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January 8, 2019

Hon. Justice Sitting in Chambers
Supreme Court of Newfoundland and Labrador
General Division
Courthouse
309 Duckworth Street
P.O. Box 937
St. John's, NL A1C 5M3

My Lord/Lady:

Re: Re: The Proposal of British Bazaar Company Limited and British Confectionery Company Limited: Court Nos. 22375 and 22376.

An application is scheduled to be heard before you on Tuesday, January 15, 2019, at 10 a.m. wherein the Applicants seek the following orders:

(a) an Order abridging the notice periods pursuant to the *Bankruptcy and Insolvency General Rules*[1], Rule 3, and the *Rules of the Supreme Court, 1986,* Rule 2.01(1);

(b) an Order pursuant to 50.4(9) of the *Bankruptcy and Insolvency Act*[2] ("*BIA*") directing that service on the service list set out in Schedule "A" to the order is sufficient for the purposes of the Application;

(c) an Order pursuant to Section 50.4(9) of the *BIA* extending the time to file Proposals in this proceeding, such extension to be up to and including March 5, 2019; and

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[1] C.R.C., c. 368
[2] R.S.C. 1985, c. B-3

(d) an order pursuant to Section 64.2 of the *BIA* declaring that the professional advisors of the Applicants shall have a charge over the assets of the Applicants in respect of fees and expenses.

We represent the Applicants. Please accept this as our client's written submissions with respect to the application.

FACT SITUATION

The overall circumstances of the Applicants are summarized in the Application Notice and supporting affidavit of Brian Connolly, and in the 1st Report of Deloitte Restructuring Inc. ("the Proposal Trustee"), filed in support of the first extension application. This information is updated in the 2nd Report of the Proposal Trustee filed contemporaneously with the Application materials.

The materials filed and to be filed describe in some detail the operations of the Applicants, the circumstances leading up to filing of the Notices of Intention to Make a Proposal ("NOI"), and the restructuring efforts undertaken since the filing of the NOI up to the present time.

The following facts are particularly germane to the Application before the Court.

British Bazaar Company Limited ("Bazaar") and British Confectionery Company Limited ("Confectionery") are the primary operating entities of a group of companies. Bazaar is a company wholly owned by Confectionary.

Confectionery operates a manufacturing facility from leased premises located in St. John's, Newfoundland and Labrador. This facility specializes in the production of specialty paper products: specifically, break-open lottery and promotional products.

Bazaar administers the customer contracts for the purchase of break-open lottery and promotional products. To fulfill these contracts, Bazaar purchases tickets directly from Confectionery. Outside of the purchase and sale of tickets from Confectionery, the economic activity within Bazaar is negligible.

Confectionery and Bazaar undertook a number of restructuring initiatives prior to the NOI filing. These included:

(i) reorganizing the companies' ownership structure;
(ii) partnering with another company so as to increase the companies' ability to source product and sell to the United States and the central Canadian market;
(iii) hiring of a Chief Financial Officer in March 2018 and a new corporate accountant in October 2018; and
(iv) focusing on overhead cost reductions.

Since the date of the NOI Filing, the companies' activities have included, but were not limited to:

(i) working with the Proposal Trustee to complete statutory requirements, including giving notice to creditors and preparing the NOI Cash Flow;
(ii) meeting in person with both of the key customers, Atlantic Lottery Corporation ("ALC") and British Columbia Lottery Corporation;
(iii) Addressing issued identified by ALC;
(iv) holding preliminary discussions with potential lenders and equity sources;
(v) working with the Proposal Trustee to answer questions of creditors and establish payment arrangements regarding post-filing obligations;
(vi) working with the Proposal Trustee to organize discussions with the significant secured and unsecured creditors including Bank of Montreal

("BMO"), Atlantic Canada Opportunities Agency and Business Investment Corporation;

(vii) working with the Proposal Trustee to monitor actual cash flow, and reporting on variances to the NOI Cash Flow; and

(viii) working with the Proposal Trustee to develop a Confidential Information Memorandum ("CIM") in support of the search for alternative financing (which is scheduled to be circulated immediately after an extension being granted).

As noted in the 2nd Report of the Proposal Trustee, during the period since the filing of the NOI the Applicants have continued operations in the ordinary course of business, without any significant deviation from the cashflow projections.

On this hearing an extension has been requested to March 5, 2019. The maximum permissible extension is to that date (45 days from January 18, 2019).

The professional advisors of the Companies also seek an administrative charge, but that charge being limited to the sum of $100,000. This matter was on the docket at the last hearing, but the request was not pursued at that time.

ARGUMENT

Each of the substantive order requests are dealt with in turn.

The Extension

The Applicants makes application to the court pursuant to section 50.4(9) of the *BIA*:

> 50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant

> the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (*c*) no creditor would be materially prejudiced if the extension being applied for were granted.

As a starting point, a useful elucidation of the requisite approach to section 50.4(9) is to be found in *Re Lockhart Saw Ltd*[3]. and the cases cited therein:

> 5 The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forward a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: *Doaktown Lumber Ltd., Re* (1996), 39 C.B.R. (3d) 41 (N.B. C.A.) at paragraph 12.
>
> 6 In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See *Cantrail Coach Lines Ltd., Re* (2005), 10 C.B.R. (5th) 164 (B.C. Master) and *Convergix Inc., Re*, [2006] N.B.J. No. 354 (N.B. Q.B.)

With this in mind, each of the three branches of the test which the Applicants must satisfy are dealt with separately.

Good faith and Due Diligence

The Applicants have clearly acted in good faith and with due diligence.

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[3] 2007 NBQB 93 [Tab 1]

The filing of the NOI by the Applicants was a prudent step given that:

(a) unsecured creditors might obtain judgments against the Applicants which might interfere with or otherwise prejudice a restructuring of debt; and

(b) BMO had given the Applicants notices of intention to enforce security pursuant to section 244 of the *BIA*.

