COURT FILE NUMBER	25-2868952 25-2868957 25-2868949	Clerk's Stamp:
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
MATTER	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF SUGARBUD CRAFT GROWER CORP. AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 1800905 ALBERTA LTD. AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TRICHOME HOLDINGS CORP.	
APPLICANTS:	SUGARBUD CRAFT GROWER CORP., TRICHOME HOLDINGS CORP., and 1800905 ALBERTA LTD.	
DOCUMENT:	**BENCH BRIEF**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MLT AIKINS LLP** 2100 Livingston Place 222 - 3rd Avenue S.W. Calgary, AB T2P 0B4 Solicitor : Ryan Zahara/Chris Nyberg Phone Number: 403-693-5420/2636 Email: rzahara@mltaikins.com/cnyberg@mltaikins.com Fax Number: 403.508.4349 File No.: 0158011/00001	

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I. INTRODUCTION

1. This Bench Brief is filed in support of an application by Sugarbud Craft Growers Corp. ("**SCGC**"), Trichome Holdings Corp. ("**THC**"), and 1800905 Alberta Ltd. ("**Opco**"; together with SCGC and THC, "**Sugarbud**" or the "**Applicants**") for an Order (Approval of Procedural Consolidation, Interim Lender's Charge, KERP Charge, D&O Charge, SISP, and Administration Charge):

(a) abridging the time for service of this Application and the supporting materials, as necessary, and deeming service thereof to be good and sufficient;

(b) consolidating, for procedural purposes only, the three Alberta Court of King's Bench in Bankruptcy and Insolvency Estate proceedings in respect of the three Applicants;

(c) pursuant to section 64.2 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "**BIA**")[1], declaring that:

i. the Applicants' counsel, MLT Aikins LLP ("**MLTA**"), Alvarez & Marsal Canada Inc. ("**A&M**") in its capacity as proposal trustee of the Applicants (the "**Proposal Trustee**"), and Burnet, Duckworth & Palmer LLP, legal counsel for the Proposal Trustee ("**BDP**"; collectively with MLTA and the Proposal Trustee, "**Administrative Professionals**") shall be paid their reasonable fees and disbursements; and

ii. the Administrative Professionals, as security for their respective professional fees and disbursements incurred both before and after the granting of the requested Order, shall be entitled to the benefit of and are hereby granted a first priority charge (the "**Administration Charge**") on all present and after-acquired property of Sugarbud (the "**Property**"), which charge shall not exceed an aggregate amount of $500,000.00;

(d) pursuant to Section 50.4 of the BIA, extending the time for the Applicants to file

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [excerpts] [**TAB 1**]

their proposal to December 10, 2022;

(e) approving a sales and investment and solicitation process ("**SISP**") in order to deal with the assets of the Applicants;

(f) pursuant to section 50.6 of the BIA, declaring that Sugarbud shall be authorized and empowered to obtain and borrow under a credit facility from Connect First Credit Union (the "**Interim Lender**" or "**CFCU**") in order to finance Sugarbud's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $2,000,000.00 unless permitted by further order of this Court (the "**Interim Financing Facility**");

(g) pursuant to section 50.6(3) of the BIA, declaring that the Interim Lender shall be entitled to the benefit of a charge (the "**Interim Lender's Charge**") on the Property to a maximum amount of $2,000,000.00 to secure all obligations to the Interim Lender ranking subordinate only to the Administration Charge;

(h) requiring the Applicants to indemnify their directors and officers (the "**Directors and Officers**") for liabilities incurred after the commencement of the within proceedings, and establishing a third-raking priority charge in the amount of $200,000.00 in order to secure such indemnity (the "**Directors' Charge**");

(i) approving a Key Employee Retention Program ("**KERP**") and a fourth-ranking priority charge in the amount of $140,000.00 to secure all obligations owed to employees pursuant to the KERP (the "**KERP Charge**");

(j) granting a Sealing Order in respect of the personal confidential employee information contained in the KERP; and

(k) such further and other relief as may be sought by Sugarbud and this Honourable Court may deem appropriate.

II. FACTS

2. The facts relied upon in support of this application are set out in the Affidavit of Daniel Wilson sworn on September 26, 2022 (the "**Wilson Affidavit**"), and in the First Report of the

Proposal Trustee dated September 27, 2022 (the "**First Report**").

III. ISSUES

3. The Applicants respectfully submit that this application raises the following issues, namely:

   (a) Should the proceedings pursuant to the BIA in relation to the three Applicants be consolidated?

   (b) Should the deadline for the Applicants to file their proposal be extended?

   (c) Should the SISP be approved?

   (d) Should the Administration Charge be granted?

   (e) Should the Interim Financing Facility and the Interim Lender's Charge, be approved?

   (f) Should the Directors' Charge be approved?

   (g) Should the KERP and the KERP Charge be approved?

   (h) Should a Sealing Order be granted in respect of the personal confidential employee information contained in the KERP?

IV. ARGUMENT

A. The Proceedings In Relation To The Three Applicants Should Be Consolidated

4. The filing of joint proposals is permitted pursuant to Division I of Part II of the BIA. Factors to be considered in determining whether to permit the filing of a joint proposal include whether the operations of the debtors are intertwined, whether they have common liabilities, whether or not the creditors are prejudiced by the joint filing, the position (if any) taken by the Official Receiver,

and whether the creditors are in favour of the proposal itself.[2]

5. In this case, the operations of the Applicants are intertwined and they intend to file a joint proposal. The Applicants are not aware of any party who objects to proceeding in this fashion, nor how any party would or could be prejudiced either by a joint proposal or by consolidating the actions at this stage. In the circumstances, consolidating the proceedings will serve to simplify the process and limit unnecessary costs, without causing prejudice to any party.

B. The Deadline For The Applicants To File Their Proposal Should Be Extended

6. The 30-day deadline to file a proposal prescribed by subsection 50.4(8) of the BIA is subject to subsection 50.4(9), which provides as follows:

> **Extension of time for filing proposal**
>
> **(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> > **(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
> >
> > **(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
> >
> > **(c)** no creditor would be materially prejudiced if the extension being applied for were granted.

7. As more particularly set out in the Wilson Affidavit and in the First Report, the relief sought in this application, including the extension of the deadline for the Applicants to file their proposal and the corollary extension of the stay of proceedings established by section 69(1) of the BIA, is sought in good faith by the Applicants.[3] The Applicants' cashflows are not sufficient to fund its

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[2] *Wasaya Airways Limited Partnership, Re*, 2016 ONSC 5600 at paras 26-36, 41 CBR (6th) 289 (Morawetz RSJ) [**TAB 2**]

[3] First Report, paragraph 66

ongoing payroll obligations. By filing Notices of Intention to Make a Proposal and bringing the within proceedings, the Applicants are seeking to avoid a "going dark" scenario which would almost certainly result in the termination of the Applicants' 50 total employees (33 of which are currently working full time) and the loss of the value of the Applicants' business as a going concern. [4]

8. The Applicants are seeking additional time and other relief in order to "keep the lights on" for a sufficient period to carry out the SISP, determine whether and on what terms the Applicants' business can be restructured or sold (ideally as a going concern), and ensure that all stakeholders are treated equitably and in accordance with their respective legal priorities. The timelines in Division I of Part III of the BIA (requiring the Court's permission for each successive 45-day extension and establishing a "hard" deadline of six months within which a proposal must be filed) ensures that matters are not left to languish, and the SISP itself contains detailed timelines. Based on the foregoing, the Applicants submit they are acting with due diligence.

9. The SISP is structured so as to test the market to see if there is a transaction, investment or sale that may establish what value the market may place on the business of the Applicants and any amounts to be distributed to the stakeholders in accordance with their respective legal priorities. The requested extension would, if granted, make such a proposal and distribution likely. Certainly, as noted in the First Report, the expected returns to stakeholders in such a scenario are preferable to those which would be realized in the Applicants' bankruptcy.

10. The Applicants are not aware of any creditor who will be prejudiced by the granting of the requested extension. The Applicants are not currently aware of any creditor who opposes the relief sought.

11. The Applicants' Notices of Intention were filed on September 26, 2022. The Applicants seek an extension of the deadline to file their proposal by 45 days, to run from the end of the initial 30-day stay of proceedings of October 26, 2022, until December 10, 2022. Subsection 50.4(9) does not explicitly require that the 45-day extension run from the hearing date, and the deadlines in Division I of Part III are not, in any case, to be interpreted in a manner that detrimentally affects

[4] Wilson Affidavit, paragraphs 8 and 9

the parties as a result of technicalities of Court scheduling.[5] Such an extension order has also been granted in other NOI proceedings in front of this Court[6].

C. The SISP Should Be Approved

12. Section 65.13 of the BIA provides that a sale or disposal of assets outside the ordinary course of business by a debtor in respect of whom a notice of intention is filed may only occur with the approval of the Court on notice to affected creditors. The factors to be considered in the approval of such a proposed sale or disposal of assets are set out in subsection 65.13(4) of the BIA:

> **Factors to be considered**
>
> **(4)** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> > **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> >
> > **(b)** whether the trustee approved the process leading to the proposed sale or disposition;
> >
> > **(c)** whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> >
> > **(d)** the extent to which the creditors were consulted;
> >
> > **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
> >
> > **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

13. Should the SISP lead to a transaction contemplated in section 65.13 of the BIA, further approval of the Court is required and will be sought. However, it is respectfully submitted that the same factors should be applied when considering whether to approve the SISP.

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[5] *Kids' Farm Inc., Re*, 2011 NBQB 240 at paras 13-14, 84 CBR (5th) 91. [**TAB 3**]

[6] *Petrolama Energy Canada Inc., Re* (10 August 2022), 25-2851343, Judicial Centre of Calgary (Alta QB, Horner J) at para 16 [**TAB 4**]

14. The SISP contemplates a two-phase bid process whereby, first, interested, qualified bidders are identified and, second, those bidders are invited to submit binding offers. The Applicants, in consultation with the Proposal Trustee, will select the successful bidder and will seek further Court approval of the proposed sale transaction.[7] This is a common and eminently reasonable process, which has the support of the Proposal Trustee (and which the Proposal Trustee affirms is preferable to bankruptcy) as per the First Report.[8]

15. The Applicants' creditors have notice of the within application, albeit short notice, and will receive notice of their eventual application to approve any transaction arising out of the SISP. Accordingly, the Applicants' creditors (and any other interested parties) will have the opportunity to fully participate in the process and ensure that their interests are protected. The reasonableness of the consideration obtained in the ultimate transaction will be demonstrated to the parties and to the Court on application for approval of the same.

D. The Administration Charge Should Be Granted

16. The Court's authority to grant the Administration Charge is confirmed by subsections 64.2(1-2) of the BIA, which provide as follows:

> **Court may order security or charge to cover certain costs**
>
> **64.2 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge,

[7] Wilson Affidavit, paragraph 63

[8] First Report, paragraphs 23 and 30

in an amount that the court considers appropriate, in respect of the fees and expenses of

> **(a)** the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> **(b)** any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> **(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

17. The secured creditors of the Applicants have been provided with notice of this application.

18. The Applicants are not aware of any secured creditor or other stakeholder who opposes the granting of a first-priority Administration Charge in the amount of $500,000.00. Such a charge is necessary and is reasonable in the circumstances. In order to implement the SISP and put themselves in a position to file a proposal, the Applicants require the assistance of their legal counsel and of the Proposal Trustee (and the Proposal Trustee, in turn, requires the assistance of its own legal counsel).[9] Each of those professional firms requires some certainty as to payment, and a first-priority charge in their favour is, the Applicants submit, a standard and optimal way to provide such certainty.[10]

E. The Interim Financing Facility And The Interim Lender's Charge Should Be Approved

19. The Court's authority to approve interim financing, and grant a priority charge securing the same, is confirmed in section 50.6 of the BIA, the relevant portions of which provide as follows:

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[9] Wilson Affidavit, paragraphs 81-83

[10] First Report, paragraph 54

Order — interim financing

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

…

Priority

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

…

Factors to be considered

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

> **(a)** the period during which the debtor is expected to be subject to proceedings under this Act;
>
> **(b)** how the debtor's business and financial affairs are to be managed during the proceedings;
>
> **(c)** whether the debtor's management has the confidence of its major creditors;
>
> **(d)** whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> **(e)** the nature and value of the debtor's property;
>
> **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> **(g)** the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

20. The secured creditors and other stakeholders have received notice of this application. Accordingly, an order approving the Interim Financing and Interim Lender's Charge is appropriate if it accords with the factors set out in section 50.6(5) of the BIA.

21. There were certain emergency amounts that were advanced by CFCU on the eve of filing the NOI proceeding and in order to allow the Applicants to continue its business operations uninterrupted.[11] Although, unlike the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"), Division I of Part III of the BIA does not contain "critical supplier" provisions, payments of pre-filing indebtedness owed to critical suppliers may nevertheless be permitted in proceedings such as these where they are required in order for the restructuring to proceed.[12] Further, the utilization of an interim financing facility to pay pre-filing indebtedness does not infringe the prohibition in subsection 50.6(1) on interim financing charges securing pre-filing obligations.[13]

22. Although it is likely that one or more additional extensions of time within which to file a proposal will be sought, the timelines in the SISP and the six-month outside date established by the BIA ensure that all steps in these proposal proceedings will be carried out in a timely fashion.

23. The Applicants desire and intend to manage their affairs as a going concern throughout the proposal proceedings which, as discussed in the Wilson Affidavit and the First Report, requires Interim Financing (supported by the Interim Lender's Charge) in order to "keep the lights on" pending the completion of the SISP and the proposal proceedings.

24. The Applicants' management has the confidence of its major creditors. Indeed, its most significant secured creditor, CFCU, is the proposed provider of the Interim Financing and has agreed to provide the same on the condition that, *inter alia*, the Interim Lender's Charge is granted.

25. The proposed Interim Financing enhances the prospects of a viable proposal being made

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[11] Wilson Affidavit, paragraphs 41 and 42

[12] *Schendel Mechanical Contracting Ltd. (Re)*, 2021 ABQB 893 at paras 20-21, 38 Alta LR (7th) 406, citing *1732427 Ontario Inc. v 1787930 Ontario Inc.*, 2019 ONCA 947, 74 CBR (6th) 273, and E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 CBR (5th) 161 [**TAB 5**]

[13] *Toys "R" Us (Canada) Ltd., Re*, 2017 ONSC 5571 at paras 8-10, 2017 CarswellOnt 14645 [**TAB 6**]

since, in the absence of such financing, the Applicants face a liquidation scenario as they will not be able to make payroll or preserve any going concern value in their business. In that case, a liquidation would result and a proposal would be unlikely.[14]

26. The Applicants operate a vertically integrated cannabis business, including ownership of their facilities and holding the required licenses to carry on business in the cannabis industry. This asset base can well secure the proposed Interim Lender's Charge.

27. Since, in the absence of the Interim Lender's Charge, the Applicants face a "going dark" or liquidation scenario, the Interim Financing can only serve to enhance the value received by the Applicants' creditors. Indeed, as noted above, the creditor who stands to be the most affected, CFCU, is the proposed Interim Financing lender and is supportive of the Interim Lender's Charge.

28. The Proposal Trustee, in its First Report, is supportive of the proposed Interim Financing and Interim Lender's Charge.[15]

29. Accordingly, the Applicants respectfully submit that the Interim Financing, together with the second-ranking Interim Lender's Charge in the amount of $2,000,000.00, should be approved.

