIA, they had already existed in the ITA for some time; 3) cases defining arm's-length in the BIA had already drawn on ITA jurisprudence for interpretive guidance; and 4) the "statute book" approach to interpretation seeks to minimize conflict or incoherence between similar language used in different enactments of the same legislative entity.

27 The general concern in non-arm's-length transactions is that there is no assurance that such a transaction "will reflect ordinary commercial dealing between parties acting in their separate interests." Provisions dealing with non-arm's-length parties are "intended to preclude artificial transactions from conferring" benefits on one or more of the parties, *McLarty v. R.*, 2008 SCC 26 (S.C.C.) at 43, citing *Swiss Bank Corp. v. Minister of National Revenue*, [1974] S.C.R. 1144 (S.C.C.) at p 1152.

28 Thus, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It is intended to address situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic factors that result in the consideration for the transfer failing to reflect the value of the transferred property, *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.).

29 Finetex maintains that it has been in opposition to Park (and FTE Canada by virtue of Park's control and direction) for some time. Park has caused FTE Canada to "shut out" Finetex from both information about and control of FTE Canada. Thus, Finetex argues, the outcome of the vote (before Finetex's vote was disregarded) was not determined by the vote of someone who was not dealing at arm's length with the debtor.

30 There is some evidence to support the proposition that Finetex and Park have been in opposition since October 2018. I am not satisfied, however, that this necessarily leads to the conclusion that Finetex and FTE Canada were not "at arm's length." This is in part because Finetex owns 100% of FTE Canada's shares and has been seeking to remove Park for many months. It will, if the proposal is approved, immediately regain control of FTE Canada because Park must resign.

31 As the proposal trustee argues at para. 36 of its factum, if the vote of Finetex is counted, triggering a bankruptcy, Finetex would be achieving a result which is precisely what s. 109(6) of the BIA was designed to prevent - a result where the insider determines the acceptance (or rejection) of a proposal to the detriment of ordinary, unrelated creditors. If the vote of Finetex remains excluded and the proposal is approved, all the unrelated, ordinary creditors are paid in full (and will presumably be willing to continue to do business with the post-proposal FTE Canada). By contrast, counting the vote of Finetex results in "another outcome;" the proposal is rejected, triggering a bankruptcy, and the related party is paid the vast majority of the net proceeds of the liquidation of FTE Canada's assets while the unrelated trade creditors receive but a small fraction of their entitlements.

32 I am not prepared to say that the chair was demonstrably wrong in deciding to disregard Finetex's vote.

33 Finetex's second argument focuses on the discretion available to the Court under s. 109(6) of the BIA. However, I assess the *Saargummi* factors as follows:

(1) the proposal advances the rehabilitation of the debtor;

  

(2) the proposal involves a rapid and orderly realization of the debtor's property;

(3) there is no evidence of any preferential payments or revisable transactions (this is discussed in more detail below);

(4) there is nothing unfair about the distribution of the debtor's assets under the proposal because, once the proposal is approved, Park resigns and Finetex can take control of FTE Canada and its assets;

(5) there is no evidence the proposal does not entail an effective business reorganization in light of FTE Canada's financial difficulty;

(6) under the proposal the FTE Canada business survives and continues to employ a dozen or more people in the Brantford area, all in the public interest; and

(7) there is no evidence of bad faith or that Finetex does not come to the Court with clean hands.

34 Factors one through six all support non-interference with the vote under s. 109(6). Since factor seven is a threshold issue (a necessary but not sufficient condition for the exercise of the Court's discretion), it cannot, standing alone, carry the day.

35 For these reasons, I find it is not appropriate to exercise my discretion under s. 109(6) of the BIA to overturn the chair's determination of the appropriate vote at the meeting of creditors.

***The 95 - 101.1 Release***

36 Sections 95 to 101.1 of the BIA deal with preferences (transfers of property which give one creditor preference over another) and transfers at undervalue (dispositions of property for no consideration or consideration which is conspicuously less than the fair market value).

*The Proposal Provisions*

37 The following sections of the proposal are relevant to the proper analysis of this issue.

38 As noted, s. 1.1(g) of the proposal defines "Claim" to include "any claims which might be made by a trustee in bankruptcy or creditor or any other party pursuant to sections 95 to 101.1 of the *BIA* or under a statute or common law rule similar to these sections."