The court's attention is drawn to *Re Convergix Inc.*[4], and particularly paragraph 39 thereof, as examples satisfying the court that the Applicants are acting with good faith and due diligence. It is noted that the Applicants have retained a trustee, and they have been working on developing a proposal with the assistance of the Proposal Trustee, and now seek time to proceed with a CIM.

It is submitted that it is clear the Applicants have acted in good faith and with due diligence, and that they continue to so act.

Likelihood of a Viable Proposal

There is evidence of the likelihood of a viable proposal being made, as opined by the Proposal Trustee. That Proposal Trustee has opined that a successful restructuring will require new financing or an equity injection. The CIM is designed to solicit same.

Re Kocken Energy Systems Inc.[5] is a recent case where the senior secured creditor, coincidentally BMO, took the position that the bank would not vote in favour of any proposal, and thus there could be no likelihood of a viable proposal. Justice Moir in that case concluded:

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[4] 2006 NBQB 288 [Tab 2]
[5] 2017 NSSC 80 [Tab 3]

19 Next is the requirement that a viable proposal is likely to be made.

20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.

21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.

22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.

23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and

> need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

The extension was granted, and ultimately the bank voted in favour of the proposal made[6].

Here the reasonable level of effort is readily apparent in the 2nd Report of the Proposal Trustee. A great deal of work has been done in laying the foundation for a successful process. There is a "better than even chance" of a viable proposal being made.

No Creditor Would Be Materially Prejudiced

There is no evidence that any creditor would be materially prejudiced by the stay being sought. Indeed, the opposite is true. The creditors will benefit from an orderly process rather than a scramble to judgment or a straight bankruptcy.

In respect of BMO, while receivables secured to the bank will be used to finance ongoing operations, the same will be replaced by new receivables so that no prejudice will result.

Summary on the Issue

It is respectfully submitted that the Applicants have adduced satisfactory evidence to show:

(a) that they have acted, and are acting, in good faith and with due diligence;

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[6] Re Kocken Energy Systems Inc., 2017 NSSC 215 [Tab 4]

(b) that they will likely be able to make a viable proposal if the extension being applied for is granted; and

(c) that no creditor will be materially prejudiced if the extension is granted.

Administrative Charge

The relevant parts of section 64.2 read:

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

There is little caselaw on the point, and the granting of an administrative charge is common in insolvency proceedings. The charge is not intended to substitute for payments of professional fees by the insolvent as the matter progresses, but rather as a

backstop to ensure that the professional fees are paid should the proposal process be unsuccessful.

For example, should the restructuring fail, as a result of no further extension being sought or a Proposal being voted down by the creditors, an automatic bankruptcy would occur. In that case, without an administrative charge the professional advisors would be unsecured for their outstanding work in progress, disbursements and outstanding invoices. It is precisely this situation that section 64.2(1) is designed to avoid.

An administrative charge was addressed in *Re Colossus Minerals Inc*[7]. The court determined that the services of the professional advisors were essential to a successful proceeding under the *BIA*.

That is also the case in this proceeding. As the secured creditors have notice of the charge, and the charge is relatively modest, it is respectfully submitted that this is an appropriate case for the charge to be granted.

All of which is respectfully submitted.

BOYNECLARKE LLP

Tim Hill, Q.C.
TH/jb

[7] 2014 ONSC 514 [Tab 5]

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TAB 1

2007 NBQB 93
New Brunswick Court of Queen's Bench

Lockhart Saw Ltd., Re

2007 CarswellNB 123, 2007 NBQB 93, 156 A.C.W.S. (3d) 290, 312 N.B.R. (2d) 19, 31 C.B.R. (5th) 116, 806 A.P.R. 19

In the Matter of the Proposal of Lockhart Saw Limited

P.S. Glennie J.

Heard: February 2, 2007
Judgment: February 9, 2007*
Docket: 12795, Estate No. 51-919744

Counsel: R. Gary Faloon, Q.C. for Lockhart Saw Limited

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Company was owner of property — Company filed notice of intention to make proposal for bankruptcy — Notice of intention provided that third party had consented to act as trustee of estate — Company canvassed market in effort to find purchaser of property — Company brought application to extend time for filing of proposal for bankruptcy — Application granted — Company's creditors had not demonstrated material prejudice or made attempts to quantify its supposed losses if extension was granted — Company had exhibited good faith and due diligence in actions to date — Company was working on restructuring and had worked to successfully reduce its overall indebtedness — Company would likely be able to make viable proposal if granted extension.

Table of Authorities

Cases considered by *P.S. Glennie J.*:

Acepharm Inc., Re (1998), 1998 CarswellOnt 1801, 4 C.B.R. (4th) 19 (Ont. Bktcy.) — considered

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

Cantrail Coach Lines Ltd., Re (2005), 10 C.B.R. (5th) 164, 2005 BCSC 351, 2005 CarswellBC 581 (B.C. Master) — referred to

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

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — referred to

Doaktown Lumber Ltd., Re (1996), 39 C.B.R. (3d) 41, (sub nom. *Doaktown Lumber Ltd. v. BNY Financial Corp. Canada)* 174 N.B.R. (2d) 297, (sub nom. *Doaktown Lumber Ltd. v. BNY Financial Corp. Canada)* 444 A.P.R. 297, 1996 CarswellNB 100 (N.B. C.A.) — referred to

Scotia Rainbow Inc. v. Bank of Montreal (2000), 18 C.B.R. (4th) 114, 2000 CarswellNS 216, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 186 N.S.R. (2d) 153, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 581 A.P.R. 153 (N.S. S.C.) — referred to

Statutes considered:

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

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

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

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 69.4(a) [en. 1992, c. 27, s. 36(1)] — considered

APPLICATION by company to extend time for filing of proposal for bankruptcy.