F. The Directors' Charge Should Be Approved

30. The Court's authority to grant a charge in favour of the directors and officers of a debtor in respect of which a Notice of Intention to Make a Proposal has been filed under Division I of Part III of the BIA is confirmed in section 64.1 of the BIA, which provides as follows:

> **Security or charge relating to director's indemnification**
>
> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer

[14] Wilson Affidavit, paragraph 60

[15] First Report, paragraphs 41 and 42

against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

31. Although the Directors and Officers do benefit from some liability insurance, as set out in the Wilson Affidavit, such insurance is inadequate in the circumstances of the Applicants' insolvency as it is subject to various exceptions, exclusions, and carve-outs. In light of the risks and uncertainties involved with having to make a claim under their existing insurance, the Directors and Officers require, as a condition of their continued participation (which will serve to enhance the value of the Applicants for all stakeholders) a Directors' Charge in order to protect themselves from additional liabilities which they may incur after the commencement of these proceedings.[16]

32. The amount of the requested Directors' Charge is modest, at $200,000.00. Further, the scope of the Directors' Charge is limited as it only applies to the extent that the Directors and Officers' existing insurance coverage does not apply. Finally, the proposed form of Order excludes the possibility of the Directors' Charge securing liability for gross negligence or wilful misconduct, which exclusion is required by the BIA.[17]

33. The Applicants therefore respectfully request that a third-priority Directors' Charge in the

[16] Wilson Affidavit, paragraphs 84 – 93.

[17] First Report, paragraph 61

amount of $200,000.00 be granted.

G. The KERP And The KERP Charge Should Be Approved

34. Although neither the BIA nor the CCAA specifically contemplates priority charges to secure KERPs, approvals of the same have routinely been sought and granted in CCAA proceedings and have, on occasion, been granted in proceedings pursuant to Division I of Part III of the BIA as well. The factors to be considered when determining whether to approve a KERP and the associated priority charge have been expressed as follows:

(a) whether the Proposal Trustee supports the KERP;

(b) whether the employees who are the subject of the KERP are likely to pursue other employment opportunities in its absence;

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

(d) whether the quanta of the proposed retention payments are reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the KERP.[18]

35. The Proposal Trustee is supportive of the KERP, as per the First Report.[19]

36. As discussed in the Wilson Affidavit, the KERP is necessary to provide critical stability to the Applicants' operations during the proposal period in order to ensure that the business of the Applicants is maintained as a going concern. Although the individuals in question have continued working for the Applicants to date, even in the face of uncertainty as to their own continued employment, it is not certain that they would continue to do so as uncertainty increases during the proposal period.

37. In light of the licensing regimes governing businesses in the cannabis industry, it is critical

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[18] *Danier Leather Inc., Re*, 2016 ONSC 1044 at paras 72-78, 33 CBR (6th) 221. [**TAB 7**]

[19] First Report, paragraphs 51 and 52

that these individuals stay in their current roles in order to ensure that the Applicants remain onside the applicable licensing regimes and regulations. The directors of the Applicants have determined that the KERP is necessary and desirable in order to promote stability and maintain the going concern value of the Applicants' business during the proposal period.[20]

38. As discussed in more detail in the Wilson Affidavit and the First Report, the quanta of the proposed payments are modest, and their timing is structured so as to align the subject employees' incentives with the other stakeholders and maximize the chances of a successful proposal being consummated within the time frames contemplated.[21]

39. The Applicants therefore respectfully request that the KERP be approved, supported by a fourth-priority KERP Charge in the amount of $140,000.00.

H. A Sealing Order Should Be Granted In Respect Of The Personal Confidential Employee Information Contained In The KERP

40. It is standard practice for the details of key employee retention plans to be protected by sealing orders, as the information contained in such documents comprises confidential and sensitive information regarding the identity and compensation of employees.[22] The aggregate amount of the KERP has been disclosed and the individual personal information adds nothing.[23]

41. The KERP has been disclosed and described with sufficient particularity in the application materials for interested parties to make submissions thereon if they so desire. The confidential terms which are specific to the employees involved are sensitive personal information, whose sensitivity outweighs any minimal public or commercial interest in disclosure. The Applicants

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[20] Wilson Affidavit, paragraphs 73 – 80.

[21] First Report, paragraph 51

[22] Wilson Affidavit, paragraph 80.

[23] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 at paras 51-52 (WL Can), 59 CBR (5th) 72 (Sup Ct J [Comm List]) [**TAB 8**]; *Altus Energy Services Ltd., Re*, 2011 CarswellAlta 2781 at paras 10-12 (WL Can) (QB) (Romaine J) [**TAB 9**]; *North American Lamb Company Ltd. et al., Re* (17 August 2022) at para 38, 2201-08920, Judicial Centre of Calgary (Alta QB, Neufeld J).[**TAB 10**]

therefore respectfully request that the employee particulars of the KERP be sealed on the Court file.[24]

V. CONCLUSION AND REQUESTED RELIEF

42. For all of the foregoing reasons, the Applicants respectfully request that an Order (Approval of Procedural Consolidation, Interim Financing Charge, KERP Charge, SISP, D&O Charge, and Administration Charge) be granted in the form of the Draft Order provided to the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of September, 2022.

MLT AIKINS LLP

Ryan Zahara / Chris Nyberg
Counsel for the Applicants

[24] First Report, paragraph 52

TABLE OF AUTHORITIES

AUTHORITIES	
1.	*Wasaya Airways Limited Partnership, Re*, 2016 ONSC 5600, 41 CBR (6th) 289
2.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [excerpts]
3.	*Kids' Farm Inc., Re*, 2011 NBQB 240, 84 CBR (5th) 91
4.	*Petrolama Energy Canada Inc., Re* (10 August 2022), 25-2851343, Judicial Centre of Calgary (Alta QB, Horner J)
5	*Schendel Mechanical Contracting Ltd. (Re)*, 2021 ABQB 893, 38 Alta LR (7th) 406
6.	*Toys "R" Us (Canada) Ltd., Re*, 2017 ONSC 5571, 2017 CarswellOnt 14645
7.	*Danier Leather Inc., Re*, 2016 ONSC 1044, 33 CBR (6th) 221
8.	*Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184, 59 CBR (5th) 72 (Sup Ct J [Comm List]
9.	*Altus Energy Services Ltd., Re*, 2011 CarswellAlta 2781 (QB)
10.	*North American Lamb Company Ltd. et al., Re* (17 August 2022), 2201-08920, Judicial Centre of Calgary (Alta QB, Neufeld J) [excerpt]

TAB 1

Bankruptcy and Insolvency Act (R.S.C. (Revised Statutes of Canada), 1985, c. B-3)

Act current to 2022-09-11 and on 2022-09-01.

PART III

Proposals

DIVISION I

General Scheme for Proposals

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

Where proposal may not be made

(1.1) A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

To whom proposal made

(1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

Idem

(1.3) Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

Classes of secured claims

(1.4) Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;

(b) the nature and rank of the security in respect of the claims;

(c) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;

(d) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and

(e) such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

Court may determine classes

(1.5) The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

Creditors' response

(1.6) Subject to section 50.1 as regards included secured creditors, any creditor may respond to the proposal as made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or

(b) sections 124 to 134, in the case of secured creditors.

Effect of filing proof of claim

(1.7) Hereinafter in this Division, a reference to an unsecured creditor shall be deemed to include a secured creditor who has filed a proof of claim under subsection (1.6), and a reference to an unsecured claim shall be deemed to include that secured creditor's claim.

Voting

(1.8) All questions relating to a proposal, except the question of accepting or refusing the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal was made.

Documents to be filed

(2) Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and

(b) the prescribed statement of affairs.

Filing of documents with the official receiver

(2.1) Copies of the documents referred to in subsection (2) must, at the time the proposal is filed under subsection 62(1), also be filed by the trustee with the official receiver in the locality of the debtor.

Approval of inspectors

(3) A proposal made in respect of a bankrupt shall be approved by the inspectors before any further action is taken thereon.

Proposal, etc., not to be withdrawn

(4) No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

Assignment not prevented

(4.1) Subsection (4) shall not be construed as preventing an insolvent person in respect of whom a proposal has been made from subsequently making an assignment.

Duties of trustee

(5) The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

Trustee to file cash-flow statement

(6) The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

(a) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the person making the proposal regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the person making the proposal.

Creditors may obtain statement

(7) Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(8) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (7) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(9) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, he is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to monitor and report

(10) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

(a) file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at any time that the court may order;

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in

respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

Report to creditors

(11) An interim receiver who has been directed under subsection 47.1(2) to carry out the duties set out in subsection (10) in substitution for the trustee shall deliver a report on the state of the insolvent person's business and financial affairs, containing any prescribed information, to the trustee at least fifteen days before the meeting of creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

Court may declare proposal as deemed refused by creditors

(12) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

(a) the debtor has not acted, or is not acting, in good faith and with due diligence;

(b) the proposal will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

Effect of declaration

(12.1) If the court declares that the proposal is deemed to have been refused by the creditors, paragraphs 57(a) to (c) apply.

Claims against directors — compromise

(13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(14) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

(b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(15) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.

Application of other provisions

(16) Subsection 62(2) and section 122 apply, with such modifications as the circumstances require, in respect of claims against directors compromised under a proposal of a debtor corporation.

Determination of classes of claims

(17) The court, on application made at any time after a proposal is filed, may determine the classes of claims of claimants against directors and the class into which any particular claimant's claim falls.

Resignation or removal of directors

(18) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.

R.S., 1985, c. B-3, s. 50; 1992, c. 27, s. 18; 1997, c. 12, s. 30; 2001, c. 4, s. 27(E); 2004, c. 25, s. 32; 2005, c. 47, s. 34; 2007, c. 36, s. 16.

Secured creditor may file proof of secured claim

50.1 (1) Subject to subsections (2) to (4), a secured creditor to whom a proposal has been made in respect of a particular secured claim may respond to the proposal by filing with the trustee a proof of secured claim in the prescribed form, and may vote, on all questions relating to the proposal, in respect of that entire claim, and sections 124 to 126 apply, in so far as they are applicable, with such modifications as the circumstances require, to proofs of secured claim.

Proposed assessed value

(2) Where a proposal made to a secured creditor in respect of a claim includes a proposed assessed value of the security in respect of the claim, the secured creditor may file with the trustee a proof of secured claim in the prescribed form, and may vote as a secured creditor on all questions relating to the proposal in respect of an amount equal to the lesser of

(a) the amount of the claim, and

(b) the proposed assessed value of the security.

Idem

(3) Where the proposed assessed value is less than the amount of the secured creditor's claim, the secured creditor may file with the trustee a proof of claim in the prescribed form, and may vote as an unsecured creditor on all questions relating to the proposal in respect of an amount equal to the difference between the amount of the claim and the proposed assessed value.

Idem

(4) Where a secured creditor is dissatisfied with the proposed assessed value of his security, the secured creditor may apply to the court, within fifteen days after the proposal is sent to the creditors, to have the proposed assessed value revised, and the court may revise the proposed assessed value, in which case the revised value henceforth applies for the purposes of this Part.

Where no secured creditor in a class takes action

(5) Where no secured creditor having a secured claim of a particular class files a proof of secured claim at or before the meeting of creditors, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

1992, c. 27, s. 19; 1997, c. 12, s. 31(F).

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested

persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Date modified:

2022-09-15

Bankruptcy and Insolvency Act (R.S.C. (Revised Statutes of Canada), 1985, c. B-3)
Act current to 2022-09-11 and on 2022-09-01.

PART III

Proposals (continued)

DIVISION I

General Scheme for Proposals (continued)

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

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

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Priority

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

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

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

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Calling of meeting of creditors

51 (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy,

if not already sent; and

(f) a voting letter as prescribed.

In case of a prior meeting

(2) Where a meeting of his creditors at which a statement or list of the debtor's assets, liabilities and creditors was presented was held before the trustee is required by this section to convene a meeting to consider the proposal and at the time when the debtor requires the convening of the meeting the condition of the debtor's estate remains substantially the same as at the time of the former meeting, the trustee may omit observance of the provisions of paragraphs (1)(b) and (c).

Chair of first meeting

(3) The official receiver, or the nominee thereof, shall be the chair of the meeting referred to in subsection (1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

R.S., 1985, c. B-3, s. 51; 1992, c. 1, s. 20, c. 27, s. 20; 1999, c. 31, s. 19(F); 2005, c. 47, s. 123(E).

Adjournment of meeting for further investigation and examination

52 Where the creditors by ordinary resolution at the meeting at which a proposal is being considered so require, the meeting shall be adjourned to such time and place as may be fixed by the chair

(a) to enable a further appraisal and investigation of the affairs and property of the debtor to be made; or

(b) for the examination under oath of the debtor or of such other person as may be believed to have knowledge of the affairs or property of the debtor, and the testimony of the debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court on the application for the approval of the proposal.

R.S., 1985, c. B-3, s. 52; 2005, c. 47, s. 123(E).

Creditor may assent or dissent

53 Any creditor who has proved a claim, whether secured or unsecured, may indicate assent to or dissent from the proposal in the prescribed manner to the trustee prior to the meeting, and any assent or dissent, if received by the trustee at or prior to the meeting, has effect as if the creditor had been present and had voted at the meeting.

R.S., 1985, c. B-3, s. 53; 1992, c. 1, s. 20, c. 27, s. 21.

Vote on proposal by creditors

54 (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Voting system

(2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Certain Crown claims

(2.1) For greater certainty, subsection 224(1.2) of the *Income Tax Act* shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of Her Majesty in right of Canada or a province for amounts that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

Where no quorum in a class

(2.2) Where there is no quorum of secured creditors in respect of a particular class of secured claims, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

Related creditor

(3) A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

Voting by trustee

(4) The trustee, as a creditor, may not vote on the proposal.

R.S., 1985, c. B-3, s. 54; 1992, c. 27, s. 22; 2000, c. 30, s. 143; 2007, c. 36, s. 19; 2009, c. 33, s. 21.

Class — creditors having equity claims

54.1 Despite paragraphs 54(2)(a) and (b), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2007, c. 36, s. 20.

Creditors may provide for supervision of debtor’s affairs

55 At a meeting to consider a proposal, the creditors, with the consent of the debtor, may include such provisions or terms in the proposal with respect to the supervision of the affairs of the debtor as they may deem advisable.

R.S., c. B-3, s. 37.

Appointment of inspectors

56 The creditors may appoint one or more, but not exceeding five, inspectors of the estate of the debtor, who shall have the powers of an inspector under this Act, subject to any extension or restriction of those powers by the terms of the proposal.

R.S., c. B-3, s. 38.

Result of refusal of proposal

57 Where the creditors refuse a proposal in respect of an insolvent person,

(a) the insolvent person is deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall either

(i) forthwith call a meeting of creditors present at that time, which meeting shall be deemed to be a meeting called under section 102, or

(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (b.1) is issued, of the meeting of creditors under section 102,

and at either meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

R.S., 1985, c. B-3, s. 57; 1992, c. 27, s. 23; 1997, c. 12, s. 33; 2005, c. 47, s. 38; 2017, c. 26, s. 7.

Appointment of new trustee

57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.

1997, c. 12, s. 34.

Application for court approval

58 On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

R.S., 1985, c. B-3, s. 58; 1992, c. 1, s. 20, c. 27, s. 23; 1997, c. 12, s. 35.

Court to hear report of trustee, etc.

59 (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

R.S., 1985, c. B-3, s. 59; 1997, c. 12, s. 36; 2000, c. 12, s. 10; 2007, c. 36, s. 21.

Date modified:

2022-09-15

Bankruptcy and Insolvency Act (R.S.C. (Revised Statutes of Canada), 1985, c. B-3)
Act current to 2022-09-11 and on 2022-09-01.

PART III

Proposals (continued)

DIVISION I

General Scheme for Proposals (continued)

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under

subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal shall be valued by the court and shall be paid in cash on approval of the proposal.

R.S., 1985, c. B-3, s. 65; 2004, c. 25, s. 35(F).

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

> **"(c)** the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of
>
> **(i)** the notice of intention, if one was filed, or
>
> **(ii)** the proposal, if no notice of intention was filed."

Idem

(3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

Certain acts not prevented

(4) Nothing in subsections (1) to (3) shall be construed

(a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed;

(b) as requiring the further advance of money or credit; or

(c) [Repealed, 2012, c. 31, s. 415]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

Powers of court

(6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it

significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with that Act and the by-laws and rules of that Association.

