

COURT FILE NUMBER 643 of 2016

COURT QUEEN'S BENCH FOR SASKATCHEWAN
 IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

APPLICANTS 101133330 SASKATCHEWAN LTD. and
 101149825 SASKATCHEWAN LTD.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF 101133330 SASKATCHEWAN LTD. and 101149825 SASKATCHEWAN LTD.

**BRIEF OF LAW FILED ON BEHALF OF THE APPLICANTS,
101133330 SASKATCHEWAN LTD. and 101149825 SASKATCHEWAN LTD.**

I. INTRODUCTION

1. Affinity supported 33330's efforts to improve the Campus and Orr Centre (the "Property") throughout these proceedings, which were undertaken with a view to benefitting the stakeholders as a whole. Consequently, the unsatisfactory outcome of the Colliers Sales Process and the increased debt now owing to Affinity as a result of the DIP financing were two of the primary considerations behind the development of the Stalking Horse Sale Process, which was itself suggested by that financial institution as being the best available path forward at this time.

2. The proposed Stalking Horse Sale Process is supported by the Monitor. As before, the Property will be exposed to a large number of prospective purchasers, and the professional advice received from Colliers is that the Colliers Sales Process is unlikely to have benefitted from a longer listing period, such that the 30 day timeframe proposed is an appropriate one based on the evidence before the Court.

3. The relevant factors articulated in the applicable *CCAA* case law discussed below therefore militate in favour of approving the Stalking Horse Sale Process, the completion

of which will also require an extension of the stay of proceedings.

II. ISSUES

4. The relief sought on this application gives rise to the following issues:
 - A. whether this Honourable Court should exercise its discretion to authorize the Stalking Horse Sale Process; and
 - B. whether the stay of proceedings should be extended in the circumstances.

III. DISCUSSION

A. Approval of the Proposed Sales Process

(i) The Nortel Criteria

5. S. 36 of the *CCAA* outlines the considerations for the Court on an application to approve a sale of the debtor company's assets outside of the ordinary course of business; however, as noted by Morawetz J. in *Re Brainhunter Inc.*,¹ the approval of a sales process is itself a distinct exercise attracting a stand-alone test:

13 ... 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?

...

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

¹ 2009 CanLII 72333 (ON SC), 2009 CarswellOnt 8207.

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.

6. Applying the foregoing test to the evidence adduced herein:

- (a) the Companies implemented their restructuring strategy for the Property, but were unsuccessful in obtaining the anticipated value for reasons outside of their control;
- (b) a sale of the Property in a manner that is supported by Affinity, whose combined pre-filing debt and subsequent DIP advances makes it by far the largest creditor in these proceedings, is therefore warranted at this time;
- (c) the outcome of the Stalking Horse Sale Process is not anticipated to benefit the whole economic community, but instead likely to result in a loss to Affinity, whose economic interests as the primary secured creditor with a first charge on the Property outweigh those of the other creditors; and
- (d) there is no better viable alternative to the Stalking Horse Sale Process of which 33330 is aware at present.

7. In the absence of a *bona fide* objection supported by admissible evidence of prejudice, the Stalking Horse Sale Process ought to be approved in the Companies' respectful submission.

B. The Stay Extension

8. As per CCAA, ss. 11.02(2) and (3), respectively, this Honourable Court may extend the stay of proceedings under an Initial Order for such period of time as is deemed

appropriate if the Companies can satisfy the Court that circumstances exist that make the order appropriate, and the Companies are continuing to act in good faith and with due diligence.

9. The timeline for completing the Stalking Horse Sale Process necessitates an extension of the stay period, and the May 6, 2019 extension date chosen will ensure that the Companies have adequate time to bring the matter back before this Honourable Court in the event a Superior Offer is obtained. In the event there is no Superior Offer, then the Companies will be back before the Court at an earlier date to implement the Stalking Horse Credit Bid.

10. The affidavit material filed evidences the Companies' good faith efforts to deal with the unsatisfactory outcome of the Colliers Sales Process, and there have been no allegations that the Companies are not acting in good faith and with due diligence, which is confirmed by the Monitor in its Tenth Report. The statutory requirements to grant an extension of the stay have accordingly been met.

V. CONCLUSION

11. For all the reasons set forth above, the Companies respectfully request that this Honourable Court grant an Order in the form of the draft Order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of February, 2019.

McDOUGALL GAULEY LLP

Per: 

Solicitors for the applicants,
101133330 Saskatchewan Ltd. and
101149825 Saskatchewan Ltd.

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TABLE OF AUTHORITIES

1. *Re Brainhunter Inc*, 2009 CanLII 72333 (ON SC), 2009 CarswellOnt 8207.

TAB 1

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.

Subject: Insolvency

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

MOTION by applicants for extension of stay and for approval of bid process and agreement.

***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.