***P.S. Glennie J.* (orally):**

1 Lockhart Saw Limited, ("Lockhart"), seeks an order pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, R.C.S. 1985, c.B-3 ("BIA") extending the time for filing a Proposal.

Overview

2 Lockhart filed a Notice of Intention to Make a Proposal under s. 50.4(1) of the BIA on January 3, 2007, (the "Notice of intention"). The Notice of Intention provided that A.C. Poirier & Associates Inc., ("ACP"), had consented to act as Trustee under a Proposal.

3 Since the filing of the proposal, Lockhart says it has been canvassing the market in an effort to find a purchaser of its real property situate in the City of Saint John. At present, based on continued customer support and discussions with certain stakeholders, it appears that there is a reasonable opportunity to complete the successful reorganization and sale of Lockhart's real property.

4 ACP is of the opinion that the creditors of Lockhart will not be materially prejudiced by the requested extension. No creditor has demonstrated material prejudice or attempted to quantify its supposed losses if an extension is granted.

Analysis

5 The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forward a proposal as

long as a court is satisfied that the requirements of section 50.4(9) are met: *Doaktown Lumber Ltd., Re* (1996), 39 C.B.R. (3d) 41 (N.B. C.A.) at paragraph 12.

6 In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See *Cantrail Coach Lines Ltd., Re* (2005), 10 C.B.R. (5th) 164 (B.C. Master) and *Convergix Inc., Re*, [2006] N.B.J. No. 354 (N.B. Q.B.)

Acting in Good Faith and with Due Diligence

7 Lockhart has been diligently working on a restructuring for over a year. It has retained the professional services of ACP to assist it in restructuring, has successfully reduced its overall indebtedness and is actively attempting to either sell or lease its real property. I am accordingly satisfied that Lockhart has acted, and is acting, in good faith and with due diligence.

Ability to Make a Viable Proposal

8 The test for whether Lockhart would likely be able to make a viable proposal if granted the extension is whether Lockhart would likely (as opposed to certainly) be able to present a proposal that seems on its face to be reasonable to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) Justice Farley was of the opinion that "viable" meant reasonable on its face to a reasonable creditor and that "likely" did not require certainty but meant "might well happen" "probable" "to be reasonably expected". See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S. S.C.).

9 On the evidence before me I find that there appears to be a core business to form the base of a business enterprise; that management is key to the ongoing viability of the business and that management appears committed to such ongoing viability; and that debts owed to creditors after sale of the real property can likely be serviced by the restructured entity.

10 Accordingly, I am satisfied that Lockhart would likely be able to make a viable proposal.

Absence of Material Prejudice to Creditors

11 On the evidence I conclude that Lockhart has honoured all of its post-filing obligations and is in a position to honour these obligations during the extension period. As well, it appears that the position of secured creditors has not and will not be adversely affected for several reasons including, mortgage payments continue to be paid and the building on Lockhart's real property continues to be insured and properly maintained; the book value of the assets forming the security of Royal Bank of Canada, ("RBC"), exceeds the amount owed to RBC by a significant amount; Lockhart continues in operation and made a profit from its operation for the month of January, 2007; Lockhart reduced the amount outstanding on its RBC operating line of credit in January, 2007; Lockhart is actively trying to lease or sell its real property; over the past year Lockhart has reduced its indebtedness to RBC from nearly $800,000 to under $200,000; and Lockhart's real property has an assessed value for real property taxes of $419,700.

12 The material prejudice referenced in section 69.4(1) of the BIA is an objective prejudice as opposed to a subjective prejudice. In other words, it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. See *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]).

13 In *Acepharm Inc., Re* (1998), 4 C.B.R. (4th) 19 (Ont. Bktcy.) the court refused to lift a stay under section 69.4 of the BIA as the moving party pleaded subjective prejudice, which did not constitute material prejudice. At paragraph 10 the court cited with approval the following passage from *Honsberger, Debt Restructuring* at section 8-44:

> what amounts to material prejudice must be decided on a case-by-case basis. It is a broad concept...the Bankruptcy Court being a court of equity must consider the impact of a stay on the parties. This will involve a weighing of the

interest of the debtor against the hardship incurred on the creditor. This has been referred to as the "balance of hurt" test.

14 On the evidence, I conclude that the proposed extension would not materially prejudice Lockhart's creditors.

Disposition

16 In the result an order will issue pursuant to section 50.4(9) of the BIA extending the time for filing a proposal to March 19, 2007.

Application granted.

Footnotes

* A corrigendum issued by the court on April 13, 2007 has been incorporated herein.

2

TAB 2

Case Name:
Convergix Inc. (Re)

IN THE MATTER of the Proposals of Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., InteliSys Aviation Systems Inc.

[2006] N.B.J. No. 354

[2006] A.N.-B. no 354

2006 NBQB 288

2006 NBBR 288

307 N.B.R. (2d) 259

24 C.B.R. (5th) 289

150 A.C.W.S. (3d) 765

2006 CarswellNB 460

Court Nos. 12381, 12382, 12383, 12384 and 12385

Estate Nos. 51-879293, 879309, 879319, 879326

and 879332

New Brunswick Court of Queen's Bench
In **Bankruptcy and Insolvency**
Judicial District of Saint John

P.S. Glennie J.

Heard: July 27, 2006.
Oral judgment: August 1, 2006.

(44 paras.)

