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COURT OF QUEEN'S BENCH OF ALBERTA	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
PLAINTIFF(S)	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	**BRIEF OF PETROLAMA ENERGY CANADA INC.**	
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 Tel: 403 571 1053/403 571 1524 Fax: 403 571 1528 nicholsonc@jssbarristers.ca / bedia@jssbarristers.ca Christa Nicholson QC/ Angad Bedi File: 15378.001	

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I. INTRODUCTION

1. This is the Brief of the Applicant, Petrolama Canada Energy Inc. ("**Petrolama**" or the "**Company**") in support of its application (the "**Application**") seeking Orders, among other things:

   (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) Approving the Company's proposed sales and investment solicitation process (the "**SISP**"), including its deeming of the Company's stalking horse proposal to creditors (the "**Stalking Horse Proposal**") to be a Qualified Bid under the SISP, and authorizing and directing the Company to implement and perform the SISP;

   (c) Approving the executed Interim Lending Terms[1] and authorizing the Company to obtain a debtor-in-possession non-revolving loan facility thereunder (the "**Interim Facility**"), permitting the Company to obtain advances in the maximum aggregate amount of $300,000 to allow the Company to pay its restructuring expenses;

   (d) Granting an "**Interim Lender Charge**" on all present and after-acquired property of the Company (the "**Collateral**"), which charge shall not exceed an aggregate amount of $300,000 to secure obligations incurred by the Company under the Interim Facility;

   (e) Granting an "**Administration Charge**" on the Collateral in a maximum amount of $150,000 as security for the payment of the professional fees and disbursements incurred and to be incurred by counsel for the Company, Alvarez & Marsal Canada Inc. (the "**Proposal Trustee**") and the Proposal Trustee's counsel (collectively, the "**Administrative Professionals**");

   (f) Granting an indemnity to the directors and officers and a "**Directors' and Officers' Charge**" on the Collateral in a maximum amount of $65,000 in favour of the directors and officers of the Company as security for the Company's obligation to indemnify them for obligations and liabilities which they may incur in such capacities after the commencement of these proceedings, except to the extent that such obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct;

   (g) Pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*,[2] (the "**BIA**"); extending the time by which the Company may file a proposal to its creditors for a 45 day period from the date following the current deadline to do so such that

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[1] The Affidavit of Paul Farley Joslyn, sworn August 2, 2022 ("**Joslyn Affidavit**"), Ex. 5.
[2] R.S.C. 1985, c. B-3 [***BIA***]

the Company may file a proposal up to and including 11:59 pm (local Calgary time) on October 10, 2022 or such other date as this Court may order;

(h) Declaring that service of the Order sought shall be deemed to be achieved by posting a copy of that Order on the website of the Proposal Trustee, namely https://www.alvarezandmarsal.com/petrolama, and by delivering an electronic copy of the Order to those parties listed on the service list prepared by counsel for the Company; and

(i) Granting such further and other relief as counsel may request and this Honourable Court may permit.

(the "**Relief Sought**").

II. FACTS

2. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Affidavit of Paul Farley Joslyn, sworn August 2, 2022 (the "**Joslyn Affidavit**").

3. The facts in support of the Company's Application are set forth in the Joslyn Affidavit, the Affidavit of Service of Amy Kuang, to be supplied in Court, and the First Report of the Proposal Trustee.[3]

III. ISSUES

4. This Brief addresses the following issue at the Application, namely, whether this Honourable Court should grant the Relief Sought.

IV. LAW AND ARGUMENTS

A. Sales Process

5. Petrolama seeks the approval of the SISP, including its deeming of 884304 Alberta Ltd.'s Stalking Horse Proposal as a Qualified Bid under the SISP, and authorization for the Company to implement and perform the SISP.

6. The test for the approval of a SISP is not prescribed by statute. Rahter it is set out in case law. In the *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd*[4] ("***CCM***") receivership proceedings the Ontario Superior Court stated:

> Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light

[3] The First Report of the Proposal Trustee (the "**First Report**"), para 67(a).
[4] 2012 ONSC 1750 ("***CCM***"), paras 6-7 [**TAB 4**].

of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

(i) Fairness and Transparency

7. The SISP contemplates, and Proposal Trustee is of the view that, the SISP provides a fair and transparent process which will be conducted in such a manner so as to give potential bidders equal access to express their interest in making an offer to purchase the Company's shares or assets.[5]

8. The owner and principal of the Stalking Horse Bidder is Mr. Holmes.[6] He was previous a director, officer and employee of the company but has since resigned.[7] Mr. Holmes will be engaged as an independent contractor as needed in these proceedings to provide assistance to the Proposal Trustee and the Company.[8]

9. To the extent that the Proposal Trustee and Petrolama believe it is important to involve Mr. Holmes in carrying out any aspect the proposed SISP, any involvement would be limited to specifically addressing technical aspects of the Mexico Project. Any information or questions provided to Mr. Holmes would be administered through the Proposal Trustee to ensure that an appropriate "wall" is in place. The Proposal Trustee, Petrolama, and its remaining officer would not share with Mr. Holmes any confidential information pertaining to the SISP.[9]

[5] Joslyn Affidavit, para 51; and First Report para 34(a).
[6] Joslyn Affidavit, para 38; and First Report para 25.
[7] Joslyn Affidavit, para 38; and First Report para 25.
[8] Joslyn Affidavit, para 38; and First Report para 26.
[9] First Report para 27.

(ii) Commercial Efficacy and Optimization of Chances for Best Offer

10. The purpose of the SISP is to canvass the market to find the highest and/or best offer for a restructuring and/or refinancing of the Company, a sale of the Company on a going concern basis, or a combination thereof.[10]

11. The Stalking Horse Proposal is a key part of the SISP[11] and is, in essence, a credit bid. The Stalking Horse Bidder, also the Interim Lender, will be advancing the Interim Facility to fund the company through the Restructuring Process[12] and, if the Stalking Horse Proposal is the Successful Bid, the obligations under the Interim Facility will be fully satisfied in exchange for receipt of shares of Petrolama through the operation of a Plan of Reorganization under the Alberta *Business Corporations Act*.[13]

12. Specifically, if the Stalking Horse Proposal is the Successful Bid, then existing shareholders of the Company will have their shares retracted and terminated for no consideration, the Stalking Horse Bidder/Interim Lender will be issued 10,000 new shares, each Affected Creditor will be assigned its pro rata share of the Net Creditor Recovery Amounts in full satisfaction of their Affected Claim, all Claims that are not Unaffected Claims shall be released, barred, and extinguished, and the BIA Charges (as hereinafter defined) will be deemed to be fully satisfied, released, and discharged.[14]

13. In *CCM*, the Court noted that stalking horse bids have been recognized in Canada and been approved for use in BIA proposals: [15]

> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

14. Courts have previously approved stalking horse bids, as a Qualified Bid or otherwise, for the purpose of sales or bidding processes.[16]

15. In another instance, interim or debtor-in-possession lenders put forward stalking horse credit bids which had the capacity to become successful bids under the SISP.[17] There,

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[10] Joslyn Affidavit, para 51; and First Report para 30.
[11] Joslyn Affidavit, para 52 and Ex. 3; and First Report para 34(c).
[12] Joslyn Affidavit, para 38 and 68; and First Report para 46.
[13] RSA 2000, c B-9; and Joslyn Affidavit, para 58.
[14] Joslyn Affidavit, para 58; and First Report para 40-42.
[15] *CCM*, para 7 [**TAB 4**]; and *Parlay Entertainment Inc., Re,* 2011 ONSC 3492 [**TAB 5**].
[16] *CCM*, para 16 [**TAB 4**]; *White Birch Paper Holding Co. Re,* 2010 QCCS 4382 [***White Birch***] para 3 [**TAB 6**]; *Nortel Networks Corp., Re*, [2009] OJ No 3169 [***Nortel 2***] para 2 [**TAB 7**]; *Nortel Networks Corp., Re*, 2009 CarswellOnt 4839 [***Nortel 1***] [**TAB 8**]; and *Indalex Ltd., Re*, 2009 CarswellOnt 4262 para 11 [**TAB 9**].
[17] *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 2840 paras 11-13 [**TAB 10**].

the SISP, and the mechanism within it allowing a stalking horse credit bid to be a successful bid, was approved.[18]

16. In many stalking horse bids there is a break fee or other payments contemplated to be paid to a stalking horse bidder in the event that it is not the successful bidder. Requirements of this nature are generally more closely scrutinized by the Court.[19] There are no such obligations of this nature contained within the SISP. [20]

17. The Court in *CCM*, noted:[21]

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

18. The Proposal Trustee believes that the six-week marketing process in the SISP sufficiently exposes the Company and its assets to the market.[22] Petrolama believes that the market for an alternative transaction to the Stalking Horse Proposal will have been properly and appropriately canvassed through the SISP.[23]

19. It is the Proposal Trustee's opinion that having the Stalking Horse Bidder participate as a stalking horse bidder would be an effective method to maximize the value of the Company.[24]

20. Accordingly, Petrolama respectfully submits that this Court should exercise its discretion to approve the SISP.

B. Interim Facility and Interim Lender Charge

21. Petrolama seeks approval of advances up to the amount of $300,000 under the Interim Facility, and a corresponding Interim Lender Charge on the Collateral to fund the

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[18] *Ibid* at para 21 [**TAB 10**].
[19] *CCM*, para 13 [**TAB 4**]; *Brainhunter Inc., Re*, 2009 CarswellOnt 8207 para 12 [**TAB 11**]; *White Birch*, para 3 [**TAB 6**]; *Nortel 2*, paras 2 and 56 [**TAB 7**]; and *Nortel 1*, paras 12 and 27 [**TAB 8**].
[20] Joslyn Affidavit, Ex. 2, Schedule B.
[21] *CCM* para 8, citing Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16 [**TAB 4**].
[22] First Report para 34(b).
[23] Joslyn Affidavit, para 55.
[24] First Report para 37.

Company's expenses during the Restructuring Period, in priority to existing creditors of the Company.

22. The BIA confers the statutory jurisdiction on this Court to grant the Interim Lender Charge to secure post-filing obligations:

> **50.6(1) Order — interim financing**
> …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.

23. Section 50.6(5) sets out the factors the Court is to consider in deciding whether to make an order to permit interim financing. They include:[25]

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

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

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

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

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

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

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

24. Petrolama has no bank debt and no secured creditors.[26] No creditors would be materially prejudiced as a result of the Interim Lender Charge.

25. The SISP contemplates that Petrolama will be subject to these proceedings from the current time until some time in November.[27] During this period, Petrolama's business

[25] *BIA* s. 50.6(5) [**TAB 1**]
[26] Joslyn Affidavit, para 12.
[27] Joslyn Affidavit, Ex. 3, page 3.

and financial affairs are to be managed by its current directors and officers.[28] Mr. Holmes, the former president of Petrolama, will continue to consult for the Company to the extent that is necessary or advisable, under the supervision of the Proposal Trustee.[29]

26. Currently, Petrolama has no on-the-ground operations in process.[30] It does have a deferred tax asset calculated to be $1,571,237[31] which could work to reduce a buyer's taxable income by this amount when applied.