39 Section 3.5 of the proposal "Claims Against Directors or Deemed Director" provides:

Any Claims (other than those set out in section 50(14) of the *BIA*, which for greater certainty includes a claim for oppression, breach of fiduciary duty or that falls within section 178 of the *BIA*, including without limitation allegations of fraud, embezzlement, misappropriation and/or defalcation) against any Director, including any deemed director, that relate to obligations of such persons to the Company or actions taken by such person on behalf of or to support the interests of the Company or where the directors are under any law liable in their capacity as directors for the payment or performance of such obligations which occurred prior to the filing date (a "**Director Claim**") shall, on the Implementation Date be and are hereby, compromised and released and forever discharged as against the directors of the Company.

40 Section 7.3, "Consents, Waivers and Agreements" provides that each creditor, including related parties, "will be deemed":

(c) to have released the Company, the Proposal Trustee and all of their respective affiliates, employees, agents, officers, shareholders, advisors (including without limitation counsel for the directors), consultants and solicitors from any and all demands, claims, actions, causes of action, counter claims, suits, debts, sums of money, accounts, covenants, damages, judgements, expenses, executions, liens, set off rights and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising based in whole or in part on any act or omission,

  

> transaction, dealing or other occurrence existing or taking place on or prior to the Implementation Date, relating to or arising out of or in connection with the matters herein, including, without limitation, those claims which could have been advanced or pursued pursuant to sections 95 to 101.1 of the *BIA*.

"Directors" are conspicuously absent from this list.

41 Subsection (e) of this section goes on to provide that:

> Notwithstanding s. 7.3(d), nothing in this Proposal or in 7.3(d) constitutes a release of the Company and/or its employees, affiliates, officers and directors in respect of a claim for oppression, breach of fiduciary duty or that falls within section 178 of the *BIA*, including without limitation allegations of fraud, embezzlement, misappropriation and/or defalcation.

"Directors" are included in this list.

42 Finally, s. 7.4, "Conditions Precedent to Proposal Implementation" provides that the implementation of the Proposal is conditional upon fulfilment or satisfaction of certain conditions, which include:

> Finetex will be provided with an opportunity to conduct a site visit and orientation at the Company's leased premises prior to September 17, 2019;
>
> Finetex shall be provided with all available current operational information relating to the Company as well as all operational information in the three months preceding the date of the Proposal including but not limited to lease information, details on capital assets and government remittances, accounts receivables and account payable information and customer and sales information;
>
> JC Park shall resign from all positions with the Company effective one day after the Approval Date; and
>
> Finetex will be provided with keys to the Company's leased premises, passwords to access the Company's premises and data and access to the Company's books and records.

*The Finetex Position*

43 Finetex represents that it and FTE Canada have possible claims against Park and his son-in-law Yoonjun Park. The evidence of Yongwon Kim, Finetex's "representative director," is that he filed a "statement of claim" with a Korean district prosecutor's office on behalf of Finetex. The "claim" is said to allege that Park "(a)...manipulated the accounting of Finetex and FT Philippines by creating false sales in order to publish the profit and loss of Finetex being in the black in the quarterly reports of 2017, and (b) had FT Philippines deal with the company under their control for their own good." No translated copy of this "claim" has been put in evidence before the Court nor is there any evidence of civil proceedings in any other jurisdiction.

44 There is also a report, described in my June 2019 endorsement, which alleges that Park and others, among other things, fraudulently created a "middle man" corporation which bought products from one FTE entity and sold them to another FTE entity at a markup, thereby secretly diverting profits that would otherwise have accrued to the FTE business, to himself.

45 Finetex objects to Park receiving a release of any kind. In particular, Finetex objects to the inclusion, in the definition of "Claim" in the proposal, of "any claims which might be made by a trustee in bankruptcy or creditor or any other party pursuant to sections 95 to 101.1 of the *BIA* or under a statute or common law rule similar to these sections."

46 Finetex argues that, even if I approve the proposal, I should only do so conditional upon the release of sections 95 to 101.1 claims being excised from the proposal, relying on the decision of Garson J. in *Innovative Coating Systems Inc., Re*, 2017 ONSC 3070 (Ont. S.C.J.) at paras 30 and 31.

*The Law*

  

47 In *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) Morawetz J. (as he then was) confirmed the three-part test for the approval of a proposal under s. 59(2) of the BIA; that is, the proposal must be:

(1) reasonable;

(2) calculated to benefit the general body of creditors; and

(3) made in good faith.