*Insolvency law -- Proposals -- Notice of intention to file a proposal -- Court approval -- Time for filing -- Related insolvent corporations were permitted to file a joint proposal pursuant to the **Bankruptcy and Insolvency** Act, without a court order authorizing the filing -- The time to file the proposal was extended, as the applicants demonstrated good faith and were diligently working on the restructuring -- Extension would not materially prejudice creditors.*

Application by four related insolvent corporations to determine whether they were permitted to file a joint proposal pursuant to the **Bankruptcy and Insolvency** Act -- Applicants also sought extension of time for filing proposal -- The four applicant corporations were wholly owned subsidiaries of InteliSys Aviation Systems, and had operated as one entity since 2001 -- They had one directing mind, had the same directors, and the same bank account -- Superintendent of Bankruptcy advised that it would not accept applicants' joint filing of Notice of Intention to Make a Proposal where there was no Court order authorizing the filing -- HELD: Application allowed -- The filing of a joint proposal under the BIA was permitted, and a formal court order was not required -- The cost of preparing separate proposals and vetting all creditors' claims to determine which corporation they were actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring the insolvent corporations -- A joint filing would occasion no prejudice to any of the creditors -- An extension of time to file the proposal was granted, as the applicants demonstrated good faith and were diligently working on the restructuring -- Further, if granted the extension, the applicants would likely be able to make a viable proposal, as management appeared to be committed to the ongoing viability of the business -- Extension would not materially prejudice creditors.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 2, s. 50.4(9), s. 50(2), s. 54(3), s. 66.12(1.1)

Income Tax Act (Canada),

Counsel:

R. Gary Faloon, Q.C., on behalf of the Applicants

DECISION

1 **P.S. GLENNIE J.** (orally):-- The issue to be determined on this application is whether related insolvent corporations are permitted to file a joint proposal pursuant to the ***Bankruptcy and Insolvency Act***. For the reasons that follow, I conclude that such corporations are permitted to do so.

OVERVIEW

2 The Applicants, Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., and InteliSys Aviation Systems Inc. (the "Insolvent Corporations") are each wholly owned subsidiaries of InteliSys Aviation Systems of America Inc. ("IYSA").

3 For all intents and purposes, the Insolvent Corporations have operated as one entity since 2001. The Insolvent Corporations have one "directing mind" and have the same directors. The Insolvent Corporations maintain one bank account.

4 The Insolvent Corporations are considered related companies under the provisions of the *Income Tax Act (Canada)*.

5 Payments to all creditors of the Insolvent Corporations, including some of the major creditors such as Atlantic Canada Opportunities Agency have all been made by one of the Insolvent Corporations, namely, InteliSys Aviation Systems Inc., ("InteliSys"), even though loan agreements may have been made with other of the Insolvent Corporations. Similarly, all employees of all the Insolvent Corporations are paid by InteliSys.

Filing of Notice of Intention to make a Proposal

6 The Insolvent Corporations attempted to file a joint Notice of Intention to Make a Proposal pursuant to the ***Bankruptcy and Insolvency Act*** (the "BIA") on June 27th, 2006 in the Office of the Superintendent of Bankruptcy ("OSB"). By letter dated June 28th, 2006 the OSB advised that it would not accept the filing of this joint Proposal.

7 On June 29th, 2006 each of the Applicants filed in the OSB a Notice of Intention to Make a Proposal. The Insolvent Corporations have each filed in the OSB a Projected Monthly Cash-Flow Summary and Trustee's Report on Cash-Flow Statement.

Extension Pursuant to Subsection 50.4(9) of the BIA

8 IYSA is required to file quarterly reports with the U.S. Securities and Exchange Commission in Washington, D.C. It is a publicly traded security, over-the-counter, on the NASDAQ. The Applicants say the implications on IYSA created by the financial situation of the Insolvent Corporations must be considered. The Applicants assert that the initial 30 day period of protection under the BIA is not sufficient time for all of the implications on IYSA to be determined and dealt with.

9 The Applicants say that their insolvency was caused by the unexpected loss of their major client which represented in excess of 25% of their combined revenue. They say that time is needed to assess the market and determine if this revenue can be replaced and over what period of time.

10 The Insolvent Corporations and Grant Thornton Limited have completed a business plan. It has been presented to investors and/or lenders. The Insolvent Corporations will need more time than the initial period of protection of 30 days under the BIA to have these lenders and investors consider the business plan and make lending and/or investment decisions.

11 Counsel for the Applicants advise the Court that the OSB does not object to joint proposals being filed by related corporations but requires a Court Order to do so.

12 The Insolvent Corporations host systems for several Canadian airlines. They provide all aspects of reservation management including booking through call centers and web sites as well as providing the capability to check in and board passengers. The total reservation booking volume is about 1300 reservations per day which results in a revenue stream of $520,000 per day. The applicants say the loss of revenue for even one day would be catastrophic. They assert that serious damage would be caused to the various client airlines. The Applicants also say it would take at least 30 days to bring another reservation system online.

ANALYSIS

13 There are no reported decisions dealing with the issue of whether a Division I proposal can be made under the BIA on a joint basis by related corporations. There are two decisions, one dealing with partners [***Howe Re,*** [2004] O.J. No. 4257, 49 C.B.R. (4th) 104, 2004 CarswellOnt 1253] and the other dealing with individuals [***Nitsopoulos Re,*** [2001] O.J. No. 2181, 25 C.B.R. (4th) 305, 2001 CarswellOnt 1994].