(8) [Repealed, 2007, c. 29, s. 92]

Permitted actions

(9) Despite subsections 69(1) and 69.1(1), the following actions are permitted in respect of an eligible financial contract that is entered into before the filing, in respect of an insolvent person of a notice of intention or, where no notice of intention is filed, a proposal, and that is terminated on or after that filing, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the insolvent person and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (9) are owed by the insolvent person to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the insolvent person with a claim provable in bankruptcy in respect of those net termination values.

1992, c. 27, s. 30; 1997, c. 12, s. 41; 2001, c. 9, s. 573; 2004, c. 25, s. 36(E); 2005, c. 47, s. 43; 2007, c. 29, s. 92; 2012, c. 31, s. 415.

Disclaimer or resiliation of agreements

65.11 (1) Subject to subsections (3) and (4), a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) may — on notice given in the prescribed form and manner to the other parties to the agreement and the trustee

— disclaim or resiliate any agreement to which the debtor is a party on the day on which the notice of intention or proposal was filed. The debtor may not give notice unless the trustee approves the proposed disclaimer or resiliation.

Individuals

(2) In the case of an individual,

(a) they may not disclaim or resiliate an agreement under subsection (1) unless they are carrying on a business; and

(b) only an agreement in relation to the business may be disclaimed or resiliated.

Court may prohibit disclaimer or resiliation

(3) Within 15 days after the day on which the debtor gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court ordered disclaimer or resiliation

(4) If the trustee does not approve the proposed disclaimer or resiliation, the debtor may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

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

(a) whether the trustee approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable proposal being made in respect of the debtor; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(6) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1) or any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (4), on the day that is 30 days after the day on which the debtor gives notice or any later day fixed by the court.

Intellectual property

(7) If the debtor has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(8) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(9) A debtor shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(10) This section does not apply in respect of

(a) an eligible financial contract;

(b) a lease referred to in subsection 65.2(1);

(c) a collective agreement;

(d) a financing agreement if the debtor is the borrower; or

(e) a lease of real property or of an immovable if the debtor is the lessor.

2005, c. 47, s. 44; 2007, c. 29, s. 93, c. 36, s. 26; 2009, c. 31, s. 63; 2018, c. 27, s. 265(F).

Application for authorization to serve a notice to bargain

65.12 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) who is a party to a collective agreement and who is unable to reach a voluntary agreement with the bargaining agent to revise any of its provisions may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the insolvent person to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent.

Conditions for issuance of order

(2) The court may issue the order only if it is satisfied that

(a) the insolvent person would not be able to make a viable proposal, taking into account the terms of the collective agreement;

(b) the insolvent person has made good faith efforts to renegotiate the provisions of the collective agreement; and

(c) the failure to issue the order is likely to result in irreparable damage to the insolvent person.

No delay on vote on proposal

(3) The vote of the creditors in respect of a proposal may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent has not expired.

Claims arising from revision of collective agreement

(4) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the insolvent person, the bargaining agent that is a party to the agreement has a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Date modified:

2022-09-15

Bankruptcy and Insolvency Act (R.S.C. (Revised Statutes of Canada), 1985, c. B-3)
Act current to 2022-09-11 and on 2022-09-01.

PART III

Proposals (continued)

DIVISION I

General Scheme for Proposals (continued)

Restriction on disposition of assets

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

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

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

Additional factors — related persons

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

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

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

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

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

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an

exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266.

Insolvent person may disclaim or resiliate commercial lease

65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial lessee under a lease of real property or an immovable, the insolvent person may disclaim or resiliate the lease on giving thirty days notice to the lessor in the prescribed manner, subject to subsection (2).

Lessor may challenge

(2) Within fifteen days after being given notice of the disclaimer or resiliation of a lease under subsection (1), the lessor may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to any parties that it may direct, shall, subject to subsection (3), make that declaration.

Circumstances for not making declaration

(3) No declaration under subsection (2) shall be made if the court is satisfied that the insolvent person would not be able to make a viable proposal without the disclaimer or resiliation of the lease and all other leases that the lessee has disclaimed or resiliated under subsection (1).

Effects of disclaimer or resiliation

(4) If a lease is disclaimed or resiliated under subsection (1),

(a) the lessor has no claim for accelerated rent;

(b) the proposal must indicate whether the lessor may file a proof of claim for the actual losses resulting from the disclaimer or resiliation, or for an amount equal to the lesser of

(i) the aggregate of

(A) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer or resiliation becomes effective, and

(B) fifteen per cent of the rent for the remainder of the term of the lease after that year, and

(ii) three years' rent; and

(c) the lessor may file a proof of claim as indicated in the proposal.

Classification of claim

(5) The lessor's claim shall be included in either

(a) a separate class of similar claims of lessors; or

(b) a class of unsecured claims that includes claims of creditors who are not lessors.

Lessor's vote on proposal

(6) The lessor is entitled to vote on the proposal in whichever class referred to in subsection (5) the lessor's claim is included, and for the amount of the claim as proven.

Determination of classes

(7) The court may, on application made at any time after the proposal is filed, determine the classes of claims of lessors and the class into which the claim of any of those particular lessors falls.

Section 146 not affected

(8) Nothing in subsections (1) to (7) affects the operation of section 146 in the event of bankruptcy.

1992, c. 27, s. 30; 1997, c. 12, s. 42; 2004, c. 25, s. 37.

Lease disclaimer or resiliation if lessee is a bankrupt

65.21 If, in respect of a proposal concerning a bankrupt person who is a commercial lessee under a lease of real property or an immovable, the lessee's lease has been surrendered, disclaimed or resiliated in the bankruptcy proceedings, subsections 65.2(3) to (7) apply in the same manner and to the same extent as if the person was not a bankrupt but was an insolvent person in respect of which a disclaimer or resiliation referred to in those subsections applies.

1997, c. 12, s. 43; 2004, c. 25, s. 38.

Bankruptcy after court approval

65.22 If an insolvent person who has disclaimed or resiliated a lease under subsection 65.2(1) becomes bankrupt after the court approval of the proposal and before the proposal is fully performed, any claim of the lessor in respect of losses resulting from the disclaimer or resiliation, including any claim for accelerated rent, shall be reduced by the amount of compensation paid under the proposal for losses resulting from the disclaimer or resiliation.

1997, c. 12, s. 43; 2004, c. 25, s. 39(E).

Certificate where proposal performed

65.3 Where a proposal is fully performed, the trustee shall give a certificate to that effect, in the prescribed form, to the debtor and to the official receiver.

1992, c. 27, s. 30.

Act to apply

66 (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

Assignments

(1.1) For the purposes of subsection (1), in deciding whether to make an order under subsection 84.1(1), the court is to consider, in addition to the factors referred to in subsection 84.1(3), whether the trustee approved the proposed assignment.

Final statement of receipts and disbursements

(1.2) For the purposes of subsection (1), the trustee is to prepare the final statement of receipts and disbursements referred to in section 151 without delay after

(a) the debtor files or is deemed to have filed an assignment;

(b) the trustee informs the creditors and the official receiver of a default made in the performance of any provision in a proposal; or

(c) the trustee gives the certificate referred to in section 65.3 in respect of the proposal.

Examination by official receiver

(1.3) For the purposes of subsection (1), the examination under oath by the official receiver under subsection 161(1) is to be held — on the attendance of the person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) — before the proposal is approved by the court or the person becomes bankrupt.

Division to be applied conjointly with other Acts

(1.4) The provisions of this Division may be applied together with the provisions of an Act of Parliament, or of the legislature of a province, that authorizes or provides for the sanction of compromises or arrangements between a corporation and its shareholders or any class of its shareholders.

Effect of *Companies' Creditors Arrangement Act*

(2) Notwithstanding the *Companies' Creditors Arrangement Act*,

(a) proceedings commenced under that Act shall not be dealt with or continued under this Act; and

(b) proceedings shall not be commenced under Part III of this Act in respect of a company if a compromise or arrangement has been proposed in respect of the company under the *Companies' Creditors Arrangement Act* and the compromise or arrangement has not been agreed to by the creditors or sanctioned by the court under that Act.

R.S., 1985, c. B-3, s. 66; 1992, c. 27, s. 31; 1997, c. 12, s. 44; 2005, c. 47, s. 45; 2007, c. 36, s. 28.

DIVISION II

Consumer Proposals

Definitions

66.11 In this Division,

administrator means

(a) a trustee, or

(b) a person appointed or designated by the Superintendent to administer consumer proposals; (*administrateur*)

consumer debtor means an individual who is bankrupt or insolvent and whose aggregate debts, excluding any debts secured by the individual's principal residence, are not more than $250,000 or any other prescribed amount; (*débiteur consommateur*)

consumer proposal means a proposal made under this Division. (*proposition de consommateur*)

1992, c. 27, s. 32; 1997, c. 12, s. 45; 2005, c. 47, s. 46.

Consumer proposal

66.12 (1) A consumer proposal may be made by a consumer debtor, subject to subsections (2) and 66.32(1).

Dealing with certain consumer proposals together

(1.1) Two or more consumer proposals may, in such circumstances as are specified in directives of the Superintendent, be dealt with as one consumer proposal where they could reasonably be dealt with together because of the financial relationship of the consumer debtors involved.

Restriction

(2) A consumer debtor who has filed a notice of intention or a proposal under Division I may not make a consumer proposal until the trustee appointed in respect of the notice of intention or proposal under Division I has been discharged.

To whom consumer proposal is made

(3) A consumer proposal shall be made to the creditors generally.

Creditors' response

(4) Any creditor may respond to a consumer proposal by filing with the administrator a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or

(b) sections 124 to 134, in the case of secured creditors.

Term of consumer proposal

(5) A consumer proposal must provide that its performance is to be completed within five years.

Priority of claims, fees

(6) A consumer proposal must provide

(a) for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the consumer debtor;

(b) for the payment of all prescribed fees and expenses

(i) of the administrator on and incidental to proceedings arising out of the consumer proposal, and

(ii) of any person in respect of counselling provided pursuant to paragraph 66.13(2)(b); and

(c) for the manner of distributing dividends.

1992, c. 27, s. 32; 1997, c. 12, s. 46; 2005, c. 47, s. 47(E).

Commencement of proceedings

66.13 (1) A consumer debtor who wishes to make a consumer proposal shall commence proceedings by

(a) obtaining the assistance of an administrator in preparing the consumer proposal; and

(b) providing the administrator with the prescribed information on the consumer debtor's current financial situation.

Duties of administrator

(2) An administrator who agrees to assist a consumer debtor shall

(a) investigate, or cause to be investigated, the consumer debtor's property and financial affairs so as to be able to assess with reasonable accuracy the consumer debtor's financial situation and the cause of his insolvency;

(b) provide, or provide for, counselling in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b);

(c) prepare a consumer proposal in the prescribed form; and

(d) subject to subsection (3), file with the official receiver a copy of the consumer proposal, signed by the consumer debtor, and the prescribed statement of affairs.

Where consumer proposal not to be filed

(3) The administrator shall not file a consumer proposal under paragraph (2)(d) if he has reason to believe that

(a) the debtor is not eligible to make a consumer proposal; or

(b) there has been non-compliance with anything required by this section or section 66.12.

Where consumer proposal wrongly filed

(4) Where the administrator determines, after filing a consumer proposal under paragraph (2)(d), that it should not have been filed because the debtor was not eligible to make a consumer proposal, the administrator shall forthwith so inform the creditors and the official receiver, but the consumer proposal is not invalid by reason only that the debtor was not eligible to make the consumer proposal.

1992, c. 27, s. 32; 1999, c. 31, s. 21(E); 2005, c. 47, s. 48.

Date modified:

2022-09-15

TAB 2

2016 ONSC 5600
Ontario Superior Court of Justice

Wasaya Airways Limited Partnership, Re

2016 CarswellOnt 16382, 2016 ONSC 5600, 272 A.C.W.S. (3d) 472, 41 C.B.R. (6th) 289

IN THE MATTER OF THE PROPOSAL OF WASAYA AIRWAYS LIMITED PARTNERSHIP AND WASAYA GENERAL PARTNER LIMITED OF THE CITY OF THUNDER BAY IN THE PROVINCE OF ONTARIO

G.B. Morawetz R.S.J.

Heard: June 8, 2016
Judgment: October 19, 2016
Docket: 21-2109581, 21-2109607

Counsel: Alex Ilchenko, for Vine and Williams Inc., Proposal Trustee
Alex MacFarlane, for Applicants
Jeremy Nemers, for Royal Bank of Canada
Vern DaRe, for Business Development Bank of Canada

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — General principles
Debtors provided air transportation services to northern Ontario and were First Nations owned — Debtors had support of their secured creditors and key equipment lessors for restructuring on basis provided for in proposals — Debtors filed joint proposal — Proposals were being made to only unsecured creditors — Liabilities of debtors were virtually identical — Creditors voted on and approved proposals at meeting of creditors — Proposal trustee recommended proposals be approved by court — Proposal trustee brought motion for approval of proposals — Motion granted — Proposals were reasonable and calculated to benefit creditors — Debtors made proposals in good faith — Joint filing was not prohibited, and it was appropriate for official receiver to accept joint proposal — Public interest served by operations of debtors was of considerable importance because debtors provided essential services to several remote First Nations communities in northern Ontario — Releases requested were reasonable and did not prejudice any creditors.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Convergix Inc., Re (2006), 2006 NBQB 288, 2006 CarswellNB 460, 24 C.B.R. (5th) 289, 307 N.B.R. (2d) 259, 795 A.P.R. 259 (N.B. Q.B.) — considered

Howe, Re (2004), 2004 CarswellOnt 1253, 49 C.B.R. (4th) 104 (Ont. S.C.J.) — considered

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

Nitsopoulos, Re (2001), 2001 CarswellOnt 1994, 25 C.B.R. (4th) 305, [2001] O.T.C. 430 (Ont. Bktcy.) — considered

Statutes considered:

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

s. 2 "person" — considered

s. 50(13) — considered

s. 50(14) — considered

MOTION by proposal trustee for approval of proposals.

G.B. Morawetz R.S.J.:

1 Vine and Williams Inc., in its capacity as the Trustee (the "Proposal Trustee") in the proposal of Wasaya Airways Leasing Ltd. ("WALL") (the "WALL Proposal") and the joint proposal of Wasaya Airways Limited Partnership ("WALP") and Wasaya General Partner Limited ("WGPL"), (the "Joint Proposal") (WALL, WALP and WGPL being collectively, the "Debtors") brought these motions for orders, *inter alia*, approving these proposals (the "WALL Proposal and the Joint Proposal" being collectively, the "Proposals") as voted on and approved by creditors at the meeting of creditors held on May 17, 2016 (the "Meetings of Creditors").

2 At the conclusion of the hearing I endorsed the record of both motions as follows:

June 8, 2016 - "Motion granted. Order signed. Reasons will follow."

3 These are the reasons.

4 The Wasaya Group of Companies and limited partnerships, which includes the Debtors, are 100% First Nations owned. The Debtors provide air transportation services in northern Ontario.

5 The Debtors have been in operation for more than twenty-six years. WALP is the primary operating arm of the Debtors.

6 WALP serves 25 destinations and has bases located in Thunder Bay, Sioux Lookout, Pickle Lake and Red Lake, Ontario. WALP provides air transportation services including passenger, charter and cargo, and is a critical lifeline for the delivery of food, medical supplies and other essential services to several remote First Nations communities. It also supplies and delivers bulk fuel for many of the Hydro One and community owned power generating plants in remote northern communities.

7 WALL is an affiliate of WGPL and WALP and owns or leases the aircraft and other critical assets used by WALP in its operations. The operations of the Debtors are integrated and dependent on one another and, consequently, it is a condition of the proposal of WGPL and WALP that the WALL Proposal be approved, and vice-versa.