27. As further detailed in the Joslyn Affidavit, the Mexico Project has potential value.[32] If the Mexico Project is fully realized, under the Stalking Horse Proposal, the Affected Creditors have the potential to receive their pro rata share of a total maximum amount of $9,000,000 USD.[33]

28. As indicated in the Cash Flow Forecast[34], the Company requires the $285,000 to fund its expenses commencing on August 12, 2022 to the week ending October 21, 2022.[35] Under the Interim Facility, up to $300,000.00 could be advanced.[36] Without the Interim Facility the Company would not have the fund to operate beyond the week of August 12, 2022.[37] The Interim Lender Charge is a condition of the Interim Financing Terms agreed upon between Petrolama and the Interim Lender.[38] Absent the Interim Lender Charge, the Interim Lender is not willing to finance the Restructuring Process.[39] The Interim Lender Charge would also allow Petrolama to continue in business during the SISP process which is aimed at enhancing the prospects of a viable proposal.[40] The Proposal Trustee is in favour of this Court granting the Interim Lender Charge.[41]

29. Interim financing and charges securing them have been approved in BIA proposal proceedings where, as in the present case:

    (a) The debtors would cease operations if the relief were not granted;[42]

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[28] Joslyn Affidavit, para 63.
[29] Joslyn Affidavit, para 38; and First Report, paras 26-28.
[30] Joslyn Affidavit, para 38.
[31] Joslyn Affidavit, para 37.
[32] Joslyn Affidavit, paras 26-36; and First Report, para 17.
[33] Joslyn Affidavit, para 32.
[34] Joslyn Affidavit, Ex. 1; and First Report, Appendix C.
[35] Joslyn Affidavit, para 39-40 and Ex. 1; and First Report, para 44.
[36] Joslyn Affidavit, para 70 and Ex. 4 s. 5.
[37] First Report, para 47.
[38] Joslyn Affidavit, Ex. 4 s. 7.
[39] Joslyn Affidavit, para 69.
[40] Joslyn Affidavit, para 71; and First Report, paras 44-46.
[41] First Report, para 63.
[42] First Report, para 47; and see *Mustang GP Ltd.*, Re, 2015 ONSC 6562 [***Mustang***], para 29 [**TAB 12**]; and *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 [***Wallbank***], para 17 [**TAB 13**].

(b) The lender would not participate without the charge;[43]

(c) The loan or facility is required to permit the SISP to proceed;[44]

(d) The current management would continue to operate the company;[45]

(e) The major asset of a company is its interest in a project that yet to be completed;[46] and

(f) The charge is supported by the proposal trustee.[47]

30. Petrolama submits that this case is an appropriate circumstance for this Court to grant the Interim Lender Charge. Accordingly, Petrolama respectfully submits that this Court should exercise its discretion to grant the Interim Lender Charge.

C. Administration Charge

31. Petrolama seeks the Administration Charge in order to secure the payment of professional fees and expenses incurred by the Administrative Professionals in connection with the Restructuring Process, in priority to existing creditors of the Company.

32. Section 64.2 of the BIA confers on this Court the statutory jurisdiction to grant the Administration Charge.[48]

33. Petrolama submits that this is an appropriate circumstance for this Court to grant the Administration Charge because:

(a) The services of the Administrative Professionals will be necessary in order to effect the completion of the SISP and the restructuring of the Company as a going concern;[49] and

(b) The quantum of the proposed Administration Charge is fair and reasonable in light of the complexity of the Restructuring Process.[50]

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[43] Joslyn Affidavit, para 69; and see *Mustang*, para 28 [**TAB 12**].
[44] Joslyn Affidavit, para 71; First Report, paras 44-46; and see *Colossus Minerals Inc., Re*, 2014 ONSC 514 [***Colossus***], paras 4 and 8 [**TAB 14**].
[45] Joslyn Affidavit, para 63; and see *Colossus*, para 5 [**TAB 14**]; and *Wallbank*, para 14 [**TAB 13**].
[46] Joslyn Affidavit, paras 26-36; First Report, para 17; and see *Colossus*, para 2.
[47] First Report, para 63; and see *Colossus,* para 9 [**TAB 14**]; *Mustang*, para 28 [**TAB 12**]; and *Wallbank*, para 19 [**TAB 13**].
[48] *BIA*, s. 64.2. [**TAB 1**]
[49] Joslyn Affidavit, para 60; and First Report, para 54.
[50] Joslyn Affidavit, para 61; and First Report, para 54.

34. Administration Charges have been approved in BIA proposal proceedings where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful proceeding under the BIA.[51]

35. Accordingly, Petrolama respectfully submits that this Court should exercise its discretion to grant the Administration Charge.

D. Directors' and Officers' Charge

36. Petrolama seeks the granting of a right of indemnity to the directors and officers and a "**Directors' and Officers' Charge**" on the Collateral in a maximum amount of $65,000 in favour of the directors and officers of the Company as security for the Company's obligation to indemnify them for obligations and liabilities which they may incur in such capacities after the commencement of the Restructuring Process, in priority to claims of any secured or other creditors of the Company.

37. The BIA confers the statutory jurisdiction on this Court to grant the Directors' and Officers' Charge.[52]

38. The purpose of a directors' and officers' charge is to:

    (a) Keep directors and officers in place during a restructuring, by providing them with protection against liabilities they could incur during the restructuring, to avoid a potential destabilization of the business;[53] and

    (b) Enable a debtor company to benefit from an experienced board of directors and senior management.[54]

39. There is currently no Directors' and Officers' liability insurance in place to indemnify the Directors and Officers of the Company.[55]

40. Charges such as the Directors' and Officers' Charges have been approved in BIA proposal proceedings where, as in the present case:

    (a) The charge is only available to the extent that the directors and officers do not have coverage under existing policies;[56]

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[51] *Colossus*, para 13 [**TAB 14**]; *Mustang*, para 33 [**TAB 12**];
[52] *BIA* s. 64.1 [**TAB 1**].
[53] *Northstar Aerospace Inc., Re*, 2013 ONSC 1780 [***Northstar***] para 29 [**TAB 15**]; and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 para 48 [**TAB 16**].
[54] *Northstar***,** para 29 [**TAB 15**].
[55] Joslyn Affidavit, para 66; and First Report, para 57.
[56] Joslyn Affidavit, para 66; and First Report, para 57; and see *Colossus*, para 18 [**TAB 14**]; *Mustang*, para 35 [**TAB 12**].

(b) There is a possibility the directors and officers whose participation in the process is critical, may not continue their involvement;[57] and

(c) The Proposal Trustee states the charge is reasonable and is supportive.[58]

41. Petrolama submits that these circumstances are appropriate ones for this Court to grant the Directors' and Officers' Charge.

42. The quantum of the proposed Directors' and Officers' Charge is both fair and reasonable given the size and complexity of Petrolama's business.[59] The directors and officers have played, and will continue to play, an important role in these proceedings.[60]

43. Accordingly, Petrolama respectfully submits that this Court should exercise its discretion to grant the Directors' and Officers' Charges.

E. Priority of BIA Charges

44. The Company requests that the priorities of the Administration Charge, the Interim Lender Charge and the Directors' and Officers' Charge (collectively, the "**BIA Charges**"), as among them, 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.

45. The Court may order that the BIA charges rank in priority over the claim of any secured creditor of the debtor.[61] The Company has no secured creditors.[62]

46. Petrolama respectfully submits that this Court should exercise its discretion to rank the BIA Charges in priority requested.

F. Extension of Time to File Proposal

47. Petrolama filed the NOI on July 27, 2022. By operation of section 50.4(8) of the BIA, Petrolama is required to file a proposal with the Superintendent of Bankruptcy within 30

[57] Joslyn Affidavit, para 66; and see *Colossus*, para 19-20 [**TAB 14**]; *Mustang*, para 35 [**TAB 12**].
[58] Joslyn Affidavit, para 67; First Report, para 60; and see *Colossus*, para 21 [**TAB 14**]; *Mustang,* para 35 [**TAB 12**].
[59] First Report, para 60.
[60] Joslyn Affidavit, paras 63 and 65; and First Report, para 59.
[61] BIA ss. 50.6(3), 64.1(2), and 64.2(2) [**TAB 1**].
[62] Joslyn Affidavit, para 12.

days[63] (the "**Proposal Period**") unless it otherwise obtains an extension ("**Extension**") of time from the Court within that 30-day Proposal Period.

48. Pursuant to section 50.4(9) of the BIA,[64] before the expiry of the Proposal Period, a debtor in a proposal proceeding may apply to the court for an order extending the time to file a proposal by a maximum of 45 days and the court may extend the time if it is satisfied that:

    (a) the insolvent person has acted, and is acting, in good faith and with due diligence;[65]

    (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted;[66] and

    (c) no creditor would be materially prejudiced if the extension being applied for were granted.[67]

49. In order to advance a proposal to present to Petrolama's creditors, Petrolama is seeking the Extension to October 10, 2022. Petrolama respectfully submits that the Extension ought to be approved for, among others, the following reasons:

    (a) Petrolama is insolvent and acting in good faith and with due diligence;[68]

    (b) The Extension is necessary for Petrolama to implement the SISP;[69]

    (c) The Extension is required in order to advance a proposal for the benefit of Petrolama's stakeholders;[70]

    (d) Without the Extension, Petrolama will have no ability to make a viable proposal to its creditors and will become bankrupt to the detriment of its stakeholders;[71]

    (e) The Stalking Horse Proposal advanced as Qualified Bid under the SISP constitutes a minimum viable proposal;[72]

    (f) No creditor will be materially prejudiced if the Extension is granted;[73]

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[63] BIA s. 50.4(8) [**TAB 1**].
[64] BIA s. 50.4(9) [**TAB 1**].
[65] BIA s. 50.4(9)(a) [**TAB 1**].
[66] BIA s. 50.4(9)(b) [**TAB 1**].
[67] BIA s. 50.4(9)(c) [**TAB 1**].
[68] Joslyn Affidavit para 75(a); and First Report para 67(a).
[69] Joslyn Affidavit, para 52 and Ex. 3 pages 2-3; and First Report, para 68.
[70] Joslyn Affidavit, para 52 and 75(b), and Ex. 3 pages 2-3; First Report, para 67(b).
[71] Joslyn Affidavit, para 75(c); and First Report, para 67(b).
[72] Joslyn Affidavit, para 75(c).
[73] Joslyn Affidavit, para 75(c); and First Report, para 67(c).