14 Section 2 of the BIA provides that persons' includes corporations.

15 When interpreting the breadth of the BIA section dealing with proposals, I am mindful of the following comments from ***Bankruptcy and Insolvency Law of Canada*** by Hon. L.W. Houlden and Hon. G.B. Morawetz, Third Edition Revised, (2006, Release 6, pages 1-6 and 1-6.1):

> The *Act* should not be interpreted in an overly narrow, legalistic manner: *A. Marquette & Fils Inc. v. Mercure,* [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, 10 N.R. 239; *Re Olympia and York Developments Ltd.* (1997), 143 D.L.R. (4th) 536, 45 C.B.R. (3d) 85, 1997 CarswellOnt 657 (Ont. Gen. Div.); *Sun Life Assurance Co. of Canada v. Revenue Canada (Taxation)*, 45 C.B.R. (3d) 1, 47 Alta L.R. (3d) 296, 1997 CarswellAlta 254, [1997] 5 W.W.R. 159, 144 D.L.R. (4th) 653 (C.A.); *Re County Trucking Ltd.* (1999), 10 C.B.R. (4th) 124, 1999 CarswellNS 231 (N.S.S.C.). It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided: *Re Handelman* (1997), 48 C.B.R. (3d) 29, 1997 CarswellOnt 2891 (Ont. Gen. Div.).
>
> The *Act* puts day-to-day administration into the hands of business people -- trustees in bankruptcy and inspectors. It is intended that the administration should be practical not legalistic, and the *Act* should be interpreted to give effect to this intent: *Re Rassell* (1999), 177 D.L.R. (4th) 396, 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.).

16 In ***Howe,*** *supra,* the debtors brought a motion for an order directing the OSB to accept for filing a joint Division I proposal, together with a joint statement of affairs, joint assessment certificate and joint cash flow statement.

17 The OSB accepted that the filing of a joint Division I proposal by the debtors was appropriate as the debts were substantially the same and because the joint filing was in the best interests of the debtors and their creditors. However, the OSB attended at the motion to make submissions regarding its policy in relation to the filing of joint Division I proposals. The policy stipulated that the OSB would refuse the filing of a proposal that did not on its face meet the eligibility criteria set out in the BIA. The policy further provided that the OSB would refuse the filing of a joint Division I proposal where the trustee or the debtors failed to obtain a Court Order authorizing the filing.

18 Registrar Sproat rejected the OSB's position as expressed in the policy. He held that the OSB had no authority to reject the filing of a proposal, subject to the proposal meeting the requirements of section 50(2) of the BIA, namely the lodging of documents.

19 The Registrar reviewed case law dealing with the permissibility of joint Division I proposals under the BIA. He found that, while not explicitly authorized, the provisions of the BIA could reasonably be interpreted as permitting a trustee to file with the official receiver a joint Division I pro-

posal. In this regard he quoted from his comments in ***Re Shireen Catharine Bennett,*** Court File No. 31-207072T, where he stated:

> It seems to me that the decision of Farley J. in *Re Nitsopoulos* (2001) 25 C.B.R. (4th) 305 (Ont. S.C.) is clear on the issue that the BIA does not prohibit the filing of a joint proposal and ... does not formally approve/permit a joint proposal to be filed. In my view, it would be consistent with the purpose of the BIA and most efficient and economical to extend the decision in *Re Nitsopoulos* and hold that joint proposals may be filed. ... I am not persuaded that a formal court order is required to permit a joint proposal to be filed. It seems to me that potential abuses can be avoided in the fashion outlined at paragraph 9 of *re Nitsopoulos* i.e. on an application for court approval. ... and determination of abuse (if any) can be dealt with on that application.
>
> Thus to summarize, no order is necessary for a joint Division I proposal to be filed. In the event that the Trustee has difficulty in the said filing the matter may be restored to my list and the OSB shall attend on the date agreed upon.

20 In the result, the Registrar ordered the OSB to accept for filing the joint proposal. The Court further held that a joint Division I proposal is permitted under the BIA and that the OSB must accept the filing of the joint proposal even in the absence of a Court Order authorizing such filing.

21 In ***Nitsopoulos****, supra,* a creditor of each of Mr. and Mrs. Notsopoulos brought a motion for an order that a proposal could not be filed on a joint basis.

22 The joint proposal lumped all unsecured creditors of the Nitsopouloses into one class, whether such creditors were creditors of the husband, the wife, or both. Justice Farley identified the issue as whether the BIA allowed a joint Division I proposal to be made.

23 He focused on an important distinction between a Division II consumer proposal and a Division I proposal. A Division I proposal must be approved by the Court to be effective. In contrast, a Division II proposal need not be specifically approved by the Court unless the Official Receiver or any other interested party applies within fifteen days of creditor acceptance to have the proposal reviewed. Justice Farley stated that the role of the Superintendent in Bankruptcy, on a directive basis, is not necessary given that there will automatically be a review by the Court to determine whether the terms and conditions of the proposal are fair and reasonable and generally beneficial to the creditors. He concluded that this review would encompass a consideration equivalent to section 66.12(1.1) of the BIA such that it would be able to determine if a joint proposal should be permitted.

24 Justice Farley concluded that the BIA should not be construed so as to prohibit the filing of a joint Division I proposal.

25 In my opinion the filing of a joint proposal is permitted under the BIA and with respect to this case, the filing of a joint proposal by the related corporations is permitted. The BIA should not be construed so as to prohibit the filing of a joint proposal. As well, I am not persuaded that a formal court order is required to permit a joint proposal to be filed.

26 In this particular case, the affidavit evidence reveals various facts which support the view that a joint filing is in the best interest of the Insolvent Corporations and their creditors.

27 I am satisfied that the Insolvent Corporations have essentially operated as a single entity since 2001. Payments to all creditors have been made by InteliSys, even though the loan agreements may have been made with other of the insolvent corporations. Inter-corporate accounting for the Insolvent Corporations may not reflect these payments or transactions.