8 The Debtors seek court approval of the Joint Proposal. WALP is a limited partnership and, WGPL, as the general partner of WALP, is liable in law for all the obligations of WALP. WGPL does not carry on business independently, and has

no separate purpose, other than to serve as the general partner of the WALP.

9 The Official Receiver accepted the filing of the Joint Proposal and the holding of a combined meeting of creditors for the unsecured creditors of WGPL and WALP.

10 The Debtors have experienced negative cash flow, losses and operational problems resulting in financial difficulties for several years leading up to 2014, at which time a comprehensive operational and financial restructuring was initiated. R.e.l. group inc. ("REL") was retained to act as Chief Restructuring Officer of the Debtors to assist in the development and implementation of the turnaround plan.

11 The Debtors have the support of their secured creditors and key equipment lessors for the restructuring on the basis provided for in the proposals. Royal Bank of Canada ("RBC") holds general security agreements over all of the assets of the Debtors as security for its loans. The total amount owing to RBC is approximately $7.85 million.

12 Business Development Bank of Canada ("BDC") has specific security on certain aircraft and other assets of WALL and holds general security agreements against WALL ranking behind RBC's security. BDC is owed approximately $2.6 million.

13 RBC and BDC entered into forbearance agreements with the Debtors to maintain their loans if the Proposals are accepted and implemented. The claims of secured creditors are not being compromised.

14 Each Proposal provides that there is one class of unsecured creditors that is comprised of all Unsecured Creditors for each entity to the extent of their proven unsecured claims. Proposals are only being made to unsecured creditors.

15 Unaffected creditors under the Proposals include claims of:

(a) secured creditors;

(b) the Proposal Trustee, its counsel and counsel to the Debtors for administrative fees and expenses;

(c) the Crown with respect to certain Crown claims which are not subject to compromise under the *Bankruptcy and Insolvency Act* ("BIA");

(d) any creditors for amounts owing by the Debtors on account of goods, property and services received after the filing date; and

(e) employees of WALP and WGPL who shall continue to receive payment of their earnings on a regular basis.

16 Upon implementation of each of the Proposals, each unsecured creditor will receive payment as follows:

(a) for proven claims of less than $1,000, a dividend payment equal to the full amounts of the claim;

(b) for proven claims between $1,000 and less than $10,000, a dividend payment of $1,000 within 30 days of the effective date;

(c) for proven claims in excess of $10,000, a dividend payment of ten cents on the dollar payable in four equal payments over 12 months; and

(d) creditors having proven claims in excess of $10,000 who notify the Proposal Trustee at least three days before the first dividend payment, may elect to receive $1,000 on the first dividend payment in full and final satisfaction of their claim.

17 The Proposals also provide that certain related party creditors will waive their rights to receive dividends on their unsecured claims and, in the case of WALL, that certain First Nations creditors agree to irrevocably direct that the dividends

payable on their claims be reinvested as unsecured loans to WALL.

18 The Proposal Trustee further reports that the liabilities of WGPL and WALP are virtually identical, with the only creditors unique to WGPL, being individual claims related to the payroll for the WALP Senior Management Team, all of which will be satisfied in full.

19 In the event of bankruptcy of each of the Debtors, the Proposal Trustee reports that the unsecured creditors would receive no distribution, and any proceeds of any liquidation of the assets of each of the Debtors would be paid to the secured creditors.

20 On May 17, 2016, the Meeting of Creditors for the Debtors was held. The Proposals were accepted by the requisite value and dollar value of the unsecured creditors of each of the Debtors entitled to vote at the Meeting of Creditors.

21 With respect to WALP and WGPL, 96.15% in number representing 99% in dollar value voted in favour of the Proposal.

22 With respect to the Proposal of WALL, 87.5% in number representing 99.76% in dollar value voted in favour of the Proposal.

23 The Proposal Trustee is of the opinion that the Proposals are advantageous to the creditors of the Debtors. The Proposal Trustee recommended that the Proposals be approved by the court.

24 The significant issue on this motion was whether it was appropriate to approve the filing of a Joint Division I Proposal by WGPL and WALP.

25 The Joint Proposal provides that:

(a) all claims asserted by Unsecured Creditors against either WGPL or WALP will be treated as claims in each estate;

(b) Unsecured Creditors only need to submit one proof of claim with respect to their claim;

(c) only one joint meeting of the Unsecured Creditors of WGPL and WALP would be held;

(d) if an Unsecured Creditor wished to submit a proxy or voting letter, only one proxy or voting letter need be submitted; and

(e) dividends will be based on proven claims submitted by Unsecured Creditors (without duplication) and only one distribution will be made to each Unsecured Creditor with a proven claim. Distributions will be made or issued by WALP, however, WGPL will be jointly liable for all payments.

26 There is very little authority or guidance on the subject of whether the filing of a Joint Proposal by related corporations is permitted under the BIA and whether an order should issue approving a Joint Proposal.

27 Counsel to the Proposal Trustee submits that the filing of a Joint Proposal by related corporations is permitted under the BIA and that, on the facts of this case, an order should issue approving the Joint Proposal.

28 Counsel to the Proposal Trustee referenced the proposal of *Golden Hill Ventures Limited Partnership* and *Golden Hill Ventures Ltd.*, Estate No.: 11-1292335 and 11-252902 (Yukon, S.C.), unreported, where the court approved a single proposal for both the general partner and the limited partnership. No reasons were provided. According to counsel to the Proposal Trustee, the proposal in that case did not provide for a consolidated estate, but rather, similar to the terms of the Joint Proposal, the *Golden Hill* proposal provided that all claims asserted against either Debtor, or both Debtors, would be treated as claims against the limited partnership for which the general partner was also liable by operation of law.

29 Counsel further noted that in *Howe, Re*, [2004] O.J. No. 4257 (Ont. S.C.J.), Registrar Sproat allowed for the filing of a

"joint proposal" by spouses who carried on a business together.

30 In *Convergix Inc., Re*, 2006 NBQB 288 (N.B. Q.B.), Glennie J. of the New Brunswick Court of Queen's Bench expanded the category of parties eligible for the filing of a "joint proposal" to related entities. In allowing the filing of a "joint proposal", Glennie J. took into account the inter-relatedness of the insolvent corporations, that the "joint proposal" would not prejudice any creditors and that the filing of a "joint proposal" by related companies in certain circumstances may be consistent with the filing of a "joint proposal" by partners in a partnership.

31 Justice Glennie opined that the filing of a joint proposal is permitted under the BIA and, in that case, the filing of a joint proposal by the related corporations was permitted. Glennie J. noted that the BIA should not be construed so as to prohibit the filing of a joint proposal. In his analysis, Glennie J. referenced *Nitsopoulos, Re*, [2001] O.J. No. 2181 (Ont. Bktcy.) where Farley J. concluded that the BIA should not be construed so as to prohibit the filing of a Joint Division I Proposal.

32 Justice Glennie also took into account that:

> (a) the cost of reviewing and vetting all inter-corporate transactions of the insolvent corporations in order to prepare separate proposals;
>
> (b) the cost of reviewing and vetting all arms-length creditors' claims to determine which insolvent corporation they are actually a creditor of; and
>
> (c) the cost of reviewing and determining ownership and title to the assets of the insolvent corporations;

would be unduly and counterproductive to the goal of restructuring and rehabilitating the insolvent corporations.

33 As noted by Vern Da Re in "The treatment of Joint Division I Proposals, 2004 Annual Review of Insolvency Law 21":

> ... Joint consumer proposals are explicitly permitted under section 66.12(1.1) of the BIA...
>
> By contrast, Joint Division I Proposals are not specifically permitted under the BIA. Section 50(1) provides that "a proposal may be made by an insolvent person ...". The words "a proposal" and "an insolvent person" are singular and, arguably, limit Division 1 Proposals to one person per filing. While the definition of "person" under section 2(1) of the BIA is inclusive, rather than exhaustive, and includes "a partnership", there is no reference to the word in its plural form.

34 The issue identified by Mr. Da Re had been considered by Farley J. in *Nitsopoulos, Re*, who referred to the definition of "person" under section 2(1) of the BIA and concluded that since the definition was inclusive, rather than exhaustive, he was unwilling to prohibit the joint filing.

35 I agree with the approach taken by Farley J. in *Nitsopoulos, Re*. I do not see anything in the definition which would prohibit the joint filing. In my view, it was appropriate for the Official Receiver to accept the Joint Proposal.

36 I accept the submissions of counsel to the Proposal Trustee. In doing so, I have taken into account that:

> (a) the operations of WALP and WGPL are completely intertwined;
>
> (b) WGPL is liable in law for all of the obligations of WALP;
>
> (c) the creditors of WGPL and WALP are not prejudiced by the filing of the Joint Proposal, as the only separate claims in WGPL will be satisfied in full as provided in the Joint Proposal and as required under s. 60 of the BIA;
>
> (d) the official Receiver permitted the filing of the Joint Proposal; and
>
> (e) the creditors of both WGPL and WALP voted overwhelmingly in favour of the Joint Proposal.

37 In order to approve a proposal, a three-pronged test must be satisfied:

(a) the Proposal is reasonable;

(b) the Proposal is calculated to benefit the general body of creditors; and

(c) the Proposal is made in good faith.

(see: *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List])).

38 In *Kitchener*, I stated the following at para. 20:

> The first two factors are set out in section 59(2), while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors, and the interests of the public at large in the integrity of the bankruptcy system.

39 As I stated in *Kitchener*, it is appropriate to accord substantial deference to the majority vote of creditors at a meeting of creditors.

40 In this particular case, it is also important to take into account the operations of the Debtors. The public interest served by the operations of the Debtors is of considerable importance. The Debtors provide essential services to several remote First Nations communities in northern Ontario.

41 The Proposal Trustee has opined that the Proposals are advantageous to the creditors. The Proposals provide for distribution to the unsecured creditors which exceed the dividend that would otherwise be available from a bankruptcy, as there would be no recovery for unsecured creditors in a bankruptcy, and the Proposals are calculated to benefit the general body of creditors of the Debtors. Further, the Proposal Trustee is of the view that the Debtors have acted in good faith and with due diligence.

42 The Proposal Trustee is of the view that the releases requested are reasonable, necessary and do not prejudice any creditors. I agree. The orders requested by the Proposal Trustee incorporate a Director and Officer Release. I am satisfied that the orders requested by the Proposal Trustee reflect the required restrictions contained in section 50(13) and 50(14) of the BIA.

43 In summary, each of the Proposals satisfies the requirements of the BIA and, accordingly, the Proposals are approved.

44 An order shall issue:

(a) approving the WALL Proposal and releases of the former and current officers and directors of WALL contained therein;

(b) approving the Joint Proposal of WALP and WGPL and the releases of the former officers and directors contained therein; and

(c) approving the WALL Report and the WALP/WGPL Report, each dated May 27, 2016 and the activities of the Proposal Trustee as described therein.

Motion granted.

TAB 3

2011 NBQB 240
New Brunswick Court of Queen's Bench

Kids' Farm Inc., Re

2011 CarswellNB 441, 2011 NBQB 240, 206 A.C.W.S. (3d) 663, 377 N.B.R. (2d) 283, 84 C.B.R. (5th) 91, 972 A.P.R. 283

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KIDS' FARM INC., a corporation incorporated under the laws of the Province of New Brunswick

AND IN THE MATTER OF AN APPLICATION BY KIDS' FARM INC. for the granting of an extension of time for filing a Proposal pursuant to Section 50.4 of the Bankruptcy and Insolvency Act

Michael J. Bray Reg.

Heard: September 9, 2011
Judgment: September 14, 2011
Docket: NB 17490, Estate No. 51-1523569

Counsel: Kevin C. Toner for Kid's Farm Inc.
Josh J. B. McElman, Rebecca M. Atkinson for Bank of Montreal

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
Bank issued notice of intention to enforce its security against applicant, debtor company — Applicant filed notice of intention to make proposal under Bankruptcy and Insolvency Act on July 27 — On August 26, applicant filed notice of motion seeking 45 day extension to file proposal — Bank requested hearing — At hearing on September 9, Bank argued that because extension was not granted within thirty days of filing of notice of intention to make proposal, debtor should be deemed to have made assignment — Application granted in part — Application for 45 day extension denied; extension granted until October 4 — Delay between filing of motion, hearing, and decision did not constitute deemed assignment — Language in s. 50.4(9) of Act states that debtor must apply to court for extension prior to expiration of thirty day period, and this was done — No draft proposal had been filed — Court was given contradictory sworn testimony without adequate support — Court on s. 50.4(9) application will not examine secured creditor's motivations for its lack of support — Analysis was limited to objective evaluation of good faith and diligence, absence of material prejudice and whether projected proposal was viable — This was difficult to ascertain based on available evidence — There was adequate reason to postulate applicant was acting in good faith and with sufficient diligence — Applicant attested to meeting three required criteria with supporting evidence that questionably met burden of proof required to establish factors on balance of probabilities.

Table of Authorities

Cases considered by *Michael J. Bray Reg.*:

Baldwin Valley Investors Inc., Re (1994), 1994 CarswellOnt 253, 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — followed

Royalton Banquet & Convention Centre Ltd., Re (2007), 2007 CarswellOnt 3796, 33 C.B.R. (5th) 278 (Ont. S.C.J.) — referred to

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] — referred to

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

s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

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

s. 50.4(10) [en. 1992, c. 27, s. 19] — considered

Farm Debt Mediation Act, S.C. 1997, c. 21
Generally — referred to

Rules considered:

Rules of Court, N.B. Reg. 82-73
R. 3 — referred to

R. 3.02(1) — referred to

APPLICATION for 45 day extension to file proposal pursuant to s. 50.4 (9) of *Bankruptcy and Insolvency Act*.

***Michael J. Bray Reg.*:**

Introduction

This matter comes before the court as an application for a 45 day extension to file a proposal pursuant to subsection 50.4 (9) of the *Bankruptcy and Insolvency Act* ("the Act").

Facts

1 Kids' Farm Inc. ("KFI") is a farming enterprise being prepared to produce hay for feed pellets. It is noted that the corporation was referred to as Kid*'s* Farm Inc. in the Superintendent's documents. In this decision the spelling used in the style of cause in documents presented to the Court has been followed.

2 Green Grass Comfort Inc. ("GGC") is the proposed purchaser of the hay for pellet production at a plant to be

constructed for this purpose on land presently owned by KFI.

3 Since 2002 KFI has received its financing from Bank of Montreal ("the Bank"). KFI's former dairy production activity had become unprofitable and between 2008 and 2009 it sold milk quotas to pay down its liability to the Bank, its major secured creditor.

4 There was a disagreement between KFI and the Bank concerning the distribution of funds received from the milk quota sales and KFI became unable to meet its obligations as they became due. Gerben Klompmaker, Managing Director of KFI, attests to this disagreement but the details thereof are not material to the present instance.

5 The Bank issued a Notice of Intention to enforce security on October 28, 2010 and appointed PricewaterhouseCoopers Inc. as receiver on August 2, 2011.

6 Attempts to achieve a resolution under the *Farm Debt Mediation Act* were apparently to no avail. KFI had filed a Notice of Intention to Make a Proposal pursuant to subsection 50.4 (1) of the Act on July 27, 2011 with A.C. Poirier & Associates Inc. to be the Trustee administering the intended proposal.

7 On August 26, 2011, KFI filed a Notice of Motion requesting a 45 day extension to file the proposal. On the same day the Bank, when served, notified the court office that it opposed the motion being heard on an *ex parte* basis and requested a hearing. The Deputy Registrar arranged for a date to be set for the Registrar to hear the motion.

8 An affidavit filed by Paul A. Stehelin of A.C. Poirier & Associates Inc. attests that the Bank and other creditors have security over sufficient real property and chattels to avoid their being prejudiced by an extension.

9 Randolph Jones, the receiver of the Bank, deposes to the fact that the Bank is not fully secured and to his belief that there is no certainty of the date of completion of the proposed pellet production plant.

Issues

10 Does the delay between the filing of the motion, its hearing and consequent decision constitute a deemed assignment since the hearing date is more than thirty days from the filing of the Notice of Intention?