(g) Petrolama has engaged with its shareholders and the Proposal Trustee;[74] and

(h) The Proposal Trustee supports the Restructuring Process which requires the Extension.[75]

50. Petrolama respectfully submits that this Court should exercise its discretion to grant the Extension.

G. Service

51. The Court may make an order:

(a) Validating service of a document served inside or out of Alberta in a manner not specified by the Alberta *Rules of Court*[76] (the "**Rules**") if it is satisfied that the method of service used brought or was likely to have brought the documents to the attention of the people to be served;[77] and

(b) Shortening a period of time specified in the Rules, unless a rule provides otherwise, whether or not that period has expired.[78]

52. The Bankruptcy and Insolvency General Rules state: [79]

> **3.** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
>
> …
>
> **6(1)** Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

53. Petrolama has created a list of creditors[80] (the "**Service List**") and served the materials for this application on the Service List via email.[81] When certain emails that were sent were found to be undeliverable, Petrolama sent the supporting materials to an updated

[74] Joslyn Affidavit, paras 4, 49 and 50; and First Report, paras 20 and 68.
[75] Joslyn Affidavit, para 6(h); and First Report, paras 24 and 69.
[76] Alta Reg 124/2010.
[77] *Ibid* R. 11.27 [**TAB 3**].
[78] *Ibid* R. 13.5 [**TAB 3**].
[79] CRC, c 368, ss. 3 and 6 [**TAB 2**].
[80] Affidavit of Amy Kuang, to be presented in Court, para 2 and Ex. A
[81] Ak Affidavit, para 2 and Exs. A-D.

email address for each of the two persons whose original emails were undeliverable and they appear to have been received by each.[82]

54. All of the materials filed in support of this application, along with other information regarding the NOI have been posted on the Proposal Trustee's website.[83]

55. Petrolama respectfully submits that this Court should exercise its discretion to:

(a) Abridge the time for service of this application together with all supporting materials and declare service to be good, valid, timely and sufficient, that no other person is required to have been served with such documents, that the hearing is properly returnable before this Court and further service is dispensed with; and

(b) Deeming service of the Order granted in respect of the Application be achieved by posting a copy of the Order on the website of the Proposal Trustee, namely www.alvarezandmarsal.com/petrolama, and by delivering an electronic copy of the Order to those parties listed on the Service List.

V. CONCLUSION AND RELIEF REQUESTED

56. For the reasons above, the Company respectfully requests this Honourable Court grant the Relief Sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of August, 2022.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____

Christa Nicholson QC / Angad Bedi
Counsel for the Applicant Petrolama Energy Canada Inc

[82] AK Affidavit, paras 3-4 and Exs. E-F.
[83] First Report, para 19.

VI. TABLE OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
2. *Bankruptcy and Insolvency General Rules*, CRC, c 368
3. *Rules of Court*, Alta Reg 124/100
4. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd*, 2012 ONSC 1750
5. *Parlay Entertainment Inc., Re*, 2011 ONSC 3492
6. *White Birch Paper Holding Co. Re*, 2010 QCCS 4382
7. *Nortel Networks Corp., Re*, [2009] OJ No 3169
8. *Nortel Networks Corp., Re*, 2009 CarswellOnt 4839
9. *Indalex Ltd., Re*, 2009 CarswellOnt 4262
10. *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 2840
11. *Brainhunter Inc., Re*, 2009 CarswellOnt 8207
12. *Mustang GP Ltd., Re*, 2015 ONSC 6562
13. *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641
14. *Colossus Minerals Inc., Re*, 2014 ONSC 514
15. *Northstar Aerospace Inc., Re*, 2013 ONSC 1780
16. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184

Tab 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50.6

s 50.6

Currency

50.6

50.6(1)Order — interim financing

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

50.6(2)Individuals

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.

50.6(3)Priority

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

50.6(4)Priority — previous orders

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.

50.6(5)Factors to be considered

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.

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

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:9 (April 27, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

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).

50.4(2)Certain things to be filed

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.

50.4(3)Creditors may obtain statement

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

50.4(4)Exception

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.

50.4(5)Trustee protected
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.

50.4(6)Trustee to notify creditors
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).

50.4(7)Trustee to monitor and report
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.

50.4(8)Where assignment deemed to have been made
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.

50.4(9)Extension of time for filing proposal
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.

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

50.4(11)Court may terminate period for making proposal
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.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:9 (April 27, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 64.1

s 64.1

Currency

64.1

64.1(1)Security or charge relating to director's indemnification

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.

64.1(2)Priority

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

64.1(3)Restriction — indemnification insurance

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.

64.1(4)Negligence, misconduct or fault

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.

Amendment History

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

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:9 (April 27, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 64.2

s 64.2

Currency

64.2

64.2(1)Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

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

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

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

64.2(2)Priority

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

64.2(3)Individual

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.

Amendment History

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

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:9 (April 27, 2022)

Tab 2

Canada Federal Regulations
Bankruptcy and Insolvency Act
Can. Reg. 368 — Bankruptcy and Insolvency General Rules
General

C.R.C. 1978, c. 368, s. 3

s 3.

Currency

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

Amendment History
SOR/98-240, s. 1

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:9 (April 27, 2022)

Canada Federal Regulations
Bankruptcy and Insolvency Act
Can. Reg. 368 — Bankruptcy and Insolvency General Rules
General

C.R.C. 1978, c. 368, s. 6

s 6.

Currency

6.

6(1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

6(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

6(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

6(4) The court may, on an *ex parte* application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

Amendment History
SOR/98-240, s. 1; SOR/2007-61, ss. 3, 63(b)

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:9 (April 27, 2022)

Tab 3

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 11 — Service of Documents
Division 6 — Validating, Substituting, Dispensing with and Setting Aside Service

Alta. Reg. 124/2010, s. 11.27

s 11.27 Validating service

Currency

11.27Validating service

11.27(1) Except in respect of a document that must be served in accordance with Division 8, the Court may, on application, make an order validating the service of a document served inside or outside Alberta in a manner that is not specified by these rules if the Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person to be served.

11.27(2) On application, the Court may make an order validating the service of a document served inside or outside Alberta if the Court is satisfied that the document would have been served on the person or would have come to the attention of the person if the person had not evaded service.

11.27(3) If service is validated by the Court under this rule, service is effected on the date specified in the order.

11.27(4) Subrules (1) and (3) apply despite any previous order that permitted or directed service of the document by a particular method.

Amendment History

Alta. Reg. 140/2013, s. 13; 36/2020, s. 18

Currency

Alberta Current to Gazette Vol. 118:5, (March 15, 2022)

Concordance References

Rules Concordance 20, Service outside jurisdiction

Most Recently Cited in: Ingram v. Alberta (Chief Medical Officer of Health), 2022 ABQB 164, 2022 CarswellAlta 560, [2022] A.W.L.D. 1393, 80 C.P.C. (8th) 150, 2022 A.C.W.S. 188 | (Alta. Q.B., Feb 24, 2022)

Alta. Reg. 124/2010, s. 13.5

s 13.5 Variation of time periods

Currency

13.5Variation of time periods

13.5(1) Unless the Court otherwise orders or a rule otherwise provides, the parties may agree to extend any time period specified in these rules.

13.5(2) The Court may, unless a rule otherwise provides, stay, extend or shorten a time period that is

(a) specified in these rules,

(b) specified in an order or judgment, or

(c) agreed on by the parties.

13.5(3) The order to extend or shorten a time period may be made whether or not the period has expired.

Currency
Alberta Current to Gazette Vol. 118:5, (March 15, 2022)

Concordance References
Rules Concordance 5, Time

End of Document

Tab 4

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two

convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

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[1] (1991), 7 C.B.R. (3d) 1 (C.A.).

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the

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[2] *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 2.
[3] *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.
[4] *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co.*, 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.).
[5] Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

[11] The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

[12] The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

[13] The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

[14] Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the

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[6] *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

[15] In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

[16] Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

[17] For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

[18] Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

[19] As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

[20] Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that

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[7] *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

[21] I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> …
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

[22] In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a

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[8] 2012 ONSC 1299 (CanLII).

receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

[23] In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

[24] The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

[25] May I conclude by thanking Receiver's counsel for a most helpful factum.

(original signed by)
D. M. Brown J.

Date: March 15, 2012

Tab 5

CITATION: Parlay Entertainment Inc. (Re), 2011 ONSC 3492
COURT FILE NO.: 32-1494254
DATE: 20110604

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF PARLAY ENTERTAINMENT INC., INSOLVENT PERSON, Applicant

BEFORE: MORAWETZ J.

COUNSEL: J. Fogarty, for the Applicant

C. Prophet, for M. Projects

HEARD & ENDORSED: June 3, 2011

REASONS: June 4, 2011

ENDORSEMENT

[1] On June 3, 2011, I heard the above motion. I endorsed the record as follows:

> Motion granted based on a reduction in the minimum overbid amount to $37,500. Stay extended to July 18, 2011. Reasons to follows on June 6, 2011.

[2] These are the reasons relating to the June 3, 2011 endorsement.

[3] The motion was not opposed.

[4] The Applicant requests an extension of time to file the proposal.

[5] The evidence in support is the Proposal Trustee's report. The report established that the Applicant is working towards a sale of assets. There are no PPSA registrations such that proceeds of sale less expenses should be available to creditors. I am satisfied that the Applicant has acted and is acting in good faith and with due diligence and that it will likely be able to make a viable proposal from the proceeds of sale. The Proposal Trustee reports that no creditor will be materially prejudiced if the extension is granted.

[6] The test under s. 50.4(9) has, in my view, been satisfied. The extension to July 18, 2011 is granted.

[7] The parties should note that any further extension requests should be supported by an affidavit of a representative of the Applicant or a satisfactory explanation as to why an affidavit is not being filed.

[8] With respect to the relief relating to the proposed sales process, the report of the Proposal Trustee was reviewed by counsel in great detail. Mr. Davidson of BDO Canada also provided additional commentary.

[9] The Report establishes that:

a. Parlay has been attempting for some time to restructure. There have been attempts to sell, which have proved unsuccessful;

b. Revenues have declined in a significant amount;

c. Losses of $2.5 million were incurred in 2010; and

d. Management is of the view that present revenue levels do not represent a sustainable business model.

[10] The Applicant and the Proposal Trustee are now of the view that a sales process, incorporating a stalking horse bid is appropriate.

[11] The Proposal Trustee's views to support this type of process are summarized in the memo of law submitted by the Applicant. The memo also sets out the considerations that have been taken into account in other stalking horse sales.

[12] This particular stalking horse asset purchase agreement includes a $50,000 break fee, a $50,000 expense reimbursement provision and a $75,000 minimum overbid provision on a sales price of approximately $2.1 million. It also provides that the purchaser, who is also the DIP lender, can credit bid to the limit of the DIP Facility.

[13] The Proposal Trustee is of the view that the process is reasonable and recommends that it be approved.

[14] The Proposal Trustee has indicated that it will file a Supplementary Report which confirms, among other things, that it is of the view that the Bidding Procedures are reasonable in the circumstances and that there is no reasonable alternative to the recommended proposal.

[15] I have also been persuaded that the time for implementing a solution is running out. The proposed transaction was referenced as being a life line. Concern was expressed with respect to the ongoing employment of Parlay's work force. I accept the legitimacy of these concerns. In the circumstances, I am satisfied that the transaction and sales process should be approved, notwithstanding reservations that I expressed relating to the indirect benefits flowing to M Projects – the Stalking Horse Bidder - in the form of the break fee, expense reimbursement and overbid requirements, when considered in totality. My reservations were addressed, to a degree,

by the concession made by M Projects to reduce the overbid provision by 50% from $75,000 to $37,500.

[16] The Proposal Trustee is of the view that the break-up fee and reimbursement fee and overbid provision are reasonable. In view of the aforementioned concession of M Projects, I am satisfied that the transaction and sales process, in the circumstances of this case, should be approved.

[17] The Applicant also requested approval of a D & O Charge. At this point, it is uncertain if the existing D & O Policy can be extended.

[18] I am satisfied that the D & O Charge should be granted, as requested, subject to the proviso that if the D & O Policy can be extended on satisfactory terms, the Proposal Trustee should report this development to the court and make appropriate recommendations as to whether the D & O Charge should be vacated.