28 In reaching the conclusion that a joint filing is in order in this case, I have taken the following factors into consideration:

(a) The cost of reviewing and vetting all inter-corporate transactions of the Insolvent Corporations in order to prepare separate proposals would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(b) The cost of reviewing and vetting all arms-length creditors' claims to determine which Insolvent Corporation they are actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(c) The cost of reviewing and determining ownership and title to the assets of the Insolvent Corporations would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

29 In addition, certain of the Insolvent Corporations have only related party debt. Pursuant to section 54(3) of the BIA, a related creditor can vote against a proposal, but not in favor of the proposal. As a result, InteliSys (NS) Co. and InteliSys Acquisition Inc. cannot obtain the required votes for the approval of an individual proposal without a court order.

30 In my opinion, these considerations are consistent only with a finding that a joint proposal is the most efficient, beneficial and appropriate approach in this case.

31 In view of the reasoning in ***Howe*** and ***Nitsopoulos***, the interrelatedness of the Insolvent Corporations, the court review inherent in any Division I proposal, and the lack of any prejudice to the creditors of the Insolvent Corporations, I conclude that the Insolvent Corporations ought to be permitted to file a joint proposal.

32 In ***Re Pateman*** [1991] M.J. No. 221 (Q.B.), Justice Oliphant commented, "I have some serious reservations as to whether a joint proposal can be made save and except in the case of partners, but since I need not determine that issue, I leave it for another day."

33 In my opinion, the companies in this case are in effect corporate partners because they are so interrelated. They have the same bank account, the same controlling mind and the same location of their offices.

34 I am of the view that the filing of a joint proposal by related corporations is permitted under the BIA, and that on the facts of this case, an Order should issue authorizing such a filing. Such an Order is consistent with the principles underlying the interpretation of the BIA, and is in the best interests of all stakeholders of the Insolvent Corporations.

Extension of Time for Filing a Proposal

35 The Applicants also seek an order pursuant to **Section 50.4(9)** of the BIA that the time for filing a Proposal be extended by 45 days to September 10th, 2006.

36 The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of **section 50.4(9)** are met: ***Re Doaktown Lumber Ltd.*** (1996), 39 C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

37 An extension may be granted if the Insolvent Corporations satisfy the Court that they meet the following criteria on a balance of probabilities:

(a) The Insolvent Corporations have acted, and are acting, in good faith and with due diligence;
(b) The Insolvent Corporations would likely be able to make a viable proposal if the extension is granted; and,
(c) No creditor of the Insolvent Cororations would be materially prejudiced if the extension is granted.

38 In considering applications under **section 50.4(9)** of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See ***ReCantrail Coach Lines Ltd.*** (2005), 10 C.B.R. (5th) 164.

39 I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

(a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;
(b) The Insolvent Corporations have completed a business plan;
(c) The Insolvent Corporations are diligently working on the Restructuring;
(d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and
(e) Representatives of the Insolvent Corporations have met with outside investors.

40 The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

41 The Affidavit evidence in this case demonstrates that the Insolvent Corporations would likely be able to make a viable proposal as there appears to be a core business to form the base of a business enterprise; management is key to the ongoing viability of the business and management appears committed to such ongoing viability; and debts owing to secured creditors can likely be serviced by a restructured entity.

42 I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent

Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.

43 Accordingly, I conclude that each of the requirements of **section 50.4(9)** of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

CONCLUSION AND DISPOSITION

44 In the result, an Order will issue that the Insolvent Corporations may file a joint proposal pursuant to the provisions of the BIA, and that, pursuant to **Section 50.4(9)** of the BIA, the time for filing a Proposal is extended by 45 days to September 10th, 2006.

P.S. GLENNIE J.

cp/e/qw/qlbxm/qlbxs

3

TAB 3

2017 NSSC 80
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

2017 CarswellNS 187, 2017 NSSC 80, 277 A.C.W.S. (3d) 21, 50 C.B.R. (6th) 168

In the Matter of the Proposal of Kocken Energy Systems Inc.

Gerald R.P. Moir J.

Heard: January 5, 2017
Judgment: January 10, 2017
Written reasons: March 22, 2017
Docket: Hfx. 458774, 40675, Estate No. 51-2097016

Counsel: Tim Hill, Q.C., for Kocken Energy Systems Incorporated
Gavin MacDonald, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Applicant company manufactured process equipment for oil and gas industry — In 2011, two shareholders of company moved manufacturing from Alberta to Nova Scotia and company acquired plant in New Brunswick in 2015 and incorporated in Barbados — Company's main secured creditor bank had 3 million dollars in venture — Company brought motion for 45 day extension to file proposal for bankruptcy pursuant to Bankruptcy and Insolvency Act — Motion granted with conditions — Since cross-examinations had not been heard, there was no resolve to conflicting evidence on company's side and generalized opinions without raw facts on bank's side — However, judge was satisfied on three points that absence of information left bank and insolvency practitioners with serious questions relevant to bank's interest in company's inventory and receivables and they had rationally founded suspicion that equipment could be transferred to Barbados company without payment, compromising bank's interest in inventory and receivables — On conditional approval, reservation stemmed from strange purchase orders from Barbados company to Canadian company with large prices — It was ordered that company give four business days' notice of bank before shipping anything out of Canada and advise bank of amount to be paid and arrangements for payment.

Table of Authorities

Cases considered by *Gerald R.P. Moir J.*:

H & H Fisheries Ltd., Re (2005), 2005 NSSC 346, 2005 CarswellNS 541, 239 N.S.R. (2d) 229, 760 A.P.R. 229, 18 C.B.R. (5th) 293 (N.S. S.C.) — considered

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (2015), 2015 ONSC 5139, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315 (Ont. S.C.J.) — considered

Statutes considered:

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

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

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

s. 178 — considered

MOTION for 45 day extension to file proposal pursuant to *Bankruptcy and Insolvency Act*.