11 Has KFI met the burden of proof of showing an extension to be justified and that no creditor will be prejudiced by this extension?

Analysis

12 Concerning the question of time limitation, subsection 50.4(9) of the Act reads as follows:

> 50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

13 The Bank argues that the fact that the extension was not granted by the court within the thirty day period means that the debtor must be deemed to have made an assignment. The case of *Royalton Banquet & Convention Centre Ltd., Re* (2007), 33 C.B.R. (5th) 278 (Ont. S.C.J.), was listed in support.

14 With the greatest respect to Deputy Registrar Diamond, I do not interpret the section in a similar manner. The language is clear in subsection (9) concerning the obligations incumbent upon the debtor. It must apply to the court for an extension prior to the expiration of the thirty day period. This was done. The court may grant the extension but may require notice to interested persons. Surely this notice presupposes that such interested persons have the right to appear and make representations before an order is granted. It would obviously be impractical in many if not most cases to do this appropriately in less than one day. One cannot postulate that Parliament legislated a provision that would be incongruous in its practical application. The Act is a commercial code amenable to common-sense interpretation and the conclusions of such interpretation should be accepted unless clear language of the drafting otherwise dictates. Pursuant to Rule 3 of the Act, Rules of Court of New Brunswick not inconsistent with the Act and its associated Rules are may apply. In a motion such as that currently under consideration Rule 3.02(1) could be applied for an expedited hearing in a case of demonstrated urgency. Parliament could have clearly mandated limits to the court's discretion to deal with applications for extension. It did not do so with the exception of subsection 50.4 (10).

> 50.4(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

15 I read this provision to be limited to restricting the court from extending the debtor's time for making an application beyond that of 30 days or from granting extensions in excess of 45 days or for a total period exceeding five months.

16 The applicant, not being deemed to have made an assignment and being allowed to present its request, must convince the court that the extension is justified, that there are diligent efforts being pursued with a probability that a viable proposal can be achieved and that no creditor will be prejudiced by the extension, if granted.

17 Although documents submitted for the consideration as evidence gave a wide contextual view of the applicant's prior dealings with the Bank and possible future litigation concerning differences and alleged wrongdoing, the court on a motion pursuant to subsection 50.4(9) of the Act, is constrained by the confines of the manner in which paragraphs a), b), and c) are drafted. Only those considerations are material and the provisions are conjunctive so the applicant must prove all three.

18 The affidavit of Mr. Klompmaker, President and Managing Director of KFI, attests that he is acting diligently and in good faith. The Bank counters that this is a shallow statement and otherwise unsupported. The reference made in this affidavit to his partner's arrangements with the ACOA, Province of New Brunswick and BDC to supplement his personal resources, however, are not contradicted. The extent of his efforts might not appear to be maximal but they are sufficient to meet a minimal test of diligence if the other two criteria are clearly met.

19 Allegations of wrongdoing by the Bank and possible misunderstandings in interpreting agreements between the parties will not be accepted either to show bad faith on the part of the applicant or misconduct by the Bank. These issues are not subject to adjudication in this forum.

20 Although the evidence is not fulsome, I am satisfied there is adequate reason to postulate for this analysis that the Applicant is acting in good faith and with sufficient diligence.

21 As to whether the Bank will be materially prejudiced we have the affidavit of Mr. Stehelin attesting that the Bank is sufficiently secured to avoid prejudice. The Bank counters that the statement by the intended administrator is brief and is not well supported.

22 The affidavit of Anna Graham, the Senior Account Manager of the Special Accounts Management of the Bank, attests to KFI's capital indebtedness of $1,006, 973.77 plus interest of approximately $57,000.00. Mention is made of security in inventory and accounts receivable. There is a general statement that inventory will be depleted, accounts receivable will be more difficult to collect and assets will depreciate.

23 Unless there is a danger of assets being removed and sequestered and of agricultural inventory being abandoned with a failure of harvesting, I view with difficulty that a short extension of time will significantly alter the security position.

24 The ratio of security to the value of the assets secured in KFI is not stated. The Bank says that it is unable to quantify. It would however, be helpful to know the probable extent of the asset diminution compared to the total value of security held.

25 There may well be some level of prejudice to the Bank if an extension is granted but would it be a "material" prejudice? By "material" I understand that which is more than a minor change such as those which happen in the daily operations of a business that is a going concern. Would the change in the security position be such that a reasonable creditor would probably not consent thereto? To evaluate this without the ratio of debt to security position of the parties being clearly exposed is difficult.

26 The affidavit of Mr. Klompmaker attests to assets of $4,437.000.00 being owned by KFI with an equity of $2,437,000.00, making an asset to debt ratio of more than 2:1. The Bank objects that the appraisal annexed as an exhibit in support is incomplete and should not be given weight because important portions that would give context have been omitted.

27 The Bank has had an appraisal done by the Altus Group which it alleges shows a much lesser value based upon the assumption of a forced sale. The Bank considered submitting this as an exhibit if a sealing order were granted to avoid a publication of information that might adversely affect any potential sale. The Court was disposed to grant that relief but would direct that the applicant have a period to respond, its agents having never before seen the document. The Bank elected not to file the appraisal.

28 The Court is placed in the inappropriate position of speculation having been given contradictory sworn testimony without adequate support.

29 The issue of whether the Applicant would be likely to make a viable proposal if the extension were granted will therefore be the turning point of this particular application.

30 In the *Baldwin Valley* case at para. 4, Farley J. discussed a viable proposal as contemplated by the second branch of the test as follows:

> 4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10 - 11 in Re Cumberland Trading Inc. released January 2, 199. "Likely" as defined in the Concise Oxford Dictionary of Current English, 7th ed. (1987; Oxford, The Claredon Press) means: *likely* 1. such as *might well happen*, or turn out to be the thing specified, *probable* 2. to be *reasonably expected* [emphasis added] I do not see the conjecture of the debtor companies' rough submission as being *"likely"*.
>
> *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List])

31 No draft of the proposal has been filed with the Court. There have been no cash flow projections nor marketing surveys presented to support Mr. Klompmaker's assertions that a net profit of $1,750,000.00 would be realized in the first three years. If he is correct there is reason to believe that a proposal would be viable.

32 It is unclear from the evidence, however, if the restructuring plan is dependent upon the pellet mill being built on the specified ten acres upon which it is alleged that the Bank refuses to discharge its mortgage, thereby stymieing any progress. If

the plan is thus structured and no other property is available, affordable or otherwise appropriate to the requirements, it would appear that the Bank holds the trump card and has shown itself to be opposed to the proposal. The conclusion would be that a proposal is not viable.

33 The Court on a section 50.4(9) application will not examine a secured creditor's motivations for its lack of support. If triable issues are involved therein they belong in another forum. In this instance we are limited to an objective evaluation of good faith and diligence, the absence of material prejudice and whether the projected proposal is viable. As previously noted, this is difficult to ascertain based on the available evidence.

Disposition

34 The applicant has attested to his meeting of the three required criteria with supporting evidence that questionably meets the burden of proof incumbent upon him to convince the Court of these factors on a balance of probabilities.

35 The application for a forty-five day extension for filing the proposal is denied. The applicant will be granted an extension to file a proposal until October 4, 2011. No request for any further extension will be considered by the Court unless the applicant files a draft of the proposal, a clear cash-flow projection, a complete appraisal of KFI assets and a business plan for the establishment of a feed production facility including a projected time for completion, a detailed indication of funding available and the sources thereof, and the contingency arrangements should the Bank not release its security on the land identified as the construction site.

Application granted in part.

TAB 4

COURT/ESTATE FILE NUMBER	25-2851343
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, OF PETROLAMA ENERGY CANADA INC.
DOCUMENT	**ORDER** **(Extension of Time to File Proposal, etc.)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Christa Nicholson QC / Angad Bedi Tel: 403 571 1053 Fax: 403 571 1528 nicholsonc@jssbarristers.ca / bedia@jssbarristers.ca File: 15378.001

Clerk's Stamp

DATE ON WHICH ORDER WAS PRONOUNCED:	August 10, 2022
NAME OF JUDGE WHO MADE THIS ORDER:	Justice K.M. Horner
LOCATION OF HEARING:	**Calgary, Alberta**

UPON THE APPLICATION of Petrolama Energy Canada Inc. (the "**Company**") filed August 2, 2022 (the "**Application**"); **AND UPON** having read the Application and the Affidavit of Paul Farley Joslyn sworn August 2, 2022 (the "**Joslyn Affidavit**"); **AND UPON** having read the First Report of the Proposal Trustee, Alvarez & Marsal Canada Inc. (the "**Proposal Trustee**") filed on [DATE]; **AND UPON** having read the Affidavit of Service, to be filed of [**TBD**], sworn August 2, 2022; **AND UPON** noting the submissions of counsel for the Company, counsel for the Proposal Trustee and the other parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

Service of the Application

1. The time for service of this Application, together with all supporting materials, is hereby abridged, if necessary, and declared to be good, valid, timely and sufficient and no other person is required to have been served with such documents, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

Defined Terms

2. Unless otherwise expressly indicated, all capitalized terms used herein and not otherwise defined shall have the meanings used in the Sales and Investment Solicitation Process (the "**SISP**") attached as **Exhibit "2"** to the Joslyn Affidavit.

Administration Charge

3. The Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Company, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a first ranking charge (the "**Administration Charge**") on all of the Collateral, which charge shall not exceed $150,000 in an aggregate amount.

Interim Financing

4. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from 884304 Alberta Ltd., (in such lender capacity, the "**Interim Lender**"; also referred to as the "**Stalking Horse Bidder**") in order to finance the Company's restructuring expenses, provided that borrowings under such credit facility (the "**Interim Facility**") shall not exceed $300,000 unless permitted by further order of this Court. The Interim Facility shall be extended on the terms and subject to the conditions set forth in the agreement entitled "Interim Financing Terms" between the Company and the Interim Lender, a copy of which is attached as **Exhibit "4"** to the Josyln Affidavit (the "**Interim Financing Terms**").

5. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender Charge**") on all of the Collateral to secure the Interim Financing Obligations (as defined in the "**Interim Financing Terms**" which are attached as **Exhibit "5"** to the Joslyn Affidavit) , which charge shall not exceed the aggregate amount advanced on or after the date of this Order together with any Interim Financing Obligations under the Interim Financing Terms, and which charge shall not secure an obligation that exists before this Order is made. The Interim Lender Change shall have the priority set out in paragraphs 8 and 10 hereof.

Directors' and Officers' Charge

6. The Company shall indemnify its directors and officers against obligations and liabilities that they may incur as its directors or officers after the commencement of the BIA Proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

7. Each of the directors and officers of the Company shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' and Officers' Charge**") on all of the Collateral, which charge shall not exceed an aggregate amount of $65,000, as security for the indemnity provided in this Order. The Directors' and Officers' Charge shall have the priority set out in paragraphs 8 and 10 hereof.

Priority of the BIA Charges

8. The priorities of the Administration Charge, the Interim Lender Charge and the Directors' and Officers' Charge (collectively, the "**BIA Charges**"), as among them, shall be as follows:

   (a) First: Administration Charge, up to the maximum amount of $150,000;

   (b) Second: Directors' and Officers' Charge, up to the maximum amount of $65,000. and

   (c) Third: Interim Lender Charge up to a maximum principal amount of $300,000 plus all other Interim Financing Obligations.

9. The filing, registration or perfection of the BIA Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

10. Each of the BIA Charges (all as constituted and defined herein) shall constitute a charge on all the Collateral and each such charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person except in the case of the Interim Lender Charge which shall be subject to the Permitted Priority Liens as defined in the Interim Financing Terms.

11. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Collateral that rank in priority to, or *pari passu* with, any of the BIA Charges, unless the Company also obtains the prior written consent of the Proposal Trustee and the beneficiaries of the Administration Charge, the Interim Lender Charge, and the Directors' and Officers' Charge, or same is authorized by further order of this Court.

12. The BIA Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by:

(a) The pendency of these proceedings and the declarations of insolvency made in this Order;

(b) Any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) The filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) The provisions of any federal or provincial statutes; or

(e) Any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the BIA Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Company of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any agreement caused by or resulting from the creation of the BIA Charges; and

(iii) the payments made by the Company pursuant to this Order, and the granting of the BIA Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

13. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the BIA Charges amongst the various assets comprising the Collateral.

Approval of SISP including Stalking Horse Proposal as a Qualified Bid

14. The SISP, including the SISP Procedures, substantially in the form attached as **Exhibit "2**" to the Joslyn Affidavit, shall be and are hereby approved, including its deeming of the Stalking Horse Proposal as a Qualified Bid and the Company and the Proposal Trustee are authorized and directed to carry out the SISP in accordance with the SISP Procedures and this Order, and are hereby authorized and directed to take such steps as they consider necessary or appropriate in carrying out each of their obligations thereunder, subject to prior approval of this Court being obtained before the completion of any transaction(s) resulting pursuant to the SISP.

15. For greater certainty, nothing herein approves the transaction contemplated in the Stalking Horse Proposal, and the approval of any transaction contemplated by the SISP shall be determined on a subsequent application made to this Court.

Extension of Time to file a Proposal

16. Pursuant to subsection 50.4(9) of the BIA, the period within which the Company is required to a file a proposal to its creditors with the Official Receiver under subsection 62(1) of the BIA shall be and is hereby extended to 11:59 pm (local Calgary time) on October 10, 2022.

Service of This Order

17. Service of this Order shall be deemed to be achieved by posting a copy of this Order on the website of the Proposal Trustee, namely www.alvarezandmarsal.com/petrolama and by delivering an electronic copy of this Order to those parties listed on the Service List prepared by counsel for the Company.

Justice of the Court of Queen's Bench of Alberta

TAB 5

2021 ABQB 893
Alberta Court of Queen's Bench

Schendel Mechanical Contracting Ltd (Re),

2021 CarswellAlta 2828, 2021 ABQB 893, [2021] A.W.L.D. 4847, 338 A.C.W.S. (3d) 414, 38 Alta. L.R. (7th) 406

In the Matter of the Bankruptcy of Schendel Mechanical Contracting Ltd.

PricewaterhouseCoopers, Court Appointed Receiver of Schendel Mechanical Contracting Ltd., Schendel Management Ltd. and 687772 Alberta Ltd. (Applicant) and C & G Hatch Associates (Hatch Company) (Respondent)

Douglas R. Mah J.

Heard: September 22, 2021
Judgment: November 9, 2021
Docket: Edmonton B203 489860, BK03 155990, BK03 155991

Counsel: Sander Lekas, for Receiver, PricewaterhouseCoopers Inc
Ryan Quinlan, for C & G Hatch Associates Ltd

Subject: Contracts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.h Onus of proof

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Onus of proof
Bankrupt filed notice of intention (NOI) to file proposal and received several extensions — Recipient supplied bankrupt with HVAC equipment on construction project and bankrupt was indebted to recipient for $175,860.35, with $34,476.75 incurring after NOI — Bankrupt paid $40,000 to recipient after filing NOI; recipient indicated payment came out of blue, bankrupt was arm's length company and recipient took no steps to collect — Bankrupt's proposal was found likely to be rejected, resulting in deemed bankruptcy and receivership order, made on same day that cheque to recipient cleared — Receiver brought application for return of payment to recipient to estate of bankrupt — Application dismissed — After filing NOI, bankrupt was trying to make proposal with creditors but continued to do business with recipient, as evidenced by invoices issued — There was no evidence of what bankrupt was trying to achieve by making $40,000 payment, which receiver applied to bankrupt's indebtedness — Stay did not apply to indebtedness arising from goods and services supplied after date of filing as this would not be claim provable in bankruptcy — There was no evidence as to whether payment was authorized by order or intended to secure future supply of product, as part of process of putting forth viable proposal — Receiver did not meet onus of proving payment violated stay — Two further stays came into effect when bankruptcy was deemed, but that order did not take effect until it was pronounced, and receiver did not establish that occurred before payment to recipient was complete — Receiver did not bring application to set transaction aside under Fraudulent Conveyances Act until after one-year limitation period passed so it was unnecessary to consider bona fides of transaction — Receiver could not succeed under Statute of Elizabeth as there was no evidence on intent Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 71(1).