[19] The ancillary relief requested is, in my view, appropriate in the circumstances.

[20] The motion is granted and an order shall issue to give effect to the foregoing.

MORAWETZ J.

Date: June 4, 2011

Tab 6

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTREAL

N° : 500-11-038474-108

DATE : Le 10 septembre 2010

SOUS LA PRÉSIDENCE DE : L'HONORABLE ROBERT MONGEON, J.C.S.

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT RELATIF À:

WHITE BIRCH PAPER HOLDING COMPANY
-et-
WHITE BIRCH PAPER COMPANY
-et-
STADACONA GENERAL PARTNER INC.
-et-
BLACK SPRUCE PAPER INC.
-et-
F.F. SOUCY GENERAL PARTNER INC.
-et-
3120772 NOVA SCOTIA COMPANY
-et-
ARRIMAGE DE GROS CACOUNA INC.
-et-
PAPIER MASSON LTÉE
Débitrices
-et-
ERNST & YOUNG INC.
Contrôleur
-et-
STADACONA LIMITED PARTNERSHIP
-et-
F.F. SOUCY LIMITED PARTNERSHIP

JM1838

-et-
F.F. SOUCY, INC. & PARTNERS, LIMITED PARTNERSHIP
Mis-en-cause
-et-
SERVICE D'IMPARTITION INDUSTRIEL INC.
-et-
KSH SOLUTIONS INC.
Opposantes

ORDONNANCE SUR REQUÊTES N^{os} 55, 58, 60, 62, 64, 71 et 72

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[1] Le Tribunal a entendu en date du 7 septembre 2010 une série de requêtes de la part de divers intervenants dans le contexte d'une demande des débitrices visant l'approbation d'un processus de vente de type "Stalking Horse" de tous les actifs du Groupe.

[2] Vu l'urgence de statuer sur ce processus, le Tribunal est d'avis que la requête des Débitrices doit être accueillie, motifs à suivre, avec certaines modifications quant aux conclusions recherchées et que les diverses requêtes des opposantes à ce processus doivent être rejetées, aussi avec motifs à être déposés ultérieurement.

[3] En conséquence, le Tribunal rend l'ordonnance suivante:

The **Motion to approve a Stalking Horse Bidder to approve an Asset Sale Agreement, to approve bidding procedures for the sale of substantially all the WB Group's assets and to schedule an auction and sale hearing** (no. 55) is granted**,** with reasons to follow, with the following modifications:

a) The dates and delays suggested in the conclusions of the Motion shall be extended to take into account the date of the present Order;

b) There shall be no Break-Up Fee of US $2,000,000.00 payable to the Stalking Horse Bidder or Purchaser (as defined in the ASA). The Stalking Horse Bidder shall, instead, be entitled to the reimbursement of its expenses up to an amount of US $3 million.

The Break-up fee and Expense Reimbursement proposed by the Stalking Horse Bidder in paragraphs 9.2 and 9.3 of the ASA shall be limited to an Expense Reimbursement not to exceed the sum of US $3 million;

c) The obligation of the Debtors and Mis-en-cause to pay the Expense Reimbursement to the Staling Horse Bidder shall be guaranteed by a

"CCAA Charge" as provided for in the definition of "Expense Reimbursement" in section 1.1 of the ASA, the whole not to exceed the sum of US $3 million and shall be payable to the Purchaser in accordance with section 9.3 of the ASA.

Accordingly, the Order pursuant to said Motion shall read as follows:

CONSIDERING the Debtors' "Motion to Approve a Stalking Horse Bidder, to Approve an Asset Sale Agreement, to Approve Bidding Procedures for the Sale of Substantially All the WB Group's Assets and to Schedule an Auction and Sale Hearing" (the **"Motion"**); and its supporting exhibits;
CONSIDERING the submissions of counsel;

GIVEN the provisions of the Initial Order granted by this Court in this matter on February 24th, 2010 (the **"Initial Order"**);

GIVEN the provisions of the order of this Court approving the Sales and Investor Solicitation Process; and

GIVEN the provisions of the *Companies' Creditors Arrangement Act*, (R.S.C., 1985, c. C-36) as amended (the **"CCAA"**);

THE COURT:

GRANTS the present Motion;

DECLARES sufficient the service and notice of the present Motion;

APPROVES the Monitor's Report, Exhibit SM-1 and the addendum thereto, Exhibit SM-1A;

APPROVES as the Stalking Horse Agreement, the Asset Sale Agreement dated August 10th, 2010, as amended on August 23rd and August 31st, 2010, Exhibit SM-2, by and between White Birch Paper Company (together with certain subsidiaries) and BD – White Birch Investment LLC (the "**Sale Agreement**"), as these documents are modified by the present Order including, without limitation, the obligations of the Sellers to pay the Expense Reimbursement not to exceed the aggregate sum of US $3 million (as such expression is defined in the Sale Agreement) to the Purchaser on the terms and conditions set forth in the Sale Agreement;

APPROVES the bidding procedures, as set out at Exhibit SM-3 (the "Bidding Procedures"), including, without limitation, the section entitled "*Expense Reimbursement*";

ORDERS that the capitalized terms used herein but not defined shall have the meanings ascribed to them in the Bidding Procedures or, if not defined therein, in the Initial Order;

DECLARES that BD White Birch Investment LLC ("BD") shall be the stalking horse bidder for the purposes of the competitive bidding process set out in the Bidding Procedures, Exhibit SM-3;

AUTHORIZES AND ORDERS the WB Group, its advisors and the Monitor to conduct the competitive bidding process set out in the Bidding Procedures, Exhibit SM-3, in accordance with the Bidding Procedures;

ORDERS that, to the extent a Qualified Bid, as defined in the Bidding Procedures, Exhibit SM-3, other than the bid received from BD White Birch Investment LLC, is received by no later than 5:00 pm (Eastern time) on September 17, 2010, an auction for the Assets of the WB Group shall be held at the offices of Kirkland & Ellis, 601 Lexington Avenue, New York, New York, United States of America, 10022, beginning at 10:00 am (Eastern time) on September 21, 2010; or at such later time or other place as the WB Group shall notify all Qualified Bidders in accordance with the terms of the Bidding Procedures;

AUTHORIZES AND ORDERS the WB Group and its advisors to carry out any such Auction in accordance with the Bidding Procedures;

DECLARES that a hearing shall take place before the Superior Court of Quebec, Commercial Division, on or prior to September 24, 2010 in order to authorize and approve the sale of the WB Group's Assets, pursuant to the terms set out in the Asset Purchase Agreement, Exhibit SM-2, or pursuant to the terms of an alternative transaction with the winning bidder at the auction, as the case may be (the "Sale Hearing");

ORDERS that, in the event that no Qualified Bids other than the Qualified Bid submitted by BD are received pursuant to the terms of the Bidding Procedures, that the WB Group is authorized and ordered to (i) cancel the Auction and (ii) seek entry of the Canadian Sale Order (as defined in the Sale Agreement) in accordance with the Bidding Procedures;

DECLARES that, pursuant to the terms of the Sale Agreement and as security for the Debtors' and the Mises en Cause's obligation to pay the Expense Reimbursement to the Purchaser, as hereby approved under the terms and conditions set forth in the Sale Agreement and the Bidding Procedures, the Purchasers are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property to the extent of the aggregate amount of the Expense Reimbursement (being an amount not to exceed three million United States dollars (US $3,000,000.00)), which charge shall be subordinate to the Administration Charge, the D&O Charge and the Interim Financing Charge, but shall otherwise be, and be

deemed to be, an additional “CCAA Charge” under, and for the purposes of, the provisions of the Initial Order concerning the CCAA Charges;

DECLARES that, in the event that BD submits the Winning Bid (as defined in the Bidding Procedures), the provisions of the ASA that contemplate that at Closing the $10 million D&O Charge (as defined in the Initial Order) and the $3 million Administrative Charge (as defined in the Initial Order) will be discharged and expunged and replaced, in effect, with the $10 million letter of credit and the $3 million Wind-Down Amount, pursuant to the Canadian Sale Order (as defined in the ASA) and as provided for under Sections 5.2(g) and 5.18 of the ASA, respectively, are hereby approved;

ORDERS that, in connection with the Bidding Procedures and pursuant to clause 7(3)(c) of the Personal Information Protection and Electronic Documents Act (Canada), the Debtors and the Mises en Cause are authorized and permitted to disclose personal information of identifiable individuals to Qualified Bidders and their advisors, but only to the extent required in connection with the terms of the Bidding Procedures and the bidding and sale process to be conducted thereunder. Each such Qualified Bidder shall maintain and protect the privacy of such information and limit the use of such information to its participation in the Sale and, if it does not complete the Sale, shall return all such information to the Debtors and the Mises en Cause, or in the alternative~~,~~ destroy all such information;

REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, including the United States Bankruptcy Court for the Eastern District of Virginia, to give effect to this Order and to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the Mises en Cause and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order;

THE WHOLE WITHOUT COSTS.

[4] La **Requête en rétractation de jugements** (no. 58) de l'opposante Service d'Impartition Industriel Inc. est **rejetée avec dépens**, motifs à suivre;

[5] La **Requête en rejet d'une demande visant à approuver une vente et pour ordonner la fin de la protection de la LACC par ordonnance** (no. 60) de l'opposante Service d'Impartition Industriel Inc. est **rejetée, sans frais**, motifs à suivre;

[6] La **Contestation et Requête pour faire déclarer abusive la requête en rétractation de jugements de Service d'Impartition Industriel Inc**. (no. 62) des Débitrices est **rejetée, avec dépens**, motifs à suivre;

[7] La **Réplique et contestation du contrôleur à la "Requête en rejet d'une demande visant à approuver une vente et pour ordonner la fin de la protection de la LACC par ordonnance" et à la "Requête en rétractation de jugements" de la requérante** (no. 64) est **rejetée, sans frais**, motifs à suivre;

[8] La **Requête pour modification et révision de l'ordonnance initiale du 24 février 2010** (no. 71) de l'opposante KSH Solutions Inc. est **rejetée, sans frais**, motifs à suivre.

[9] La **Contestation de la créancière KSH Solutions Inc. à la "Motion to approve a Stalking Horse Bidder, to approve an asset sale agreement, to approve the bidding procedures for the sale of substantiallly all the WB Group assets and to schedule an auction and sale hearing" et Requête pour ordonner la fin de la protection de la LACC** (no. 72) est **rejetée, sans frais**, motifs à suivre.

_____
ROBERT MONGEON, J.C.S.

Me Jean Fontaine
Stikeman Elliott
Pour les Débitrices

Me Jean-Éric Guindon
Bélanger Sauvé
Pour l'Opposante Service d'Impartition Industriel Inc.

Me Pierre-Stéphane Poitras et Me Julie Lavertu
Gilbert Simard Tremblaly
Pour l'Opposante KSH Solutions Inc.

Me Louis Gouin
Ogilvy Renault
Pour le Contrôleur

Date d’audience : 7 septembre 2010

Tab 7

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

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

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD & DECIDED: **JUNE 29, 2009**

E N D O R S E M E N T

INTRODUCTION

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

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

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

[4] The following are my reasons for granting these orders.

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUES AND DISCUSSION

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

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

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

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

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

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

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

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra,* at paras. 43-52.