Gerald R.P. Moir J. **(orally):**

Introduction

1 Kocken Energy Systems Incorporated filed a notice of intention to make a proposal on December 7, 2016. It moves to extend the deadline for filing the proposal by the maximum allowed under the *Bankruptcy and Insolvency Act*, forty five days. Its major secured creditor, the Bank of Montreal, opposes the extension. It says that the stay should end and Kocken should be bankrupt. Alternatively, the extension should be no more than thirty days.

Facts

2 Kocken manufacturers specialized process equipment for the oil and gas industry. The company's predecessor did business in Alberta since about 2005. By 2007, it had just two shareholders, William Famulak and Arthur Sager. In 2011, they decided to move manufacturing to Eastern Canada. In 2015, Kocken acquired a plant at St. Antoine, New Brunswick.

3 The Bank of Montreal provided financing to purchase the plant as well as current financing. Kocken also had a relationship with the Royal Bank of Canada.

4 On Tuesday, November 8, 2016 the Bank of Montreal stopped extending current credit. Kocken reverted to the Royal Bank. The Bank of Montreal invited PricewaterhouseCoopers to review Kocken's performance and make recommendations. PricewaterhouseCoopers prepared, and Bank of Montreal and Kocken endorsed, an engagement letter dated November 14. Mr. David Boyd took charge of the assignment. (I have an affidavit from him.)

5 PricewaterhouseCoopers studied the St. Antoine plant, read accounting records, and interviewed Kocken operatives until about November 21, 2015. After that, it reported to the Bank of Montreal. The bank issued a notice of intention to enforce security on November 25.

Kocken and Bank of Montreal Breakdown

6 I have the affidavit of Ms. Anna Graham for the bank. She swears to a debt well over $3 million dollars and security in the St. Antoine plant, personal property, accounts receivable, and inventory. She also swears to these defaults at para. 9 of her affidavit:

Based on the information available to BMO, the Borrower has breached its obligations to BMO including the following:

insufficient working capital to meet financial covenants, inability to fund current operations, entering into the Reorganization, as defined in the Boyd Affidavit, failing to provide financial statements and information, ceasing to conduct its banking with BMO and disposing of assets subject to the Security.

7 In para. 10, Ms. Graham swears that these defaults continue. She adds that Kocken failed to respond to requests for basic information. She offers her opinion that Kocken is deliberately hiding information.

8 At the heart of Ms. Graham's concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transferred to a related company recently incorporated in Barbados. That company is Kocken Energy Systems International Incorporated.

9 That this is the fundamental concern underlying the bank's decisions to suspend current financing, to enforce security, and to oppose the proposal is apparent from para. 16 of Mr. Boyd's affidavit as well as Ms. Graham's affidavit as a whole.

10 According to Mr. Sager, Kocken was simply a manufacturer. Most contracts for the sale of manufactured equipment and the intellectual property behind the equipment were with Mr. Famulak independently. Mr. Sager retained Mr. Rick Ormston, an accountant and consultant of Halifax about establishing a company that would be the design and engineering base for Mr. Famulak. That consultation lead to the Barbados company I mentioned, which I shall refer to as Kocken Barbados.

11 Mr. Ormston developed a plan, the details of which were unknown to the Bank of Montreal or PricewaterhouseCoopers. There are numerous contradictions between Mr. Boyd's affidavit and Mr. Sager's second affidavit, which responded to Mr. Boyd's. The contradictions concern what one said to the other, what Mr. Sager informed Mr. Boyd, and the subjects on which information was withheld or unavailable.

12 No one was cross-examined and I am in no position to resolve the evidentiary contradictions. The conflicting evidence is therefore unhelpful for making findings. Similarly, Ms. Graham's affidavit contains many generalized opinions without the raw facts required for findings on her subjects. I am, however, satisfied on three points.

13 Firstly, neither the Bank of Montreal nor PricewaterhouseCoopers knew the details of the Ormston plan. The absence of information left the bank and the insolvency practitioners with serious questions, itemized at para. 18 of Mr. Boyd's affidavit. Secondly, these questions were relevant to the bank's interest in Kocken inventory and receivables. Thirdly, the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment, compromising the bank's interest in inventory and receivables.

Recent Developments

14 In the last three working days, Kocken made some disclosure to the bank and PricewaterhouseCoopers. Most importantly, Kocken delivered a copy of the Ormston plan. It referred to draft documents that had not been disclosed yet, but the bank and the trustee must now know what the plan was really about.

Disposition

15 Subsection 50.4(9) provides three thresholds that the insolvent must prove before the court has any discretion to grant an extension:

(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.

16 I am not prepared to embrace the generalized allegations made in Ms. Graham's affidavit because this court makes findings on evidence of raw fact. Nor can I resolve the evidentiary contradictions between Mr. Sager and Mr. Boyd. What is left suggests good faith and due diligence.

17 I reject the submission that Kocken's initial evidence failed to disclose material facts. This submission is premised on the PricewaterhouseCoopers characterization of the relationship between Kocken and Kocken Barbados. As I said, the contradictions between the evidence of Mr. Boyd and Mr. Sager are irresolvable at present. The rest of the evidence supports good faith and due diligence.

18 I am satisfied on the first threshold.

19 Next is the requirement that a viable proposal is likely to be made.

20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.

21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.

22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.

23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

25 Finally, I have only one reservation about "no creditor would be materially prejudiced". The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices. They purport to be conditional on resolving issues between Kocken and the Bank of Montreal.

26 By virtue of its s. 178 security, the bank owns the inventory. The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first.

27 I can diminish my concern by exercising my inherent jurisdiction to control this proceeding and the parties to it. I will order that Kocken give four business days' notice to the bank before it ships anything out of Canada and, along with the notice, advise the bank of the amount to be paid and the arrangements for payment. In view of my willingness to make such an order, I find that no creditor will be prejudiced by the order extending time.