Table of Authorities

Cases considered by *Douglas R. Mah J.*:

DGS v. HAS (2019), 2019 ABQB 887, 2019 CarswellAlta 2467, 6 Alta. L.R. (7th) 343 (Alta. Q.B.) — referred to

Gingrich v. Gingrich (2012), 2012 ABCA 371, 2012 CarswellAlta 2073, 30 R.F.L. (7th) 81 (Alta. C.A.) — considered

Jones, Re (2003), 2003 CarswellOnt 3184, (sub nom. *Jones v. R.)* 2003 D.T.C. 5663, 175 O.A.C. 263, [2004] 1 C.T.C. 65, 45 C.B.R. (4th) 263, 66 O.R. (3d) 674, 66 O.R. (3d) 683 (Ont. C.A.) — referred to

Krumm v. McKay (2003), 2003 ABQB 437, 2003 CarswellAlta 961, [2003] 9 W.W.R. 442, 17 Alta. L.R. (4th) 103, 47 C.B.R. (4th) 38, 342 A.R. 169 (Alta. Q.B.) — considered

Palechuk v. Fahrlander (2006), 2006 ABCA 242, 2006 CarswellAlta 1062, 61 Alta. L.R. (4th) 71, [2006] 10 W.W.R. 68, 28 R.F.L. (6th) 294, 26 E.T.R. (3d) 79, 273 D.L.R. (4th) 332, 397 A.R. 151, 384 W.A.C. 151 (Alta. C.A.) — followed

Phoenix Land Ventures Ltd. v. FIC Real Estate Fund Ltd. (2015), 2015 ABCA 245, 2015 CarswellAlta 1323, 77 C.P.C. (7th) 268, (sub nom. *FIC Real Estate Fund Ltd. v. Phoenix Land Ventures Ltd.)* 602 A.R. 394, (sub nom. *FIC Real Estate Fund Ltd. v. Phoenix Land Ventures Ltd.)* 647 W.A.C. 394, 27 Alta. L.R. (6th) 257 (Alta. C.A.) — considered

Schendel Management Ltd., Re (2019), 2019 ABQB 545, 2019 CarswellAlta 1457, 73 C.B.R. (6th) 13, 1 Alta. L.R. (7th) 385, [2020] 10 W.W.R. 443 (Alta. Q.B.) — referred to

Startek Computer Inc. (Trustee of) v. Samtack Computer Inc. (2000), 2000 BCSC 1316, 2000 CarswellBC 1802, 20 C.B.R. (4th) 166 (B.C. S.C. [In Chambers]) — considered

Wosk's Ltd., Re (1985), 58 C.B.R. (N.S.) 312, [1986] 2 C.T.C. 78, 86 D.T.C. 6243, 1985 CarswellBC 807, 58 C.B.R. 312 (B.C. S.C.) — referred to

728835 Ontario Ltd., Re (1998), 1998 CarswellOnt 2576, (sub nom. *728835 Ontario Ltd. (Bankrupt), Re)* 111 O.A.C. 155, 3 C.B.R. (4th) 214 (Ont. C.A.) — referred to

1732427 Ontario Inc. v. 1787930 Ontario Inc. (2019), 2019 ONCA 947, 2019 CarswellOnt 20100, 74 C.B.R. (6th) 273 (Ont. C.A.) — considered

Statutes considered:

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

s. 50(12) — referred to

s. 50(12.1) [en. 2005, c. 47, s. 34(4)] — referred to

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

s. 57 — referred to

s. 69(1) — considered

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — referred to

s. 71(1) — considered

s. 95 — referred to

s. 96 — referred to

s. 121(1) — considered

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

Fraudulent Conveyances Act, 1571 (13 Eliz. 1), c. 5
Generally — referred to

Fraudulent Preferences Act, R.S.A. 2000, c. F-24
Generally — referred to

s. 1 — considered

s. 2 — considered

s. 3 — considered

s. 6 — referred to

APPLICATION by receiver for return of payment to estate that bankrupt made to creditor.

***Douglas R. Mah J.*:**

A. Background

1 The dispute here concerns the legality of a $40,000 payment made by an insolvent company to one of its suppliers. The Applicant Receiver, PricewaterhouseCoopers, says the payment is prohibited on a number of grounds, and seeks its return for the benefit of the estate. The recipient Hatch says the payment was both innocently and validly received, and that Hatch is entitled to retain it.

2 The insolvent company, Schendel Mechanical Contracting, was one of a trio of associated companies that at one time collectively constituted a major construction concern in Alberta operating under the Schendel name. The events leading to Schendel's financial demise are described in Justice Lema's receivership decision of July 19, 2019 reported at 2019 ABQB 545.

3 The payment in question was made by way of cheque on July 8, 2019. Schendel had filed a Notice of Intention under section 50.4(1) of the Bankruptcy and Insolvency Act on March 22, 2019 and had obtained a series of extensions from the Court to file a proposal. However, it was not until July 19, 2019 at 11:48 AM that Hatch's bank certified the cheque. There is no evidence before me as to the exact moment in time on that same day that Justice Lema's decision was pronounced.

4 Between April 2018 and May 2019, Hatch had supplied Schendel with HVAC equipment on various Schendel projects. The affidavit of Mr. Manning dated September 2, 2021 itemizes at para 8 the various invoices rendered by Hatch to Schendel during that period. As of May 24, 2019, Schendel was indebted to Hatch to the extent of $175,860.35, of which the sum of $34,476.75 was incurred post-NOI.

5 Mr. Manning, who is Hatch's sales manager, deposes that Schendel's cheque for $40,000 was received by Hatch out of the blue. Hatch is arm's-length from Schendel. Mr. Manning deposes that Hatch had taken no steps to collect the indebtedness aside from normal periodic inquiries to the customer regarding payment. He states that no one at Hatch, as far as he knows, had any conversation with anyone at Schendel regarding special treatment for Hatch. Mr. Manning says on behalf of Hatch that he does not know why Schendel chose to forward the payment at that time or why Hatch may have

received a payment when other creditors did not. The payment was assumed to be and treated by Hatch as a payment on account.

6 The Receiver is not able to shed much light on the matter. Mr. Fleming, the Receiver's deponent, in his December 1, 2020 affidavit simply states that PwC in the course of its administration duties reviewed Schendel's bank records and noted that the $40,000 cheque cleared Schendel's bank on the same day that the Receivership Order was granted. PwC as Schendel's Receiver demanded that Hatch refund the amount, which Hatch has refused to do and which leads us to the present application.

7 No evidence was tendered by either side concerning the impugned transaction from Schendel itself, the proposal trustee under the NOI (Grant Thornton LLP), the current Trustee in Bankruptcy (also Grant Thornton LLP), nor ATB which was the secured creditor and the prime mover behind the receivership. Hatch applied the $40,000 payment to certain specific invoices and provided that information to PwC but it was not put before the Court.

A. The Receiver's Arguments

8 The Receiver stakes its position that the funds should be returned on these grounds:

- upon the filing of the NOI, and throughout the extensions of the proposal period, the automatic stay under section 69(1) of the BIA was in effect and consequently Hatch had no remedy against Schendel;
- the court-ordered stay contained at paras 8 and 9 of Justice Lema's Receivership Order of July 19, 2019 and the simultaneous stay imposed by a deemed bankruptcy under section 69.3(1) of the BIA deprived Hatch of any remedy as of that date;
- alternatively, the payment is a preference prohibited by sections 1, 2 or 3 of the Fraudulent Preferences Act; or
- in the further alternative, the payment is contrary to the *Statute of Elizabeth*.

In response, Hatch asserts that:

- the latter two of the extension orders for the NOI expressly prescribe a process by which Schendel could make payments, and the Receiver has failed to prove that the process was not followed in the case of the subject payment;
- Hatch, in the circumstances, is in any event the equivalent of a *bona fide* purchaser for value, having provided both pre and post-NOI consideration;
- no assets of Schendel vested in anyone prior to the Receivership Order and deemed bankruptcy, and the Receiver has failed to prove that the Receivership Order and deemed bankruptcy were granted before the cheque cleared Schendel's bank;
- the required intent cannot be shown to invoke either of sections 1 and 2 of the Fraudulent Preferences Act or the *Statute of the Elizabeth*; moreover, the one-year limitation period for challenging a transaction under section 3 elapsed before this application was brought.

9 It was acknowledged by both sides that sections 95 and 96 of the BIA do not apply as it is the Receiver, not the Trustee in Bankruptcy, bringing the application.

10 With all these arguments, the Receiver bears the onus of proof.

B. The Notice of Application

11 The Receiver's Notice of Application filed in this matter invoked only the *Fraudulent Preferences Act* and the *Statute*

of Elizabeth. It did not mention the *BIA* at all, nor either the statutory stays or the stay in the Receivership Order. The grounds for the application speak only of unlawful preferences or conveyances.

12 Mr. Quinlan, counsel for Hatch, at the hearing before me on September 22, 2021, expressed surprise that counsel for the Receiver, Mr. Lekas, was purporting to rely on the stay provisions in the *BIA*, other provisions in the *BIA*, and the Receivership Order stay as grounds of argument. Mr. Lekas, who spent the bulk of oral argument discussing the various stays and the *BIA*, acknowledged that the Notice of Application did not refer to these arguments.

13 In order to remedy the situation, I adjourned the application for written argument so that Mr. Quinlan could address the effect of the stays and the *BIA* in a more fulsome way. Additional written argument was provided by counsel on October 6, 2021 (Mr. Quinlan) and on October 13, 2021 (Mr. Lekas).

14 Mr. Quinlan submitted at the end of his written submissions that I could dismiss all of the Receiver's arguments concerning the statutory stays, the *BIA* itself and the court-ordered stay in the Receivership Order, on the basis of non-compliance with Rule 6.3(2), which requires an applicant to specify the grounds relied upon in the Notice of Application, relying on *DGS v HAS*, ABQB 887 at paras 58-61. I am not going to do that. The Court retains discretion to relieve against non-compliance in a case like this and I do so. To me, any prejudice to Hatch has been addressed by adjourning the matter for written argument.

15 Given the amount at stake, I was somewhat reluctant even to ask counsel to submit written argument but ultimately concluded that was the only way to achieve fairness in this application.

C. Stay under Section 69(1) of the BIA

16 The Receiver's first branch of argument relates to the automatic stay created by section 69(1) of the BIA. This provision provides that no creditor has any remedy against the insolvent person or that person's property, on the filing of the NOI, or is permitted to commence or continue any action, execution or other proceeding, for the recovery of a claim provable in bankruptcy.

17 The Receiver argues that the stay was continuously in effect from March 22, 2019 and throughout the various extensions until the date of Schendel's receivership and deemed bankruptcy on July 28, 2019. All through that period, says the Receiver, Hatch was legally prevented by the statutory stay from dealing in any manner whatsoever with the $40,000 cheque.

18 Hatch says that it took no positive steps to collect on any indebtedness from Schendel. Rather, it says the cheque simply appeared on July 8, 2019 and that Hatch was a totally passive party.

19 In Startek Computer Inc (Trustee of) v Samtech Computer Inc 2000 BCSC 1316, 20 CBR (4th) 166, Harvey J found that the cashing of a cheque by a creditor after the NOI date (although the cheque was received prior to that date) was a "remedy" within the meaning of section 69(1) and therefore prohibited by the statutory stay. However, as I read the case, the judge does not explain why this is the case and his view seems to be influenced by the fact that the cheque-casher was attempting to get paid twice for the same services.

20 A case cited by Hatch, *1732427 Ontario Inc v 1787930 Ontario Inc*, 2019 ONCA 947, makes the point that not every post-NOI payment by an insolvent company to a creditor is necessarily prohibited by the stay. There are circumstances where such payments are necessary to enable the company to pursue the restructuring process, and thus are valid. The case involved a preauthorized debit arrangement that had been entered into between the parties prior to the NOI and there was evidence that honouring the arrangement was essential to continue delivery of required fuel post-NOI. The Ontario Court of Appeal in *1732427 Ontario Inc* overturned the commercial court judge, who had cited and made a similar finding as Harvey J in *Startek Computer*, and stated:

> [13] We do not agree with the respondent's submissions that the parties could not enter into an agreement for the payment of past debts in order to secure future fuel supplies. This would undermine the first stage of *the BIA process* that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit

> from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97*of* the *BIA* is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.

[14] Apposite is the commentary of E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 who writes:

> There is, however, no specific prohibition in the *BIA* on the debtor effecting payment of claims provable in the proposal proceedings. Instead, the *BIA* provides the trustee in the proposal (or the bankruptcy trustee in the event the proposal fails) with remedies against any creditor who receives such a payment on the basis that the payment is a preference. Payments to critical suppliers in the context of proposal proceedings are best analyzed on the basis that they are a preference. . . . In the context of proposals section 97*of* the *BIA* arguably clarifies that payments to suppliers made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid. [Emphasis in original.]

21 The Ontario Court of Appeal concluded in this case that it was a critical question whether the payment of past indebtedness was a *bona fide* condition of post-NOI fuel supply, needed for the restructuring to proceed. The question was remitted to the commercial court to determine.

22 Here, what is known from the evidence is that Schendel was trying to make a proposal to its creditors and had continued to do business with Hatch after filing its NOI, as evidenced by the various invoices issued by Hatch to Schendel in the post-NOI period. There is no evidence of what Schendel was trying to achieve by making the $40,000 payment. Mr. Manning, Hatch's representative, reports that there were no discussions between Hatch and Schendel with regard to treating Hatch differently from other creditors. He has no further information about any other conversations that might have occurred.

23 Further, the proposal process was subject to court supervision at the relevant time. In the last of the extension orders, granted by Justice Yamauchi on June 11, 2019, the following conditions were imposed by the Court:

> (a) For the period of the Further Extension, Schendel shall report prior to the end of each business day on actual payments proposed to be made regarding disbursements for the next day (the "Projected Disbursements"). The report on the Projected Disbursements is to be made concurrently to the Proposal Trustee and to ATB. The Proposal Trustee shall review the Projected Disbursements and provide its approval to pay the Projected Disbursements or comment on any concerns with payment before noon on the next business day. The Proposal Trustee's comments shall be provided concurrently to Schendel and ATB. Following approval by the Proposal Trustee, Schendel may proceed to pay the Projected Disbursements;
>
> (b) For the period of the Further Extension, Schendel will not enter into any further specific direct payment arrangements that would modify existing contracts without approval from the Proposal Trustee and ATB, or pending further Order of this Court . . .

24 There is no evidence before me as to whether the $40,000 payment in question either was an approved payment within the meaning of condition (a) above, in which event it would be valid, or a prohibited payment arrangement under condition (b) above. In the latter regard, I do not know whether there was an existing supply contract between Hatch and Schendel or whether the payment in question modified it or not, or if so, whether there was approval from the Proposal Trustee and ATB.

25 Finally, it is known that Hatch supplied goods to various Schendel projects during the post-NOI period to the tune of $34,476.75. Hatch advised the Receiver of which specific invoices to which the $40,000 was applied. That information was not provided to the Court. It is known that apart from those specific invoices, there was a balance that was applied to indebtedness on the Paul Band School project, where one invoice related to the post-NOI period.

26 The stay would not apply in respect of indebtedness arising from goods and services supplied to Schendel after the date of filing the NOI as such indebtedness would not be "a claim provable in bankruptcy" per section 69(1): *Wosk's Ltd R*, e, 1985 Carswell BC 807 (SC), 58 CBR 312; *728835 Ontario Ltd., Re*, 1998 CarswellOnt 2576, 3 C.B.R. (4th) 214.; and *Jones,*

Re, 2003 CarswellOnt 3184, 2003 CarswellOnt 3184, [2003] O.J. No. 3258.