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

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

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

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

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

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

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

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

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

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

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

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

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

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

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

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

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

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

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

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

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

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

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

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

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

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

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

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

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

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

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

(d) is there a better viable alternative?

I accept this submission.

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

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

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

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

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

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

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

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

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

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

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

DISPOSITION

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

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

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

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

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

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

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

Tab 8

2009 CarswellOnt 4839
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4839, [2009] O.J. No. 4293, 56 C.B.R. (5th) 74

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended (Applicants)

And In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Morawetz J.

Heard: August 4, 2009
Judgment: August 4, 2009
Docket: 09-CL-7950

Counsel: Mr. D. Tay, Mr. M. Kotrly for Nortel Networks Corporation et al.
Mr. J.A. Carfagnini, Mr. C.G. Armstrong for Monitor, Ernst and Young Incorporated
Mr. J. Bunting for Nortel Networks UK Limited (In Administration)
Mr. S.R. Orzy for Noteholders
Mr. S. Kukulowiz for Canadian Lawyers, for Unsecured Creditors' Committee
Ms T. Lie for Superintendent of Financial Services of Ontario
Mr. C. Thorburn for Canadian Lawyers, for Matlin Patterson
Mr. K. McElcheran for Avaya Inc.
Ms F. Baloo for CAW Canada Legal Department
Mr. D. Yiokaris for Former Employees
Ms L. Pillon for Enterprise Network Holdings Bv

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Telecommunications company entered protection under Companies' Creditors Arrangement Act — Telecommunications company wished to execute sale agreement for certain assets and undertake auction regarding other assets — Telecommunications company brought motion for approval of process and sale, and to seal certain records, with parallel motion brought in United States — Motion granted — Court had jurisdiction to authorize sale agreement — Approving sale was appropriate — Fact that plan was absent did not prevent sale — Sale was subject to further court approval — Informal objections in United States had been resolved.
Table of Authorities
Cases considered by *Morawetz J.*:
Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) — referred to
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

***Morawetz J.*:**

1 This Hearing was conducted by way of video conference with a parallel motion being heard in the United States Bankruptcy Court with His Honor Judge Gross presiding over the Hearing in the U.S. Court.

2 This Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol which has previously been approved by both the U.S. Court and by this court.

3 Nortel brings this motion for the approval of the Bidding Procedures relating to the Enterprise Solutions Business. It also seeks approval of the Sale Agreement among Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL") and Nortel Networks Inc. ("NNI") and their affiliates as "Sellers" and Avaya Inc. as "Purchaser."

4 In addition, the Applicants also request the approval of a Side Agreement among the Sellers and the court appointed administrators, which Side Agreement is attached to the Eighteenth Report filed by Ernst and Young Inc., the Monitor.

5 Finally, the Applicants seek a Sealing Order to seal the Confidential Appendix to the Eighteenth Report pending further Order of this court.

6 The Bidding Procedures and Sale Agreement are described in the affidavit of Mr. George Riedel, Chief Strategy Officer of Nortel, sworn July 30, 2009 and they are also described in the Eighteenth Report of the Monitor.

7 Nine formal and informal objections were filed in the U.S. Proceedings. These objections have been resolved and in some cases minor modifications have been made to the Bidding Procedures.

8 I am satisfied that no further comment is required in this Endorsement with respect to the objections filed in the U.S. Proceedings.

9 The transaction described in the Sale Agreement is very complex. The Monitor has made specific reference to the transaction. The Enterprise Solutions business involved addresses the communications needs of large and small businesses across various industries by providing products and services that integrate voice, E-mail, conferencing, video and instant messaging. Competitors to the business include Cisco, Avaya, Alcatel-Lucent, Siemens Enterprise Communications, NEC and others.

10 This business operates globally in approximately 121 countries. The Monitor has indicated that the business has an installed base with over 75 million voice lines and 75 million data ports. The fiscal revenues in 2008 were $2.8 billion representing approximately 27% of Nortel's 2008 revenues.

11 With respect to the Canadian aspect, the fiscal 2008 revenues in Canada were $183 million representing approximately 26% of Nortel's 2008 Canadian revenue.

12 The base purchase price as set out in the Stalking Horse Agreement is $475 million. It also provides for a Break-Up-Fee of $14.25 million and an Expense Reimbursement cap of $9.5 million.

13 The materials indicate that Bids are to be received by September 4, 2009 with the Sellers to conduct an auction on September 11, 2009 followed by a motion to approve any transaction both before this court and the U.S. Court.

14 With respect to the evidence in support of the transaction, I refer to the conclusions of Mr. Riedel at paragraphs 38 to 40 of his affidavit where he states as follows:

> 38. "I believe that the Sale Agreement is the product of a vigorous, comprehensive and fair process. The proposed Auction Sale Process for the Enterprise Solutions Business, based on the Sale Agreement as a stalking horse bid, is the best way to preserve the business as a going concern and to maximize value and preserve as many jobs as possible for the Applicants'

employees. I further believe that exploration of the sale of the other businesses as a going concern through this process will provide the greatest chances for further value and maximization and job preservation."

39. "Based on the Applicants' previous consideration of potential transactions involving the Enterprise Solutions Business and after re-canvassing the marketplace since the commencement of these proceedings, I believe that the proposed transaction with the Purchaser represents the highest and best proposal available for the Enterprise Solutions Business, subject to the receipt of a better bid through the auction process contemplated in this motion."

40. "The Sale Agreement also requires an expeditious sale process and provides the Purchaser the right to terminate the Sale Agreement if certain milestones in the sale process are not timely met. For these reasons, the expeditious sale of the Assets is critical to the maximization of the value of the Applicants' assets and, in turn, to a recovery for the Applicants' estates."

15 The Monitor has similarly provided extensive background to the transaction and reports its analysis and recommendations at paragraph 92 of the Eighteenth Report where it states as follows:

92. "The Monitor has reviewed Nortel's efforts to divest its Enterprise Solutions Business and is of the view that the Company is acting in good faith to maximize the value. The Monitor recommends approval of the Avaya Agreement as a "stalking horse" bid, approval of the Bidding Procedures as described and approval of the Side Agreement. In so doing, the Monitor considers the potential payment of the Break Fee and Expense Reimbursement to Avaya as reasonable in the circumstances."

16 The Bidding Procedures, as proposed, are not unlike the Bidding Procedures which have previously been approved in the sale of the CMDA Business and the LTE Business. The Bidding Procedures in respect of these businesses were approved by this court on June 29, 2009 with Reasons released on July 23, 2009 [2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List])].

17 Likewise, as with the previous transaction, I am satisfied that this court has the jurisdiction to authorize the Sale Agreement. (See Reasons from July 23, 2009.)

18 Turning now to a consideration of whether it is appropriate in this case to approve the sale process.

19 The factors to consider on a sales process under the CCAA, in the absence of a plan, has been previously considered in these proceedings, and again, I refer to the Nortel Reasons of July 23, 2009 at paragraph 49. Those factors are as follows:

1) Is a sales transaction warranted at this time?

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

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

4) Is there a better viable alternative?

20 In this case the details of the transaction and the sales process, as described in Mr. Riedel's affidavit and in the Monitor's Eighteenth Report, establish, in my view, that it is appropriate to approve the Sale Agreement. The factors, as set out and previously accepted in the Reasons of July 23, are equally applicable in this transaction.

21 I also note that there were no objections with respect to the sale process.

22 I also note that the sale is subject to further court approval, and, again, the court will expect that the Applicants will make reference to the *Soundair* principles at such time.

23 As it was previously noted in the Reasons of July 23, the Applicants are part of a complicated corporate group, they carry on an active international business, and I accept that an important fact to consider in the CCAA process is whether the case can be made to continue the business as a going concern.

24 I am satisfied, having considered the factors referenced above, as well as the facts summarized in the affidavit of Mr. Riedel, and in the Eighteenth Report, that the Applicants have met the test and I am therefore satisfied that this motion should be granted.

25 Accordingly I approve the Bidding Procedures as described in Mr. Riedel's affidavit and in the Eighteenth Report which procedures have also been approved this morning by Judge Gross in the U.S. Court.

26 I am also satisfied that the Sale Agreement and Side Agreement should be approved.

27 Further, that the Sale Agreement be accepted for purposes of conducting the Stalking Horse Bid in accordance with the Bidding Procedures including, without limitation the Break Up Fee, and the Expense Reimbursement.

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

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

30 This concludes my Endorsement in respect of the Bidding Procedures and the Sale Agreement.

Motion granted.

Tab 9

2009 CarswellOnt 4262
Ontario Superior Court of Justice [Commercial List]

Indalex Ltd., Re

2009 CarswellOnt 4262, 179 A.C.W.S. (3d) 269, 79 C.C.P.B. 101

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADIAN INC. AND NOVAR INC. (Applicants)

Morawetz J.

Heard: July 2, 2009
Judgment: July 2, 2009
Docket: CV-09-8122-00CL

Counsel: Linc Rogers, Katherine McEachern, Jackie Moher for Applicants
Ashley Taylor, Lesley Mercer for FTI Consulting Canada ULC, Monitor
Paul Macdonald, Jeff Levine for JPMorgan (DIP Lender)
Kenneth D. Kraft for SAPA Holding AB
Andrew Hatnay, Demetrios Yiokaris, Andrew Mckinnon for Keith Carruthers, SERP Retirees
Brian Empey for Sun Indalex
John D. Leslie for U.S. Unsecured Creditors' Committee
G. Finlayson for U.S. Bank as Trustee for the Noteholders

Related Abridgment Classifications
Pensions
I Private pension plans
I.5 Practice in pension actions
I.5.f Miscellaneous
Headnote
Pensions --- Practice in pension actions — Miscellaneous
Applicant company was insolvent — Applicants put forth marketing process, which was court approved — Bid was submitted — Bidder was not assuming pension liabilities — Retirees objected to bid — Applicants brought application for order approving bidding procedures, order deeming bid to be qualifying bid, and order approving breakup fee — Application granted — Applicants adhered to court approved process — There was no basis on which to delay process or to give effect to objection raised by retirees.

***Morawetz J.*:**

1 The Applicants seek an Order approving the Bidding Procedures as well as an Order deeming the Stalking Horse Bid to be a Qualified Bid pursuant to the Bidding Procedures as well as approval of the Breakup Fee.

2 The Monitor recommends that the relief be granted. No party, with the exception of Mr. Carruthers and the SERP Retirees, is opposed.

3 This motion stems directly from the Marketing Process which was approved by the Court on April 22, 2009. The conduct of the Marketing Process is set out both in the Affidavit of Mr. Fazio and in the Monitor's Reports. The Stalking Horse Bid of SAPA Holdings was executed on June 16, 2009. The Notice of Motion was served on June 17, 2009.

4 The Marketing Process was conducted in both U.S. and Canada. Mr. Rogers advised that the Bidding Procedures were approved, with minor modification, by the U.S. Bankruptcy Court earlier today.

5 It is also noted that it is a condition precedent to the performance of the Stalking Horse Bidder that the Bidding Procedures be Court approved by today.

6 Mr. Rogers expressed the view that the Stalking Horse Bid is a worst-case scenario - but that it does represent a "bird in the hand".