28 I am prepared to extend the period for filing a proposal by the full 45 days, counting from last Thursday.

Motion granted with conditions.

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TAB 4

2017 NSSC 215
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

2017 CarswellNS 598, 2017 NSSC 215, 282 A.C.W.S. (3d) 15, 51 C.B.R. (6th) 339

In the Matter of the Proposal of Kocken Energy Systems Incorporated

Gerald R.P. Moir J.

Heard: June 28, 2017
Judgment: August 11, 2017
Docket: Hfx. 458774

Proceedings: additional reasons to *Kocken Energy Systems Inc., Re* (2017), 2017 CarswellNS 187, 2017 NSSC 80, Gerald R.P. Moir J. (N.S. S.C.)

Counsel: Tim Hill, Q.C., for Kocken Energy Systems Incorporated
Gavin MacDonald, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Major secured creditor (bank) of oil and gas equipment manufacturer, K Inc., provided K Inc. with financing to purchase plant — Bank became concerned that K Inc. was transferring assets to related Barbados company, considered that K Inc. breached its obligations to have sufficient working capital to meet obligations, was unable to fund current operations, failed to provide financial statements and information, and was banking with another bank and disposing of secured assets — Bank withdrew credit and issued notice of intention to enforce security — K Inc. filed notice of intention to make proposal in bankruptcy and then obtained 45-day extension of deadline for filing proposal from court despite bank's opposition — Court granted extension on condition that K Inc. gave bank prior notice of any shipments out of Canada and payment arrangements therefor — Court noted bank's reasonable suspicion that equipment might be transferred to Barbados company without payment given strange purchase orders with very large prices from K Inc. Barbados to K Inc., and noted that extension would prejudice bank if used to deliver inventory off shore without first being paid — Extension decision was apparently interpreted in manner unfavourable to K Inc.'s reputation with some international businesses — K Inc. brought motion for order clarifying extension decision — Motion granted — Earlier decision was regrettably misinterpreted by some to cast doubt on K Inc.'s business efficacy — Reference to suspicion about equipment transfers was reference to bank's suspicion, not court's findings — Reference in earlier decision to concerns that K Inc. underwent some kind of reorganization and that its assets were being transferred to related, recently incorporated company in Barbados was statement about bank's concerns, not finding court made against K Inc. on that issue.

ADDITIONAL REASONS to judgment reported at *Kocken Energy Systems Inc., Re* (2017), 2017 NSSC 80, 2017 CarswellNS 187 (N.S. S.C.), extending bankrupt's time to file proposal in bankruptcy.

Gerald R.P. Moir J. **(orally):**

1 Last winter, the Bank of Montreal opposed Kocken's motion to extend time for it to make a proposal. I granted the motion on reasons given from the bench. Kocken requested transcription. The transcript was published.

2 I am told that the decision lead to news reports unfavourable to Kocken, and these reports hurt its reputation with some international businesses.

3 This summer I heard an uncontested motion to approve Kocken's proposal. I read the proposal and studied the Trustee's report. I found the creditors voted unanimously in favour of the proposal and the proposal provides a much better recovery for creditors than bankruptcy would have done. Therefore, I was prepared to grant the motion.

4 However, Kocken asked that I issue reasons in writing because of the news reports. I agreed. The reports should be corrected.

5 Also, we have here an example of something seldom written about but relevant in early challenges to a reorganization effort. A secured creditor who is able to veto a proposal, or a plan of arrangement, vehemently opposes the effort from the beginning and says it is doomed because the creditor will exercise its veto when the time comes. That forecast does not always come true.

6 My earlier decision was published as *Kocken Energy Systems Inc., Re*, 2017 NSSC 80 (N.S. S.C.). I summarized the bank's concerns and expressed a reservation. I also noted the banks present intention to veto any proposal.

7 I said at para. 8, "At the heart of [the bank's] concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transfered to a related company recently incorporated in Barbados." Note that this is a statement about the bank's concerns, and it would be wrong to report that the court made any finding against Kocken on that score. Further, at the time of the hearing for an extension, Kocken made a disclosure relevant to the expressed concern. See para. 14.

8 At para. 13, I said "...the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment...". This refers to the bank's suspicion, not my findings.

9 I found Kocken acted in good faith (para. 18). I found there was a good chance a viable proposal would be developed (para. 24). Subject to one reservation, I found that no creditor would be materially prejudiced by the extension (para. 25).

10 I said at para. 25, "The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices." I said at para. 26, "The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first." The solution was an injunction restraining Kocken from shipping product out of Canada without notice to the bank: para. 27. Nothing came of this.

11 As I said, the creditors voted unanimously to accept the proposal that was developed further in the extended period. That included the positive vote of the Bank of Montreal, who is to receive substantial funds under a formula and write off any balance.

12 In conclusion, the outcome bore out Kocken's submission that a threat to veto a developing proposal is always subject to assessment. See para. 21. I regret that my earlier decision was misinterpreted by some to cast doubt on Kocken's business efficacy. I have granted the requested order.

Additional reasons clarifying original judgment extending time to file proposal issued.

End of Document

Tab 5

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XX Miscellaneous

Headnote

Bankruptcy and insolvency --- Miscellaneous
Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant's property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant's directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.

Table of Authorities

Statutes considered:

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

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

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

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

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

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

s. 64.2 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

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

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

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

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

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

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

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

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

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

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

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

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

Administration Charge

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

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

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

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

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

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and

liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

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

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

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

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

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

The SISP

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

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

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

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

26 Lastly, the Proposal Trustee supports the proposed SISP.

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

Engagement Letter with the Financial Advisor

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

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

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is

equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

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

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

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

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

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

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

Extension of the Stay

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

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

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

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

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

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

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.