27 In summary, there is no evidence before the Court, one way or the other, as to:

- whether the payment was, or was not, authorized by Yamauchi J's Order of June 11, 2019. (Certainly, Hatch would be in no position to know one way or the other.)

- whether the payment was intended by Schendel to secure future supply of critical product, as part of the process of trying to put forward a viable proposal.

28 The onus of proof is upon the Receiver to prove that the payment was in violation of the stay. The evidence does indicate that Schendel and Hatch continued to do business together after the NOI was filed. I should not simply assume facts that are in the Receiver's favour. As shown in the above two bullet points, there may well be circumstances in which the payment is valid. In the absence of evidence, the probability of either "yes" or "no" to either of the questions posed in the two bullet points above is evenly balanced, not tipped in favour of the Receiver.

29 Further, the evidence before me indicates that some portion of the $40,000 payment was applied to post-NOI supply of goods. The evidence shows that some $34,476.75 worth of product was supplied by Hatch to Schendel in the post-NOI period.

30 I also agree that the question of whether Hatch should be allowed to retain the payment is better analysed as a question of whether the payment is a preference, as stated by the Court of Appeal of Ontario in *1732427 Ontario Inc*.

31 For these reasons, I am not prepared to say that the funds should be remitted by Hatch to the Receiver because the payment violated the stay imposed by section 69(1).

D. Dual Stays on July 19, 2019

32 In Justice Lema's receivership decision, as a precursor to making the Receivership Order, he also found that Schendel's proposal was likely to be refused, resulting in a deemed bankruptcy: BIA, sections 50(12) and (12.1) and section 57. As a result of a bankruptcy and receivership occurring simultaneously, two further stays came into effect:

- the court-ordered stay at paras 8 and 9 of Justice Lema's Receivership Order; and

- the further statutory stay found at section 69.3(1), which occurs on the bankruptcy and relates to the recovery of a claim provable in bankruptcy.

33 Both have the effect of providing that the creditor has no further remedy or action against the debtor or the debtor's property upon the occurrence of the bankruptcy or receivership. What is in controversy is exactly when on July 19, 2019, the two stays took effect, since the time of pronouncement is unknown but the moment the cheque cleared is known, being 11:48 AM on that day.

34 The Receiver argues that the time of day of the pronouncement is irrelevant so long as it happened on July 19, 2019. In so saying, the Receiver relies on section 121(1) of the BIA:

> **121(1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

35 The phrase "on the day on which the bankrupt becomes bankrupt" can have no meaning, the Receiver says, other than all debts existing at 12:01 AM on the day of bankruptcy become a claim provable in bankruptcy. In other words, section

121(1) operates as a "relation back" provision such that all of the debtor's debts and liabilities crystallize as, or convert to, a claim provable in bankruptcy as of 12:01 AM on the date of bankruptcy. As such, by necessary implication, the Receiver says that Hatch's only recourse as of 12:01 AM on that day was to file a proof of claim and could not in any way deal with the cheque.

36 To evaluate this argument, one must have regard to the purpose of section 121(1). Authors Houlden, Morawetz and Sarra, in their 2019 Annotated Bankruptcy and Insolvency Act, comment as follows regarding:

> The purpose of this subsection is, so far as possible, to include every kind of claim in the definition of "provable claim" so that when the bankrupt receives a discharge, he or she will be free of the claims of creditors and will be able to make a fresh start. (at p 686)
>
> The expression "the day on which the bankrupt becomes bankrupt" presumably means the date on which the assignment is filed or the bankruptcy order is made. A debt or liability incurred by the bankrupt after the filing of the application but prior to the making of the bankruptcy order is a provable claim . . . (at p 688)

37 The purpose of the section therefore is to define which claims are provable in bankruptcy so that they may be dealt with in the bankruptcy. If the payment has already been made, it would not be a claim provable in the bankruptcy (again, subject to the law of preferences). The section does not go so far as to create and apply a "relation back" effect to completed transactions occurring after 12:01 AM on the day of but before the actual occurrence of the bankruptcy. Such an interpretation could capture otherwise valid payments that are made in the normal course earlier in the day. In my view, if the section is to have such an effect, more specific language would be required.

38 Hatch points out, and I agree, that Justice Lema's Order (which had the effect of placing Schendel in receivership and deeming it bankrupt) could only take effect upon pronouncement, and not before. In this regard, Hatch relies on section 71(1) of the BIA:

> **71(1)** On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this act and to the rights of secured creditors, immediately past to invest in the trustee named in the bankruptcy order assignment, in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

39 The notion of an order taking effect at the moment of pronouncement is further supported by Court of Appeal statements in this regard: Under Rule 9.6, "an order that is pronounced is effective from the moment of pronouncement": *Gingrich v Gingrich*, 20212 ABCA 371 at para 9, and "for one thing, orders and judgments in Alberta are effective on pronouncement . . . ": *Phoenix Land Ventures Ltd v FIC Real Estate Fund Ltd*,, 2015 ABCA 245. Further, in *Phoenix Land Ventures* at para 25, the Court equated pronouncement with the written Reasons for Decision.

40 Thus, Schendel did not cease to have dominion over its own property and that property did not vest in the Trustee in Bankruptcy (Grant Thornton LLP) until the moment of pronouncement of Justice Lema's Order, i.e. when the written decision was released. There is no evidence before the Court as to when that exact moment was. Again, I cannot simply assume facts that are in the Receiver's favour. As stated, the Receiver bears the onus of proof in this application. It is not proven on a balance of probabilities that the Receivership and deemed bankruptcy occurred before the payment was complete.

41 I accept the Receiver's argument that actual payment did not occur on July 8, 2019, when the cheque was received by Hatch but rather on July 19, 2019, when Hatch's bank cleared the cheque, but that makes no difference to the outcome.

42 As a consequence of the foregoing, I cannot rule in favour of the Receiver on this branch of argument. Further, I feel that in order to promote commercial certainty sections 71(1) and 121(1) of the BIA should be read together such that the moment the bankruptcy occurs should be the same for both purposes, not occurring at different times of the same day.

E. Fraudulent Preferences Act

43 Section 1 of the Fraudulent Preferences Act provides that a payment made by a person in insolvent circumstances with intent to defeat, hinder, delay or prejudice the person's creditors or any of them is void against any such creditors. Section 2 provides that a payment made to a creditor by a person in insolvent circumstances with intent to give that creditor preference over other creditors is void against such creditors.

44 In both cases, the intent of the insolvent person is a critical factor. Here, there is no evidence from any person as to Schendel's intent in making the payment. Nor can the requisite intent be inferred to satisfy the required standard of proof. As noted above, it could just as easily be inferred that the payment was authorized by Justice Yamauchi's extension Order or made as a necessary part of the proposal process. Consequently, the Receiver cannot succeed on either sections 1 or 2.

45 Section 3 states that a payment by a person in insolvent circumstances to a creditor that has the effect of giving that creditor a preference over other creditors is void against those other creditors, so long as the action to set aside the transaction is commenced within a year. The payment was made by Schendel on July 8, 2019 and effectively realized by Hatch on July 19, 2021, while the Receiver's application to impeach the transaction (i.e. the application before me) was filed on April 30, 2021. Hatch says the application was brought well beyond the prescription period of one year.

46 The Receiver argues that the relevant action to be commenced in this case for the purposes of section 3 is the Receivership Application, which was filed before July 19, 2021. It is by this application that the Receiver says it sought the power to impugn preferential transactions, from which the application before me merely flows. Thus, according to the Receiver, the limitation period had not expired since the action was started before the payment was complete.

47 I do not agree with the Receiver here. The Receivership Order did give the Receiver the authority to investigate and seek recovery of preferential payments. However, the Receiver still had to conduct its due diligence and exercise discretion to commence the application or not. The receiver made its demands upon Hatch in July and September of 2019, but did not bring the application until more than a year and half later. Therefore, in my view, the action to recover the payment was commenced beyond the one-year period and the Receiver cannot succeed on section 3.

48 Receiverships can linger for years. This one has gone on for over two years already. Potentially, transactions that occurred in the distant past could be attacked under this theory. Such a situation could lead to commercial uncertainty. The Court should interpret statutes affecting commercial relations, such as the *Fraudulent Preferences Act*, in a manner that best promotes certainty.

49 In view of the above findings, it is unnecessary for me to consider Hatch's argument concerning whether the transaction was *bona fide* within the meaning of the saving provision (section 6).

F. Statute of Elizabeth

50 In order to set aside a transaction using the *Statute of Elizabeth*, the Applicant must establish each of the following per Palechuk v Fahrlander, 2006 ABCA 242 at para 31:

1. there must be a conveyance of real or personal property;

2. for no or nominal consideration;

3. with intent to defraud, delay, or hinder creditors;

4. the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and

5. the conveyance must have had the intended effect.

51 With regard to intent, Romaine J noted in Krumm v McKay, 2003 ABQB 437 at para 15:

> While the ***Statute of Elizabeth*** includes an exception for *bona fide* transfers for consideration, it is restricted to transferees who do not have knowledge of fraud. With respect to a transfer for value, a creditor attempting to rely on the ***Statute of Elizabeth*** must establish that the transferor had the necessary fraudulent intention and that the transferee was privy to the fraud.

52 Hatch says that this quoted passage applies because Hatch provided both pre and post-NOI consideration in the form of supply of product. Further, Hatch points out that this branch of the Receiver's argument suffers from the same deficiency as before, that is, lack of evidence as to Schendel's intent. Moreover, the claim is further weakened because Hatch has expressly provided evidence of no intent on its part. Thus, the Receiver cannot succeed here. I agree.

G. Outcome

53 As a result of all of the foregoing, the Receiver's Application to recover the $40,000 from Hatch is dismissed.

54 Counsel may approach me in writing within 30 days of the date of this decision to address costs, if the parties so wish.

Application dismissed.

TAB 6

2017 ONSC 5571
Ontario Superior Court of Justice [Commercial List]

Re TOYS "R" US (CANADA) LTD.

2017 CarswellOnt 14645, 2017 ONSC 5571, 283 A.C.W.S. (3d) 471

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

F.L. Myers J.

Heard: September 19, 2017
Judgment: September 20, 2017
Docket: CV-17-00582960-00CL

Counsel: Brian F. Empey, Melaney Wagner, Christopher Armstrong, for Applicant
R. Shayne Kukulowicz, Jane Dietrich, for Proposed Monitor, Grant Thornton Limited
Tony Reyes, for pre-filing ABL lenders
Alexander Cobb, for B4 lenders
Linc Rogers, Chris Burr, for JPMorgan Chase Bank, NA, the lead lender on behalf of the proposed DIP lenders

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.viii Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
US parent company of toy and baby product retailer filed for US bankruptcy protection — Both parent company and Canadian subsidiary (T Inc.) defaulted under asset-based lender (ABL) facilities provided to it and parent company — T Inc. brought initial application under Companies' Creditors Arrangement Act (CCAA) and for approval of debtor in possession (DIP) lending facility to repay ABL lender and to fund cash flow needs and restructuring — Application granted in part — T Inc. met definition of debtor company for purposes of initial hearing under CCAA and it was appropriate to grant stay under s. 11.02, but DIP lenders were not granted enhanced enforcement rights — Court-ordered charge was not being used to improve security of pre-filing ABL lenders or to fill gaps in their security coverage — DIP terms were generally limited to standard lending terms — Stay provisions generally prevented creditors from enforcing claims without leave so DIP lenders were well protected without extraordinary power to enforce claims without court scrutiny — Terms of DIP documents limiting T Inc.'s entitlement to oppose DIP lenders could create complex and ambiguous situation — DIP lenders were replacing first secured lenders and did not need special priority when they were likely entitled to step into their priority position under doctrine of equitable subrogation — DIP lenders would be entitled to take minimal steps to give notice of

default and to withhold further advances while parties come to court.

Table of Authorities

Cases considered by *F.L. Myers J.*:

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 2(1) "debtor company" — considered

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

s. 11.02 [en. 2005, c. 47, s. 128] — considered

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

s. 11.51(3) [en. 2005, c. 47, s. 128] — considered

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

APPLICATION by retailer under Companies' Creditors Arrangement Act for stay and for approval of enhanced terms for debtor in possession lending facility.

***F.L. Myers J.*:**

1 At the conclusion of the hearing I granted the relief sought by the applicant with minor revisions for reasons to be delivered shortly. These are my reasons for doing so.

2 The applicant is Canada's leading retailer of toys and baby products. It operates from 82 stores across all ten provinces and over the internet. It employs nearly 4,000 people. This number increases to more than 6,000 during the peak holiday season. It is an important participant in the Canadian retail economy and a much beloved childhood icon in many Canadians' lives.

3 The applicant is an indirect, wholly owned subsidiary of TOYS "R" US INC. a US company. On September 18, 2017 the US parent, several affiliates, and the applicant filed for bankruptcy protection in the US Bankruptcy Court for the Eastern District of Virginia. They did so in order to protect against stakeholder action that could adversely impact their businesses while they explore restructuring options. Publicity concerning the problems facing the companies has already led some suppliers to take steps to limit the credit terms that they are willing to extend to the retailer. As a result, the businesses found themselves in need of the stability of bankruptcy protection.

4 The Canadian applicant's operations are generally autonomous from the parent's US operations. But, the applicant's pre-filing US$200 million secured revolving credit facility and its US$125 million secured term loan facility were both provided under a wider asset-backed lending facility provided by the pre-filing ABL lenders to the US and Canadian

companies.

5 When the applicant and its US affiliates filed for US bankruptcy protection, they committed defaults under their ABL facilities. Therefore, although the applicant is generally cash flow positive and has positive shareholder equity, it found itself without borrowing facilities and within two weeks of being unable to meet its obligations as they come due.

6 As a result of its looming liquidity crisis, the applicant meets the definition of a "debtor company" to whom the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 applies. *Stelco Inc., Re* [2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List])], 2004 CanLII 24933. It has liabilities of more than $5 million and otherwise meets the technical requirements of the statute.

7 The applicant needs the protection of a general stay that is available under the *CCAA*. The stay is a court order that prevents people and companies with claims against the applicant from cancelling their contracts or taking steps to enforce their claims against the applicant during the period of the restructuring. All creditors and claimants are held at bay, together, to maintain a level playing field. At the same time, the stay protects the applicant's business in order to: create conditions under which a lender will advance fresh funds to the applicant to carry it through its restructuring efforts; help prevent suppliers from ceasing or tightening credit terms just prior to the vital holiday selling season; to prevent enforcement efforts by creditors that would deflect the company from its efforts to find a win-win restructuring for the general body of its creditors; and to enable the applicant to continue to operate on a "business as usual" basis to protect the value of its business and brand for all. I am satisfied that this is an appropriate case in which to grant a stay as sought under s. 11.02 of the *CCAA*.

8 The applicant expresses concern that it might be required to pay some pre-filing claims to critical suppliers and others despite the general goal of a bankruptcy proceeding to freeze all claims at the filing date. For example, employees with wages accrued before today need to be paid in the ordinary course in order to keep the workforce engaged. Customers holding gift cards and similar pre-paid rights need to be able to enforce those pre-filing claims in order to protect the company's public customers. There is good reason to allow these types of claims to protect the goodwill of the business in the interests of all creditors even though most others are being prevented from enforcing their claims while these claims are recognized.