48 The nature and scope of releases under a proposal are an important consideration in evaluating the reasonableness of that proposal. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), the Court of Appeal for Ontario set out the criteria for assessing a release in the context of a Plan under the CCAA. I am aware of no reason why these criteria are not equally applicable to a proposal. They include:

(a) the parties to be released are necessary and essential to the debtor's proposal;

(b) the claims to be released are rationally related to the purpose of the proposal and necessary for it;

(c) the proposal cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the proposal;

(e) the proposal will benefit not only the debtor company but creditors generally;

(f) the voting creditors who have approved the proposal did so with knowledge of the nature and effect of the releases; and that

(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

*Analysis*

49 It is common ground that the parties to this disagreement about the 95 - 101.1 release were consulted and had input into the terms and the language of the amended proposal. The report of the proposal trustee documents a process by which the original creditors' meeting was adjourned to consider proposed amendments to the proposal and allow time for Finetex and its counsel to review the proposed amendments and obtain instructions from Mr. Kim. During the adjournment period, there were discussions and negotiations, following which FTE Canada amended its proposal to reflect some of the things Finetex had demanded. There was no agreement, however, about excising the 95 - 101.1 release from the proposal.

50 In light of the controversy over this issue, the proposal trustee undertook a limited review of the FTE Canada's banking records over the past five years to identify potential preferences and transactions at undervalue and, in particular, with respect to related parties. Based on the proposal trustee's review, two issues were identified:

(i) there were a number of transactions, including some with related parties (including Finetex), which the proposal trustee did not have the time to review in detail or obtain explanations or supporting documents which might have enabled the proposal trustee to comment on the propriety of the transaction; and

(ii) there were a few months of missing bank statements that could not be located which impaired the proposal trustee's ability to complete its review.

Accordingly, the proposal trustee concluded that it would neither support nor oppose the inclusion in the amended proposal of the 95 - 101.1 release.

  

51 It is also relevant to my analysis of this issue that no one, other than the proposal trustee (as outlined above) filed any evidence to support their position for or against the inclusion of the 95 - 101.1 release in the proposal.

52 Examining the factors set out in *Metcalfe*, *supra*, I find as follows.

**(a) Necessary and Essential**

53 Park was necessary and essential to FTE Canada's proposal. It was at his direction that the proposal was initiated and brought forward.

**(b) Rationally Related**

54 Lack of evidence on this issue makes the analysis more difficult. In effect, Park and FTE Canada argue that the 95 - 101.1 release is rationally related to the proposal because that is what it took for the amended proposal to be approved by the directing mind of FTE Canada. I do not find this approach particularly helpful, although I acknowledge that in the ebb and flow of insolvency litigation, what a party is prepared to accept on one issue may in some circumstances be evidence that it is rationally related to the proposal as a whole.

55 I view the issue differently, however. Finetex's allegation is that it has claims against Park for, among other things, the secret diversion of profits from FTE entities to himself and the intentional misrepresentation of revenues to improve the "look" of FTE entities' financial statements.

56 The release language which forms part of the proposal excludes from the release claims under s. 50(14) and s. 178 of the BIA. Thus, excluded from the release in the proposal are claims against directors that relate to contractual rights of creditors arising out of contracts with one or more directors or are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors. The proposal also excludes from the release claims arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation.

57 In light of these exclusions, any conduct of Park which fell into one of these categories, even if it related to a ss. 95 to 101.1 preference or undervalue transaction, would not be released.

58 During argument, I asked counsel for Finetex what his client would be getting by excising the 95 - 101.1 release that it would not already be getting by virtue of the limitations on the release in the existing proposal. Mr. Nowina could not articulate a specific, or a general category of, claim that, having regard to Finetex's pending allegations and concerns, would not be excluded from the release under the existing terms of the proposal. The concern, he said, is "we do not know what we do not know."

59 Given that the release defined in the proposal excludes every category of claim which Finetex has, to date, described and that Finetex cannot describe a potential claim it might have against Park that would not be caught by the existing exclusions from the release, I find the release is rationally related to the proposal in the circumstances.

**(c) Cannot Succeed Without**

60 Again, given the limited nature of the evidence, what I have to go on is the representations of counsel for Park and FTE Canada to the effect that the existing proposal, as amended through negotiation as described above, is what the company, through Park, is willing to accept. The lack of evidence makes it difficult to say this criterion has been fulfilled.