7 This is not a motion to approve the transaction. This issue will be addressed at a future time.

8 The approval of the Bidding Procedures is opposed by Mr. Hatnay on behalf of certain retirees. Mr. Hatnay requests a 7-day adjournment. That request is problematic in view of the aforementioned condition precedent. The main concern of the retirees is that their position and views have not been considered in this process. The Stalking Horse Bidder is *not* assuming the pension liabilities. Further, Mr. Hatnay submits that there are a number of unanswered questions relating to both the Executive Pension and the Supplementary Pension.

9 The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. In addressing this objective, the Applicants put forth a process - the Marketing Process - which has already been Court approved. No party objected to the previous approval. In my view, the Applicants have adhered to the Court approved process and there is no basis to either delay the consideration of this motion or to give effect to the objection raised by the retirees. To hold otherwise would be to jeopardize the Stalking Horse Bid.

10 In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction - but that is for another day. The *Soundair* principles raised by Mr. Hatnay are more applicable, in my view, to any sale approval motion. For today's motion, the process that is relevant is the Marketing Process as approved on April 22, 2009 which the Applicants have followed.

11 The Bidding Procedures are therefore approved. The Stalking Horse Bid is deemed to be a Qualifying Bid and the Breakup Fee is approved.

12 The Monitor filed a Supplement to the Sixth Report. In my view, this document contains confidential information the release of which could be prejudicial to the interests of the Applicants and stakeholders. In my view, it is appropriate to grant a sealing order with respect to this Supplement. The document is to be sealed pending further order.

Application granted.

Tab 10

CITATION: PCAS Patient Care Automation Services Inc. (Re), 2012 ONSC 2840
COURT FILE NO.: CV-12-9656-00CL
DATE: 20120514

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: 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 PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc., Applicants

BEFORE: D. M. Brown J.

COUNSEL: S. Babe, for the Applicants

M. Wasserman, for the Monitor, Pricewaterhouse Coopers Inc.

R. Thornton and A. Shepherd, for 2320714 Ontario Inc., the DIP Lender

D. Bulas, for Castcan Investments

R. M. Slattery, for Royal Bank of Canada

HEARD: May 14, 2012

REASONS FOR DECISION

I. Request for increase in DIP Lending Facility and approval of a Sale and Investor Solicitation Process

[1] PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc. move under the *Companies' Creditors Arrangement Act* for an increase in the DIP Lending Facility and the approval of a Sale and Investor Solicitation Process ("SISP"). At the hearing I granted and signed the order sought, subject to a few modifications. These are my reasons for so doing.

II. Background to this motion

[2] The history of this matter is set out my Reasons of April 20, 2012 (2012 ONSC 2423), May 5, 2012 (2012 ONSC 2714) and May 8, 2012 (2012 ONSC 2778).

III. Increase in DIP Lending Facility

[3] At present the approved DIP Lending Facility stands at $5,350,000. The DIP Lender has received commitments to increase that facility by an additional $10,000. The DIP Lender, through the applicants, renews its request to increase the facility by further $640,000 to account for fees and expenses of counsel to the DIP Lender payable pursuant to the terms of the DIP Facility. Lender's Counsel has agreed to contribute the fees and expenses to the funding of the DIP Lender instead of requiring payment would could impact the applicants' cash flows. In total, the applicants seek an increase in the DIP Lending Facility to $6 million.

[4] In its Fifth Report dated May 11, 2012, the Monitor, PricewaterhouseCoopers Inc., reported that it had reviewed and approved the fees submitted by Lender's Counsel. The Monitor concluded that the work performed by Lender's Counsel was "necessary to raise the required DIP financing in order to implement the expedited SISP". The Monitor stated:

> Given the challenges of raising a DIP Facility for a pre-commercialization technology company and the need of the Company to continually increase its DIP Facility in the weeks since March 23, 2012, the amount of time and effort expended by counsel to the DIP Lenders does not seem unreasonable in the circumstances.
>
> The Monitor will review the relevant invoices of the DIP Lender's counsel detailing the fees and expenses of the DIP Lender incurred after May 7, 2012 (which are included in the estimate of fees discussed above) prior to any such fees and expenses being added to the DIP Facility.

[5] Pursuant to the Initial Order the DIP Lender's Charge ranked in priority to all other interests "with the exception of valid, enforceable and perfected Encumbrances existing as at the date of filing". The proposed increase in the amount of the DIP Lending Facility will not affect those priorities. The two general secured creditors, RBC and Castcan, did not oppose the increase in the DIP Lending Facility.

[6] Taking into account the factors set out in *CCAA* s. 11.2(4), I approved an increase in the DIP Lending Facility to $6 million.

IV. Sales and Investor Solicitation Process

A. Overview of the proposed SISP

[7] The applicants seek approval of a Sales and Investor Solicitation Process which has four main features:

(i) A short time frame – the deadline for bids will be May 24, 2012, a few days before the current Stay Period expiry date of May 28, 2012;

(ii) Primary control of the SISP by the applicants, not the Monitor;

(iii) The submission of a stalking horse credit bid by the DIP Lender; and,

(iv) The solicitation and consideration by the applicants of any Qualified Bids in consultation with the Monitor.

[8] According to Mr. Loreto Grimaldi, the Chief Legal Officer of PCAS, the SISP has been developed by the applicants in conjunction with the Monitor. The SISP is intended to maximize stakeholder value through either a going-concern sale of the applicants' business or the attraction of new investment, with a plan of compromise or arrangement.

B. The solicitation and bidding process

[9] The SISP will commence with the distribution of a "teaser" letter. Interested parties may sign a confidentiality agreement to secure access to an online data room and updated business plan. The proposed SISP stipulates the technical requirements for any bid to be considered a Qualified Bid. The terms of the SISP permit the applicants to waive compliance with the requirements for a Qualified Bid, but only with the consent of the Monitor.

[10] Mr. Grimaldi deposed that given the efforts of the applicants over the past number of months to generate interest in the company by contacting a large number of potential investors, the applicants believe that the short SISP time frame – basically 10 days – is justified and practicable. The reality of the situation is that given the applicants' past marketing efforts, a number of potentially interested bidders will be much further along the due diligence and bid preparation curve than those who enter the process at this stage. Nonetheless, the liquidity problems facing the applicants necessitate this abbreviated SISP process.

C. The DIP Lender's stalking horse credit bid

[11] The SISP terms which I approved described the stalking horse credit bid which the DIP Lender will submit as follows:

> 10. The Applicants have agreed with the DIP Lender that the DIP Lender shall submit a stalking horse bid for the purchase of substantially all of the property, assets and undertaking of the Applicants on an "as is, where is" basis (the "Stalking Horse Bid "). The Stalking Horse Bid will allow the DIP Lender to credit bid its debt in exchange for the purchase of the Applicants' Property. The Stalking Horse Bid will provide for a purchase price equal to the amount of outstanding secured liabilities owing by the Applicants to the DIP Lender (being the principal amount of the DIP Loan advances and all interest and all reasonable fees and expenses to the closing) plus the assumption of all senior secured indebtedness of the Applicants (the "Secured Indebtedness "), estimated to be approximately CDN $7.9 million. The purchase price contained in the Stalking Horse Bid will be satisfied by the release of the liabilities owed to the DIP Lender by the Applicants plus the value of the assumed senior secured indebtedness. The Stalking Horse Bid shall not be permitted to be in an amount in excess of the Secured Indebtedness.

[12] In the event that no Qualified Bid is received from another person, under the SISP the Stalking Horse Bid will be treated as the Successful Bid for which the applicants shall seek court approval.

[13] Counsel for the applicants and the DIP Lender explained that this Stalking Horse Bid is designed to operate primarily to give an indicative price to other bidders for the company's business and assets. The terms and conditions of the actual Stalking Horse Bid will be available in the applicants' online due diligence room.

D. The treatment of Qualified Bids

[14] In the event that the SISP results in the submission of one of more Qualified Bids, the following rules will apply:

> 15. If one or more Qualified Bids other than the Stalking Horse Bid are received in accordance with the Bidding Procedures, the Applicants, in consultation with the Monitor, may choose to:
>
> (a) accept one Qualified Bid (the "Successful Bid" and the Qualified Bidder making the Successful Bid being the "Successful Bidder ") and take such steps as are necessary to finalize and complete an agreement for the Successful Bid with the selected bidder; or
>
> (b) continue negotiations with a selected number of Qualified Bidders (collectively, "Selected Bidders ") with a view to finalizing an agreement with one of the Selected Bidders.
>
> 16. The Applicants shall be under no obligation to accept the highest or best offer and the selection of the Selected Bids and the Successful Bid shall be entirely in the discretion of the Applicants, after consultation with the Monitor.

[15] As can be seen, the contemplated SISP contains significant discretion and flexibility, as well as the risk that a successful transaction may not be negotiated prior to the expiry of the Stay Period. However, I accept the submission of counsel for the DIP Lender that the applicants anticipate a diversity of forms of bids and therefore require sufficient flexibility in the process in order to be able to compare "apples to oranges to fish".

[16] The SISP provides that the applicants will apply to the court for approval of the Successful Bid.

E. Analysis

[17] In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750, I attempted to summarize the jurisprudence on the approval of sales and investment solicitation processes as follows:

> [6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
>
> [7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.
>
> [8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:
>
> > To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

[18] In the present case two key factors have shaped the proposed SISP: (i) the liquidity problems facing the applicants, and (ii) the extensive efforts taken by the company prior to the *CCAA* process to market and solicit interest in the business of the applicants. I accept, as an accurate statement of the business reality facing the applicants, the following statements made by the Monitor in its Report:

> The proposed expedited SISP considers the urgent need of the Company to effect a transaction which will result in the sale of the Company's Property or an investment in the Company's business. The Company is in the midst of a liquidity crisis and will likely be unable to commercialize the MedCentres if the SISP is unsuccessful.
>
> Under the circumstances, the expedited SISP is likely the most viable process to maximize the value of the Company for the benefit of its stakeholders. In light of this situation, the Monitor supports the Company's request for approval of the proposed expedited SISP to permit interested parties with an opportunity to invest in the Company or make an offer to acquire the Company's assets.

[19] Given the extensive efforts to date by management of the applicants to solicit interest in the business and given the liquidity crunch facing the applicants, I was satisfied that the proposed SISP would result, in the specific circumstances of this case, in a fair, transparent and commercially efficacious process which should allow a sufficient opportunity for interested parties to come forward with a superior offer and thereby optimize the chances of securing the best possible price for the assets up for sale or the best possible investment in the continuing operations of the applicants. For those reasons I approved the SISP.

[20] Finally, the applicants did request, at the instance of the Monitor, amendments to the powers of the Monitor which I had granted in my May 7, 2012 order. As counsel explained to me during the hearing, the applicants, DIP Lender and Monitor concurred that the applicants, not the Monitor, should take the lead in soliciting Qualified Bids, in large part due to the past efforts by members of the Board to interest various investors in the business. In light of that "game plan", the Monitor concluded that it would not need to exercise some of the expanded marketing powers which I had approved on May 7. That order simply granted the Monitor expanded powers; it did not require the Monitor to exercise them. In the result, the Monitor has elected not to exercise those powers, I accepted the Monitor's explanation for its decision, and therefore saw no need to amend my May 7 order.

V. Summary

[21] For those reasons I approved (i) an increase in the DIP Lending Facility to $6 million, (ii) the SISP, and (iii) the Fifth Report of the Monitor and the activities described therein.