9 In addition, a small number of critical suppliers of goods and services may have the ability to avoid the stay order under the CCAA and the US automatic stay. Sometimes those suppliers will threaten to refuse to continue to supply a *CCAA* debtor unless they are paid their pre-filing claims in priority to others. In some circumstances this could imperil the applicant's business. Under s. 11.4 of the *CCAA*, the court may declare a person to be a "critical supplier." A critical supplier can be compelled to supply the applicant with goods and, in return, it can be provided with court-ordered security to protect its right to payment. That situation is quite different than the order sought in this case. Here, the applicant is not seeking to compel anyone to supply on credit against its will. The suppliers of concern in this case may claim to be beyond the reach of the court's orders. Rather, here, the applicant is recognizing that in some specific and limited cases, it may face an inordinate risk of interruption of its operations if it does not agree to pay to a supplier of goods or services the amounts of its claims that would otherwise be frozen at the filing date. Providing such a payment is a form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system. Accordingly, circumstances where payment of pre-filing claims will be allowed to suppliers of goods and services will be few. They will be carefully scrutinized by the applicant and the Monitor. The initial order granted by the court in this proceeding empowers the Monitor to exercise discretion to approve a payment to a critical supplier on its pre-filing claims. The Monitor will do so only in truly critical situations. It will be guided by the factors set out in para. 55 of the applicant's factum as drawn from the discussion by Morawetz J. (as he then was) in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]).

10 The applicant asks for the approval of a debtor in possession (DIP) lending facility to repay its pre-filing ABL indebtedness and to fund its cash flow needs as it bulks up its inventory for holiday sales and then throughout its restructuring. Section 11.2 of the *CCAA* provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in *CCAA* cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing

existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.

11 The DIP terms are lengthy and complex. The court has had limited time to scan and parse the documents and has relied heavily on the Monitor's and the applicant's assessments and submissions. Based on my review and the submissions made, I am satisfied that the DIP terms are generally limited to standard lending terms. With one exception discussed below, I was not drawn to any terms that might be thought to create unusual powers in the DIP lenders to control the applicant or the process. There do not appear to be any terms that provide incentives for the DIP lenders to try to execute loan-to-own or other strategies to somehow extract more value than is made available in fees and interest on the face of the DIP loan documents. Scrutinizing complicated, lengthy DIP terms on an urgent initial hearing is a dangerous pursuit. The court relies on the integrity of the parties to disclose unusual terms and otherwise to protect the stakeholders from terms that may be buried in thick documents that could later create skewed outcomes or incentives that are contrary to the interests of the stakeholders generally. If a DIP lender wants extraordinary rights or powers beyond standard, plain vanilla lending terms, they should be disclosed expressly and subject to transparent scrutiny at minimum.

12 In this case, the DIP lenders ask for the right to enforce their security in the event that they claim that the applicant has committed a default under the terms of its new borrowing. The stay provisions that I have approved above generally prevent creditors from enforcing their claims without leave of the court. In some cases the stay may prevent a supplier from unilaterally discontinuing supply. The parties are able to come to court very quickly on the Commercial List. Therefore, a party who has good cause to be released from a stay can usually get to court to ask for an order lifting the stay before it has suffered much, if any, prejudice. But the leave requirement ensures that suppliers or others cannot claim that an applicant is in default and take unilateral, destabilizing steps without scrutiny of the alleged default by stakeholders, the Monitor, and ultimately, the court.

13 The DIP lender and the applicant agreed that the DIP lender could give five days' notice of default to the applicant and then take a number of unilateral enforcement steps. This reverses the burden and requires the applicant to come to court during the five day period to have the DIP lenders' claims reviewed. But there are terms of the DIP documents that limit the applicant's entitlement to oppose the DIP lenders. This could create a complex and ambiguous situation.

14 In my view, the stay provisions protect the stakeholders, creditors, and the public interest as much as the applicant. The court process provides assurances of transparency and accountability to which all interested parties are entitled as a *quid pro quo* for the protections offered by the statute. The DIP lenders are well protected without an extraordinary power to enforce their claims without court scrutiny. The DIP lenders in this case are replacing first secured lenders. It is not clear why they need special DIP priority when the DIP lenders are likely entitled to step into the priority position of the pre-filing ABL lenders under the doctrine of equitable subrogation. The applicant is paying the DIP lenders more than $20 million in fees plus enhanced interest for a loan that is protected not only by equitable priority but by court-ordered security. DIP loans have not proven to be that risky in Canada generally. I know of only one case where a DIP lender has not been repaid in full and that was a very specific instance where the DIP lender was the principle purchaser of the CCAA debtor's goods and needed to keep funding the debtor at a loss in order to keep its own business afloat.

15 In this case, the applicant seems to be solvent on a balance sheet basis. The B4 lenders have advised the court that they expect to realize substantial value from their security against the shares of the applicant. I see no valid reason for the DIP lenders to require any significantly enhanced enforcement rights when their position is protected already. Given the applicant's consent and the importance of the DIP loan to the restructuring process generally, I accept that the DIP lenders will be entitled to take minimal steps to give notice of default and to withhold further advances while the parties come to court. Otherwise, the DIP lenders require leave of the court on notice before they may accelerate their loans or to take any other enforcement steps.

16 The fees and disbursements of the Monitor, counsel, and the financial advisors to the debtor will be protected by a court ordered charges as well under s. 11.52 of the *CCAA*. The members of the board of directors and officers of the applicant will also be protected against the risk of incurring uninsured, post-filing liabilities. I am satisfied that the applicant and the Monitor have calculated the limits of this charge to reflect realistic, potential statutory D & O liability. I am less sanguine that these liabilities cannot be insured at a reasonable cost under s. 11.51 (3) of the *CCAA*. One can always postulate that an insurer might decline coverage or that the insurance limits might prove to be insufficient. However, creating a charge can also

provide an incentive to structure affairs so that others can access the available insurance precisely because the Ds & Os can access their charge and do not need their insurance. Moreover, the standard, *in terrorem* assertion that the Ds & Os are necessary to the restructuring and may resign unless they are granted a charge is rarely subjected to real scrutiny. However, absent concerns expressed by those being primed, I am satisfied that the applicants have met the statutory test for the purposes of this initial hearing.

17 Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee is a strong performing business facing a liquidity crisis that causes it to suffer technical insolvency. It is fair, reasonable, and wholly appropriate for it to be supported by the protections of the *CCAA* so as to provide it with an opportunity to restructure its affairs to enable it to address its current circumstances.

18 Order accordingly.

Application granted in part.

End of Document

TAB 7

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

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.

End of Document

TAB 8

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was

granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Table of Authorities

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

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

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

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

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

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

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

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

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

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

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

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

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

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

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

s. 23 — considered

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

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

***Pepall J.*:**

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities

will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at

May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have

acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*[5]; *Smurfit-Stone Container Canada Inc., Re*[6]; and *Calpine Canada Energy Ltd., Re*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*[8] and *Global Light Telecommunications Inc., Re*[9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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

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

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA

proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of

essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

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

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*[11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

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

2 R.S.C. 1985, c.C.44.

3 R.S.C. 1985, c. B-3, as amended.

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522 (S.C.C.).

TAB 9

2011 CarswellAlta 2781
Alberta Court of Queen's Bench

Altus Energy Services Ltd., Re

2011 CarswellAlta 2781

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, R.S.A. 2000, c. B-9

IN THE MATTER OF ALTUS ENERGY SERVICES LTD. and NUSCO NORTHERN MANUFACTURING LTD.

B.E.C. Romaine J.

Judgment: January 18, 2011
Docket: Calgary 1001-18567

Counsel: Counsel — not provided

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

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

Table of Authorities

Cases considered by *B.E.C. Romaine J.*:

Altus Energy Services Ltd., Re (2010), 2010 CarswellAlta 2972 (Alta. Q.B.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Pt. 6, Div. 4 — referred to

***B.E.C. Romaine J.*:**

1 *UPON* the application of Altus Energy Services Ltd. and Nusco Northern Manufacturing Ltd. (collectively, "Altus" or the "Applicants"); *AND UPON* having read the Application, the Affidavit of Chris Haslam, sworn January 17, 2011 (the

"Haslam Affidavit"), and the First Report of the Monitor of Altus; *AND UPON* hearing counsel for Altus, counsel for the Monitor and counsel for other interested parties; *IT IS HEREBY ORDERED AND DECLARED THAT:*

2 1. Service of notice of this application for this Order is hereby abridged and service thereof is deemed good and sufficient.

3 2. Capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Initial Order granted herein on December 21, 2010 [2010 CarswellAlta 2972 (Alta. Q.B.)], (the "Initial Order").

4 3. The Stay Period, as defined in Paragraph 13 of the Initial Order, is hereby extended to March 18, 2011.

5 4. In accordance with Paragraph 31 of the Initial Order, Altus is hereby entitled to borrow a further $1,500,000 from the DIP Lender under the DIP Lender's credit facility with Altus.

KEY EMPLOYEE RETENTION PLAN ("KERP")

6 5. The Key Employee Retention Plan ("KERP"), as that term is defined and described in the Haslam Affidavit, and the amounts of the KERP payments under the KERP as described in Exhibit "D" to the Haslam Affidavit, is hereby approved and ratified. Altus is hereby authorized and directed to implement and perform its obligations under the KERP in accordance with the terms of the KERP as may be modified by this Order, and to execute and deliver such additional or auxiliary documents as may be necessary to give effect to the KERP.

7 6. The KERP retention payments shall be paid to the participating employees either upon the successful completion of a Plan of Arrangement in these proceedings or otherwise upon the termination of these proceedings. Payment will only be made if the participating employee has not had his or her employment with Altus terminated for cause prior to the KERP retention payments becoming payable in accordance with this provision.

8 7. The employees of Altus who are eligible for and agree to participate in the KERP shall be entitled to the benefit of and are hereby granted a charge on the Property, which charge shall not exceed $275,000, as security for the payment of the amounts that such employees may become entitled to under the KERP (the "KERP Charge"). The KERP Charge shall be added to and form part of the definition of "Charges", as defined at paragraph 38 of the Initial Order, and the terms of the Initial Order that apply to all of the other Charges collectively, specifically paragraphs 38-42, shall apply *mutatis mutandis* to the KERP Charge.

9 8. The KERP Charge shall come after the other Charges, such that the relative priorities of the Charges set out at paragraph 37 of the initial Order shall be as follows:

First — Administration Charge (to the maximum amount of $500,000);

Second — DIP Lender's Charge;

Third — Directors' Charge (to the maximum amount of $500,000); and

Fourth — KERP Charge (to the maximum amount of $275,000)

10 9. Exhibit "D" referred to in the Haslam Affidavit contains confidential information and shall be sealed on the court file in these proceedings and segregated from, and not form part of, the public record.

11 10. The Clerk of the Court shall file Exhibit "D" of the Haslam Affidavit in a sealed envelope attached to a notice that sets out the style of cause in these proceedings, the aforementioned description of the documents contained therein and a statement that the envelope's contents are sealed pursuant to the Order

12 11. This Older is made notwithstanding the restricted court access application requirements contained in Part 6,

Division 4 of the Alberta *Rules of Court*.

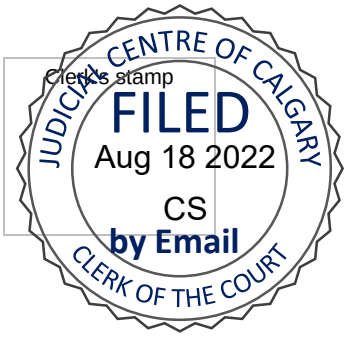
End of Document

TAB 10

COURT FILE NUMBER	2201-08920
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTH AMERICAN LAMB COMPANY LTD., CANADA SHEEP AND LAMB FARMS LTD., CANADA SHEEP HOLDINGS LTD., LAMB CLUB MARKETING LIMITED, CANADA LAMB GROWERS LTD., CANADA LAMB PROCESSORS LTD. and CANINE FAIR LTD.



DOCUMENT	**AMENDED AND RESTATED INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Howard A. Gorman, Q.C. / Meghan L. Parker howard.gorman@nortonrosefulbright.com meghan.parker@nortonrosefulbright.com Tel: +1 403.267.8222 Fax: +1 403.264.5973 Lawyers for the Monitor File no.: 1001221818

DATE ON WHICH ORDER WAS PRONOUNCED: AUGUST 17, 2022

LOCATION OF HEARING OR TRIAL: CALGARY, ALBERTA

NAME OF JUSTICE WHO MADE THIS ORDER: HONOURABLE JUSTICE R.A. NEUFELD

UPON the application of Ernst & Young Inc. (the **"Monitor"**) in its capacity as Court-appointed Monitor in respect of the debtor companies, North American Lamb Company Ltd., Canada Sheep and Lamb Farms Ltd., Canada Sheep Holdings Ltd., Lamb Club Marketing Limited,

Canada Lamb Growers Ltd., Canada Lamb Processors Ltd. and Canine Fare Ltd. (collectively, the **"Debtor Companies"**); **AND UPON** having read the Application of the Monitor, the Affidavit of Gary Alexander sworn on August 4, 2022 (the "**Alexander Affidavit**"), the Pre-filing Report of the Monitor, the First Report of the Monitor, and the Brief of Law of the Monitor, all filed; **AND UPON** reviewing the initial order granted in the proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") by the Honourable Justice K.M. Horner on August 8, 2022 (the "**Initial Order**") on the application of Fresh Canada Meats Ltd. ("**FCM**"); **AND UPON** hearing counsel for the Monitor and any other interested parties appearing at the application; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this amended and restated initial order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Debtor Companies are companies to which the CCAA, applies.

PLAN OF ARRANGEMENT

3. FCM and/or the Debtor Companies shall have the authority to file and may, subject to further order of this Court, file with this Court plans of compromise or arrangements (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Debtor Companies shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

and set off and/or consolidate any amounts owing by the Interim Lender to the Debtor Companies against the obligations of the Debtor Companies to the Interim Lender under the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Debtor Companies and for the appointment of a trustee in bankruptcy of the Debtor Companies; and

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

37. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed under the CCAA, or any proposal filed under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

KEY EMPLOYEE INCENTIVE PLAN

38. The Key Employee Incentive Plan (**"KEIP"**), which is exhibited as Confidential Exhibit "A" to the Alexander Affidavit (filed under Sealing Order of this Court), is hereby approved, and the Debtor Companies are authorized and directed to make the payments contemplated under the KEIP should any applicable employees become entitled to any such payments in accordance with the terms and conditions of the KEIP.

39. Each of the beneficiaries of the KEIP shall be entitled to the benefit of and are hereby granted a charge on the Property (the **"KEIP Charge"**), which KEIP Charge shall not exceed an aggregate amount of $500,000, to secure the amounts payable under the KEIP.

SELLING AGENT CHARGE

40. The Selling Agent, as defined in the First Report of the Monitor and the sales and investment solicitation process attached as Appendix "B" thereto (**SISP**), shall be entitled to the benefits of and is hereby granted a charge (the "**Selling Agent's Charge**") on the "Property" and "Business" subject to the SISP (and both as defined in the SISP), which charge shall not exceed an aggregate amount of $500,000, as security for the fees and expenses payable to the Selling Agent pursuant to the engagement letter between the

Monitor and the Selling Agent, dated August 15, 2022. The Selling Agent's Charge shall have the priority set out in paragraphs 41 and 43, hereof.

VALIDITY AND PRIORITY OF CHARGES

41. The priorities of the Administration Charge, the Interim Lender's Charge and the KEIP Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $700,000);

Second – Interim Lender's Charge (to the maximum amount of $1,800,000);

Third – KEIP Charge (to the maximum amount of $500,000);

Fourth – Selling Agent's Charge (to the maximum amount of $500,000).

42. The filing, registration or perfection of the Administration Charge, the Interim Lender's Charge, the KEIP Charge and the Selling Agent's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, or, in the case of the Selling Agent's Charge, a charge on the "Property" and "Business" subject to and as defined in the SISP, and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

44. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Debtor Companies shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Debtor Companies also obtain the prior written consent of the Monitor, the Interim Lender, and the beneficiaries of Charges, or further order of this Court.

45. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Debtor Companies, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Interim Financing Term Sheet or the Definitive Documents, shall create or be deemed to constitute a new breach by the Debtor Companies of any Agreement to which they are a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Debtor Companies entering into the Interim Financing Term Sheet, or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Debtor Companies pursuant to this Order, including the Interim Financing Term Sheet or the Definitive Documents, and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

46. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Charges amongst the various assets comprising the Property.