**(d) Contribution By Releasee**

61 As described in sub-heading (a) above, Park has contributed to the proposal in a material way although it is clear he has made no financial contribution.

**(e) Benefit Creditors Generally**

  

62 I have no hesitation in concluding that the proposal benefits creditors generally because, in the absence of the proposal being approved, FTE Canada will be liquidated and the trade creditors will receive only a fraction of what they are owed. The employees will also all lose their jobs.

**(f) Knowledge of Voting Creditors**

63 The amended proposal was put before the creditors at the continued creditors' meeting. It is clear the terms of the release were known to the creditors. It was common ground among counsel at the hearing, however, that the trade creditors were entirely indifferent to the terms of the release one way or the other.

**(g) Fair and Reasonable**

64 The proposal, if approved, results in the unrelated, ordinary creditors being paid in full, the business continuing and the empoyees' jobs being preserved. The scope of the exclusions from the release under the proposal appears to cover any claim articulated by Finetex. I find the release to be fair and reasonable.

***Approval of the Proposal***

65 For reasons outlined in this decision, I find the proposal is reasonable. I also find that the proposal is calculated to benefit the general body of creditors. Finally, there is no evidence that the proposal has been made in bad faith. Accordingly, the proposal, as approved by the voting creditors, is approved. The activities of the proposal trustee and the payment of its fees and disbursements as well as those of its counsel are also approved.

*Motion granted.*

**End of Document** 

# TAB
# 4

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**
Bankruptcy and insolvency
XX Miscellaneous
**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
# 5

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

# In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous
**Headnote**
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous
D Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Motion brought to, inter alia, approve stalking horse agreement and SISP — SISP approved — Certain other relief granted, including that key employee retention plan and charge were approved, and that material about key employee retention plan and stalking horse offer summary would not form part of public record pending completion of proposal proceedings — SISP was warranted at this time — SISP would result in most viable alternative for D Inc. — If SISP was not implemented in immediate future, D Inc.'s revenues would continue to decline, it would incur significant costs and value of business would erode, decreasing recoveries for D Inc.'s stakeholders — Market for D Inc.'s assets as going concern would be significantly reduced if SISP was not implemented at this time because business was seasonal in nature — D Inc. and proposal trustee concurred that SISP and stalking horse agreement would benefit whole of economic community — There had been no expressed creditor concerns with SISP as such — Given indications of value obtained through solicitation process, stalking horse agreement represented highest and best value to be obtained for D Inc.'s assets at this time, subject to higher offer being identified through SISP — SISP would result in transaction that was at least capable of satisfying s. 65.13 of Act criteria.
**Table of Authorities**
**Cases considered by *Penny J.*:**
*Brainhunter Inc., Re* (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed
*CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered
*Colossus Minerals Inc., Re* (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

 

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

*Indalex Ltd., Re* (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

*Mustang GP Ltd., Re* (2015), 2015 ONSC 6562, 2015 CarswellOnt 16398, 31 C.B.R. (6th) 130 (Ont. S.C.J.) — followed

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

*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 4839, 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered

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

*Sino-Forest Corp., Re* (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to

*Stelco Inc., Re* (2006), 2006 CarswellOnt 394, 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List]) — followed

*Ted Leroy Trucking Ltd., Re* (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

*W.C. Wood Corp., Re* (2009), 2009 CarswellOnt 7113, 61 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]) — considered

**Statutes considered:**

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

Generally — referred to

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

s. 65.13 [en. 2005, c. 47, s. 441] — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

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

s. 137(2) — considered

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

**The Motion**

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

  

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

**Background**

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

**The Stalking Horse Agreement**

  

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

**The SISP**

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

  

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

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

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

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

(4) Is there a better viable alternative?

*Brainhunter Inc., Re*, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

  

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, 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.

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

**The Break Fee**

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

  

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

**Financial Advisor Success Fee and Charge**

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

*Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

  

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

**Administration Charge**

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

**D&O Charge**

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a 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 NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

  

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

**Key Employee Retention Plan and Charge**

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp., Re supra.*

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

  

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

*Grant Forest Products Inc., Re*, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

**Sealing Order**

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re*, *supra*.

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP.

  

The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

*Order accordingly.*

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF STAR NAVIGATION SYSTEMS GROUP LTD.**

Estate/Court File No.: 32-2594575

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

Proceeding commenced at Toronto

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# (RETURNABLE JANUARY 8, 2020)

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