(original signed by)
D. M. Brown J.

Date: May 14, 2012

Tab 11

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

Brainhunter Inc., Re

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

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

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

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

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

Table of Authorities

Cases considered by *Morawetz J.*:

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

Statutes considered:

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

s. 36 — considered

***Morawetz J.*:**

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

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

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

4 The Monitor recommends that the motion be granted.

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

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

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

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

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

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

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

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

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

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

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

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

(d) Is there a better viable alternative?

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

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

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

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

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

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

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

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

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

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

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

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

Motion granted.

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

Brainhunter Inc., Re

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

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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

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XIX.3.b.iv Miscellaneous

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Generally — referred to

s. 36 — considered

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

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

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

4 The Monitor recommends that the motion be granted.

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

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

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

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

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

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

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

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

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

(d) Is there a better viable alternative?

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

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

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

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

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

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

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

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

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

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

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

Motion granted.

Tab 12

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

BEFORE: Justice H. A. Rady

COUNSEL: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

Introduction

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

Preliminary Matter

[2] As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as

the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

[3] Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

Background

[4] The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

[5] On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

[6] The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

[7] Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

[8] In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

[9] The plant employs twelve part and full time employees.

[10] The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

[11] Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

[12] The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

[13] In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

[14] On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. – 2478223 Ontario Limited – purchased and took an assignment of FCC's debt and security at a substantial discount.

[15] Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

[16] On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the

debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

[17] On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

[18] In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

i. the sale process will be commenced immediately following the date of the order approving it;

ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;

iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;

iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;

v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

[19] StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

> A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

[20] The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

[21] StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

[22] The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

[23] Searches of the *PPSA* registry disclosed the following registrations:

(a) Harvest Ontario Partners:

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) Harvest Power Mustang Generation Ltd.

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

[24] There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

[25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion

materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

b) the DIP agreement and charge

[26] S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** 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(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[27] S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** 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.

[28] This case bears some similarity to *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

[29] The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

[30] In *Re Comstock Canada Ltd.*, 2013 ONSC 4756 (S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6 as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > …the purpose of the *CCAA*… is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> …
>
> Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
>
> [Emphasis in original]

[31] I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

d) the D & O charge

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **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.

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

[35] I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

[36] The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

[37] In *Re Brainhunter* (2009), 62 C.B.R. (5th) 41, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re,* [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?
>
> 14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.
>
> 16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[38] It occurs to me that the Nortel Criteria are of assistance in circumstances such as this – namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

[39] In *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies* 2012 ONSC 175 (S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

> 6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp*.: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
>
> 7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

[40] I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

f) Extension of time to file a proposal

[41] It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is

necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

[42] For these reasons, the relief sought is granted.

"Justice H.A. Rady"
Justice H.A. Rady

Date: October 28, 2015

Tab 13

CITATION: Re P.J. Wallbank Manufacturing Co. Limited, 2011 ONSC 7641
COURT FILE NO.: CV-11-0123-OTCL
DATE: 20111221

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF THE Proposal of P.J. Wallbank Manufacturing Co. Limited

BEFORE: D. M. Brown J.

COUNSEL: J. Fogarty and S-A. Wilson, for the Applicant

G. Moffat, for General Motors LLC

T. Slahta, for TCE Capital Corporation

HEARD: December 21, 2011

REASONS FOR DECISION

I. Overview of motion for approval of DIP financing

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

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

II. The Debtor and its creditors

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

[4] Wallbank has several secured creditors. It owes Danbury Financial Services Inc. about $720,000.00 under a credit facility. Until September, 2011, TCE Capital Corporation factored

Wallbank's accounts receivable, but stopped as a result of a default on that facility. Wallbank owes TCE approximately $700,000.00. Both Danbury and TCE have registered financing statements against Wallbank over all classes of collateral except "consumer goods". Wallbank owes P. & B. W. Holdings Inc., the trustee of a family trust, $724,500; the Trust has subordinated its interest in Wallbank's property to each of Danbury and TCE. Wallbank owes $74,180.53 to three remaining secured creditors: Xerox Canada Inc., Anthony Wallbank and Edward Wallbank. All three have subordinated their security in favour of Danbury and TCE.

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

III. The proposed DIP Facility

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

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

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

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

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

---

[1] DIP Facility Term Sheet.

(i) absent an event of default, GM agrees to refrain from re-sourcing the component parts made by Wallbank for up to 60 days;

(ii) GM agrees to pay for post-filing orders on a "net 7 days prox" basis;

(iii) Wallbank agrees to build an inventory of GM-ordered component parts in accordance with an inventory bank production plan to be agreed upon with GM;

(iv) The parties have identified which tools used by Wallbank belong to GM and to other parties; and,

(v) Wallbank agrees not to manufacture products for other Large or Medium Customers without GM's prior consent and without those customers agreeing to abide by all or some of the terms of the Accommodation Agreement, including terms governing the time for the payment of receivables and the price of the products

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

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

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

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

IV. Analysis

A. The statutory provisions

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

> 50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(*a*) or 50.4(2)(*a*), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> …
>
> (3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

…

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

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

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

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

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

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

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

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

B. Consideration of the various factors

B.1 Likely duration of NOI proceedings

[13] The evidence indicates that Wallbank likely will not be subject to NOI proceedings past the end of February, 2012. It requires the DIP Facility to continue operating, and by its terms that facility has a maximum term of 60 days from the date of filing the NOI. The cash-flow statement filed by Wallbank projects that it will have drawn fully on the DIP Facility by the middle of next February.

B.2 Management of Wallbank's affairs

[14] Although current management will continue to operate Wallbank, as described above the Accommodation Agreement places significant restrictions on the company's operations. Simply put, GM wants to use the next 45 days or so to build up an inventory of needed component parts and is insisting that any other customer who wishes to order product from Wallbank must do so on the credit and pricing terms set out in the Accommodation Agreement. Those terms require very prompt payment of receivables and an agreement to pay a higher price for Wallbank's products.

[15] The materials do not disclose how many employees presently work at Wallbank. Some employees are members of the Canadian Auto Workers. The Proposal Trustee reports that a dispute currently exists whereby the CAW is not permitting Wallbank to ship product to Gates Corporation, a result of which could be a reduction by $40,000.00 in the opening accounts receivable forecast in the cash-flow statement.

B.3 Enhancement of prospects of a viable proposal

[16] According to the Proposal Trustee Wallbank is developing a restructuring plan which would involve either (i) identifying a strategic partner, (ii) restructuring its debts, or (iii) an orderly liquidation of its assets.

[17] Wallbank filed a cash-flow projection for the period ending February 26, 2012. The projection was vetted by a DIP advisor appointed by GM. The cash-flow supports Mr. Wallbank's statement that without the proposed DIP Facility the company will be unable to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with that assessment:

> In the event that the DIP Loan is not approved by the Court, the Company may have no choice but to immediately cease operations, and the Company's ability to make a proposal to its creditors will be severely compromised.

[18] The evidence is clear that absent approval of the DIP Facility, Wallbank will close its doors and turn off its lights.

B.4 Report of the Proposal Trustee

[19] In its December 20, 2011 report the Proposal Trustee stated that it was satisfied that Wallbank is proceeding in good faith with its proposal, supported the need for interim financing, and concluded that "the benefits of granting such an Order far outweigh the prejudice to the Company, the creditors, employees and customers that these stakeholders would experience if the Order were not granted."

B.5 Nature and value of Wallbank's property

[20] Although Wallbank filed evidence about its current indebtedness, it did not file any detailed historical evidence about balance sheet or profit/loss position. The current value of its assets is unclear; the evidence suggests that Wallbank has operated at a loss for at least the past two years.

B.6 Confidence of major creditors

[21] According to the Proposal Trustee certain customers support Wallbank's proposal efforts: GM, Omex, Dayco, Magna Corporation, Stacktole, 3M, Bontaz and Admiral Tool.

[22] As to creditors, GM, of course, supports Wallbank's motion. The Trust has indicated that it does not oppose the order, but without prejudice to its right to move to vary the order at some later date. In light of changes made to the proposed DIP Order as a result of negotiations amongst the parties, Danbury does not oppose the order sought. Xerox was served earlier today with the motion materials, but has not communicated any position to Wallbank's counsel.

[23] TCE does not oppose the order sought, as revised, provided the order is made subject to three conditions:

(i) The order would be without prejudice to TCE's asserted position with respect to its ownership of factored receivables;

(ii) Wallbank, TCE and GM will agree on a process for the collection and remittance of accounts receivable; and,

(iii) GM waives its rights of set-off relating to pre-November 30, 2011 accounts receivable purchased by TCE, save and except for Allowed Set-Offs as defined in section 2.4(B) of the Accommodation Agreement.

Both Wallbank and GM are amenable to those conditions. I accept those conditions and make them part of my order.

B.7 Prejudice to creditors as a result of the Interim Financing Charge

[24] Although, like any charge, the Interim Financing Charge will impact all creditors' positions to some degree, the terms of the charge's priority have been negotiated to minimize the prejudice to Danbury and TEC. As well, given the immediate cessation of Wallbank's activities would result from the failure to approve the DIP Facility and Interim Financing Charge, on balance the benefit to all stakeholders of the proposed DIP Facility significantly outweighs any prejudice.

[25] Sections 2.1 and 2.2 of the Accommodation Agreement contemplated that both components of the Initial Financing advanced by GM – professional fees and the funding of operations – would be secured by the Interim Financing Charge. Section 50.6(1) of the *BIA* provides that a charge "may not secure an obligation that exists before the order is made". Wallbank advised that all funds made available by GM for professional fees are unspent and remain in counsel's trust account. Wallbank intends to return those funds to GM which plans, in turn, to advance similar amounts to Wallbank in the event a DIP Order is made. GM confirmed that the amounts advanced to date under section 2.1(C) of the Accommodation Agreement would not be subject to the Interim Financing Charge, but would be secured by the security described in the opening language of section 2.1 of the Accommodation Agreement. In my view the proposed treatment of the funds relating to professional fees is consistent with the intent of section 50.6(1) of the *BIA* and I approve it.

B.8 Conclusion

[26] For these reasons I am satisfied that it is appropriate to authorize Wallbank to enter into the DIP Facility agreement and to grant the proposed Interim Financing Charge. Accordingly, an order shall go in the form submitted by the applicant, which I have signed.

(original signed by)
D. M. Brown J.

Date: December 21, 2011

Tab 14

CITATION: Colossus Minerals Inc. (Re), 2014 ONSC 514
COURT FILE NO.: CV-14-10401-00CL
DATE: 20140207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, As Amended

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

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: S. Brotman and D. Chochla, for the Applicant Colossus Minerals Inc.

L. Rogers and A. Shalviri, for the DIP Agent, Sandstorm Gold Inc.

H. Chaiton, for the Proposal Trustee

S. Zweig, for the Ad Hoc Group of Noteholders and Certain Lenders

HEARD: January 16, 2014

ENDORSEMENT

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

Background

[2] The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has

no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

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

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

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

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

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

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

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

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

Administration Charge

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

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

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

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

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

Directors' and Officers' Charge

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

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

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

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

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

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

The SISP

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

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

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

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

[26] Lastly, the Proposal Trustee supports the proposed SISP.

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

Engagement Letter with the Financial Advisor

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

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

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

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

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

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

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

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

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

Extension of the Stay

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

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

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

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

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

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

[43] Lastly, the Proposal Trustee supports the requested relief.

Wilton-Siegel J.

Released: February 7, 2014

Tab 15

CITATION: Northstar Aerospace, Inc. (Re), 2013 ONSC 1780
COURT FILE NO.: CV-12-9761-00CL
DATE: 20130409

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC., NORTHSTAR AEROSPACE (CANADA) INC., 2007775 ONTARIO INC. AND 3024308 NOVA SCOTIA COMPANY, Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **C. J. Hill and J. Szumski, for Ernst & Young Inc., Court-Appointed Monitor**

J. Wall, for Her Majesty the Queen in Right of Ontario, as Represented by the Ministry of the Environment

P. Guy and K. Montpetit, for the Former Directors and Officers Group

Steven Weisz, for Fifth Third Bank

ENDORSEMENT

Motion Overview

[1] This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the "Monitor") of Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "Applicants"), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the "Claims Procedure") authorized by order of August 2, 2012 (the "Claims Procedure Order") are valid claims for which the former directors and officers of the Applicants (the "D&Os") are indemnified pursuant to the indemnity (the "Directors' Indemnity") contained in paragraph 23 of the Initial Order dated June 14, 2012 (the "Initial Order").

[2] If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the "D&O Charge Reserve") to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the "Pre-Filing Agent").

[3] For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

[4] In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to "MOE Pre-Filing D&O Claim", "MOE Post-Filing D&O Claim" and "WeirFoulds Post-Filing D&O Claim" have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

[5] The two claims at issue are described in proofs of claim (collectively, "the Proofs of Claim") filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the "MOE") and by WeirFoulds LLP ("WeirFoulds") on behalf of certain of the D&Os ("WeirFoulds D&Os").

[6] The MOE proof of claim (the "MOE Proof of Claim") asserts, among other things, a "Pre-Filing D&O Claim" (the "MOE Pre-Filing D&O Claim") and a "Post-Filing D&O Claim" (the "MOE Post-Filing D&O Claim") (collectively, the "MOE D&O Claims"), for costs incurred and to be incurred by the MOE in carrying out certain remediation activities originally imposed on the Applicants in an Ontario MOE Director's Order issued under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA") on March 15, 2012 (the "March 15 Order"). The basis for the D&Os' purported liability is a future Ontario MOE Director's Order (the "Future Director's Order"), which the MOE intends to issue against the D&Os. According to the Monitor's counsel, the Future Director's Order will require the D&Os to conduct the same remediation activities previously required of the Applicants.

[7] The WeirFoulds proof of claim (the "WeirFoulds Proof of Claim") responds to the threat of the Future Director's Order. It asserts a Post-Filing D&O Claim (the "WeirFoulds Post-Filing D&O Claim") by the individual WeirFoulds D&Os for contribution and indemnity against each other, and against the former directors and officers of the predecessors of Northstar Inc., in respect of any liability that they may incur under the Future Director's Order.

[8] Neither the MOE nor the D&Os object to the Monitor's proposed adjudication procedure.

Background to the CCAA Proceedings

[9] On May 14, 2012, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C. 36 ("CCAA"); Ernst & Young Inc. was subsequently appointed as the Monitor (the "CCAA Proceedings").

[10] A number of background facts have been set out in *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 4423 (*Northstar*) and *Northstar Aerospace, Inc. (Re)* 2012 ONSC 6362. A number of the issues with respect to MOE's claims against the Applicants have been covered in a previous decision. See *Northstar, supra.*

Directors' Indemnification and Directors' Charge

[11] The Initial Order provided that the Applicants would grant the Directors' Indemnity, indemnifying the D&Os against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings.

[12] Paragraph 23 of the Initial Order provides:

> 23. This court orders that the CCAA Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the CCAA entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[13] Paragraph 24 of the Initial Order further provides that the D&Os and the chief restructuring officer would have the benefit of a charge, in the amount of US$1,750,000, on the Applicants' current and future assets, undertakings and properties, to secure the Directors' Indemnity (the "Directors' Charge").

[14] The Directors' Charge, as established in the Initial Order, was fixed ahead of all security interests in favour of any person, other than the "Administration Charge", "Critical Suppliers' Charge" and the "DIP Lenders' Charge".

[15] The statutory basis for the Directors' Charge is set out in section 11.51 of the CCAA, which reads as follows:

> 11.51(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 after the commencement of proceedings under this Act.
>
> 11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[16] Any order under this provision affects, or potentially affects, the priority status of creditors. It is through this lens that the court considers motions. The order is discretionary in nature, is extraordinary in nature and should be, in my view, applied restrictively as it alters the

general priority regime affecting secured creditors. In this case, the order was made and it has priority over Fifth Third Bank.

D&O Claims

[17] On August 2, 2012, the Claims Procedure Order was issued to solicit the submissions of Proofs of Claim by the claims bar date of October 23, 2012 (the "Claims Bar Date") in respect of all "D&O Claim[s]".

[18] As indicated by the Monitor's counsel, the definition of a "D&O Claim" is very broad. It includes both claims that arose prior to June 14, 2012 (pre-filing D&O claims) and claims that arose from and after June 14, 2012 (post-filing D&O claims). It also potentially includes both post-filing D&O claims which are secured by the Directors' Charge and post-filing D&O claims which are not secured by the Directors' Charge.

[19] Paragraph 25 of the Claims Procedure Order specifically recognizes this distinction:

> 25. This court orders that no Post-Filing D&O Claim shall be paid by the Monitor from the D&O Charge Reserve without the consent of the Pre-Filing Agent and the CRO Counsel and D&O Counsel or further Order of the court and the determination that a claim is a Post-Filing D&O Claim does not create a presumption that such D&O Claim is entitled to be paid by the Monitor from the D&O Charge Reserve.

[20] The MOE D&O Claims concurrently asserts the MOE Pre-Filing D&O Claim and the MOE Post-Filing D&O Claim for the same amounts, namely:

(a) $66,240.36 for costs incurred by the MOE to carry out the remediation activities described in the March 15 Order up to the date when the MOE Proof of Claim was filed;

(b) $15 million for future costs to be incurred by the MOE to carry out the remediation activities described in the March 15 Order; and

(c) a presently unknown amount required to conduct additional environmental remediation work necessary to decontaminate the Site and the Bishop Street Community.

[21] As there are no funds available for distribution to unsecured pre-filing creditors in the CCAA Proceedings, the Monitor appropriately has not considered the validity of the MOE Pre-Filing D&O Claim. This motion, from the Monitor's standpoint, therefore only addresses the MOE Post-Filing D&O Claim.

[22] The WeirFoulds Proof of Claim provides that:

> This proof of claim is filed in order to preserve the right to commence:

(1) any and all claims over that any of the [WeirFoulds D&Os] may have against each other; and

(2) any and all claims that any of the [WeirFoulds D&Os] may have against any former director or officer of Northstar Aerospace, Inc., or predecessor companies, for contribution or indemnity, based upon any applicable cause of action in law or in equity, in relation to any liability that may be found to exist against any of the [WeirFoulds D&Os] in connection with the proofs of claim filed in the within proceedings by the Ontario Ministry of the Environment, dated October 19, 2012.

[23] For the purpose of resolving the entitlement of any claimant to the D&O Charge Reserve, paragraph 22 of the Claims Procedure Order allows the Monitor and certain other parties to bring a motion seeking approval of an adjudication procedure for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

[24] The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

[25] In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

[26] The Monitor's counsel appropriately sets out the issues of this motion, as follows:

(a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;

(b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;

(c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and

(d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

[27] I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

[28] The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

[29] The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications, Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) and *Canwest Publishing Inc., Re*, 2010 ONSC 222.

[30] In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

> To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

[31] The Yuen affidavit goes on to identify the specific obligations and liabilities for which the Directors' Charge was requested, including liability for unpaid wages, pension amounts, vacation pay, statutory employee deductions and HST. At paragraph 143 of his affidavit, Mr. Yuen states:

> I am advised by Daniel Murdoch of Stikeman Elliott LLP, counsel to the CCAA Entities, and do verily believe, that in certain circumstances directors can be held liable for certain obligations of a company owing to employees and government entities. As at May 18, 2012, the CCAA Entities were potentially liable for some or all of unpaid wages, pension amounts, vacation pay, statutory employee deductions, and HST (Harmonized Sales Tax) of approximately CDN $1.65 million …

[32] The Monitor's counsel submits that the quantum of the Directors' Charge was tailored to the Applicants' existing liability for such amounts.

[33] The scope of a section 11.51 charge is limited in several ways:

(a) section 11.51 does not authorize the creation of a charge in favour of any party other than a director or officer (or chief restructuring officer) of the companies under CCAA protection;

(b) section 11.51 does not authorize the creation of a charge for purposes other than to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of its CCAA Proceedings; and

(c) section 11.51(4) requires the court to exclude from the section 11.51 charge the obligations and liabilities of directors and officers incurred through their own gross negligence or wilful misconduct.

[34] In my view, it would be inappropriate to determine that the Proofs of Claim are claims for which the D&Os are entitled to be indemnified under the Directors' Indemnity, as doing so would wrongly and inequitably affect the priority of claims as between the MOE and the Fifth Third Bank.

[35] In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar, supra*, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.

[36] Simply put, the activity that gave rise to the MOE claims occurred prior to the CCAA proceedings. It is not the type of claim to which the Directors' Charge under section 11.51 responds. Rather, in the CCAA proceedings, it is an unsecured claim and does not entitle the MOE to obtain the remedy sought on this motion. The fact that the MOE seeks this remedy through the D&Os does not change the substance of the position.

[37] The situation facing the Applicants, the Monitor, Fifth Third Bank, and others affected by the Directors' Charge, has to be considered as part of the CCAA Proceedings. In my view, it would be highly inequitable to create a parallel universe, wherein certain MOE claims as against the Applicants are treated as unsecured claims and MOE D&O Claims and the WeirFoulds Post-Filing D&O Claim are treated as secured claims with respect to the Directors' Charge.

[38] It could be that the MOE has a remedy against the D&Os; however, any remedy they may have does not provide recourse against the D&O Charge in these CCAA Proceedings. Nevertheless, it remains open for the MOE to pursue its claims against the D&Os on the motion returnable on April 18, 2013.

Order

[39] In the result, I grant the Monitor's motion, approve the aforementioned adjudication process, and approve the activities of the Monitor as described in the Seventh Report of the Monitor dated November 7, 2012. I also direct the following:

(1) The MOE Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity;

(2) The WeirFoulds Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity; and

(3) The US$1,750,000 held by the Monitor in respect of the D&O Charge Reserve be paid to the Pre-Filing Agent.

MORAWETZ J.

Date: April 9, 2013

Tab 16

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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"

BEFORE: PEPALL J.

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

REASONS FOR DECISION

Relief Requested

[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

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

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

[2] R.S.C. 1985, c.C.44.

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 *Re Stelco*[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.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[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 *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[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.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[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 *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[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.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (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: *Re General Publishing Co.*[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 *Re Grant Forest*[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

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[10] (2003), 39 C.B.R. (4th) 216.

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.

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[11] [2009] O.J. No. 3344. 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.

[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.

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Pepall J.

Released: October 13, 2009