

2. The Stay of Proceedings granted by the Initial Order expired at 11:59 p.m. (local Saskatchewan time) on Sunday, June 19, 2016, since which time the following additional extensions have been granted:
 - (a) on June 13, 2016, the Honourable Justice G.A. Meschishnick granted an Order extending the Stay of Proceedings until 11:59 p.m. on August 31, 2016;
 - (b) on August 17, 2016, the Honourable Justice G.A. Meschishnick granted an Order extending the Stay of Proceedings until 11:59 p.m. on January 1, 2017; and
 - (c) on December 22, 2016, the Honourable Justice G.A. Meschishnick granted an Order extending the Stay of Proceedings until 11:59 p.m. on June 12, 2017 (the “**Third Extension Order**”).
3. Since the Third Extension Order, the Applicants’ efforts have been focused primarily on improving the value of the Campus and Orr Centre.
4. With respect to the latter, a strategy has been formulated and the requisite supporting work is presently underway for a rezoning application to the City of Regina, which the Applicants anticipate will result in a significant increase to the bare land value of the Campus. The outcome of that application will not, however, be known until 2018; consequently, an extension of the present stay period is required to obtain municipal approval. The Applicants’ consultant is presently projecting a similar timeframe for the approval of the Amended Willows Concept Plan in Saskatoon, such that it appears the overarching land development strategies will dovetail in early 2018.
5. In the meantime, the Applicants are working towards rehabilitating the Orr Centre itself into an income producing asset. The professional advice received by the Applicants is that the value of the Orr Centre itself would benefit from a number of repairs to the facilities and HVAC equipment, as well as the demolition of certain buildings which has the potential to significantly decrease the ongoing property tax assessment and is supported by current tenants.

6. Additional DIP Financing is, however, required in order to complete this additional work. The Applicants are therefore requesting approval of a Secondary DIP Facility in the amount \$500,000.00.
7. The role to be played by the Campus and Orr Centre in the forthcoming Plan was previously unknown. It now appears that, provided certain steps are taken, these assets can play a much larger role in funding the Plan than could have previously been foreseen. Consequently, more time and financing is necessary to bring the Applicants' strategy to fruition. The Applicants are therefore seeking a further stay of proceedings until December 24, 2017 (the "**Fourth Extension**").

II. ISSUES

8. The Applicants submit that followings issues arise on this application:
 - A. Should this Honourable Court extend the Stay of Proceedings?
 - a. Is it appropriate in the circumstances to extend the Stay of Proceedings?
 - b. Have the Applicants acted in good faith and with due diligence?
 - c. If granted, how long should the Stay of Proceedings be extended?
 - B. Should the Applicants be entitled to further Debtor-in-Possession Financing?
 - C. Should the Confidential Calyniuk Affidavit be sealed and remain confidential?

III. DISCUSSION

A. Extending the Stay of Proceedings

9. Subsection 11.02(2) of the CCAA provides that a court may extend the stay of proceedings under an Initial Order for such period of time as is deemed appropriate. The onus placed upon the debtor in making such an application is established by subsection 11.02(3):

11.02(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

10. As will be canvassed in more detail below, the Applicants respectfully submit that granting an extension of the stay of proceedings is appropriate in the circumstances and that they are continuing to act in good faith and with due diligence in their restructuring efforts.

i. The Extension is Appropriate in the Circumstances:

11. In determining whether an extension of the Stay is “appropriate” the Court considers, amongst other things:
- (a) whether the extension sought furthers the underlying purposes of the CCAA, which are to “avoid the social and economic losses resulting from liquidation of an insolvent company” (*Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 70, [2010] 3 SCR 379 [TAB 1]) by facilitating a plan of arrangement or compromise between the debtors and creditors;
 - (b) the debtor’s progress during the previous stay period toward a restructuring;

- (c) whether creditors will be prejudiced if the court grants the extension; and
 - (d) the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension (*Federal Gypsum Co., Re*, 2007 NSSC 347 at paras 24-29, 40 CBR (5th) 80 (NS SC) [TAB 2]).
12. The underlying purposes of the CCAA are best served by granting the extension sought in the circumstances because the two overarching plans for improving the primary assets are not projected to be completed until 2018. Allowing the two redevelopment processes to run their respective courses will result in a very significant increase in the bare land values of both the 825 Land and the Campus, over and above what could currently be expected. The debts secured against each are significant, and both the secured and unsecured creditors will experience very large losses if these assets are liquidated in their current condition.
13. The Applicants and their consultant have made considerable progress in Regina since the Third Extension. The servicing capacity and permissible types and density of development for the Campus have been determined, and it has been professionally surveyed, allowing for a multitude of site plans to be developed resulting in the present strategy to rezone. The anticipated increase in the bare land value is something that could not have been foreseen without the expert work of the Applicant's consultant and will be of significant benefit to all stakeholders as it will assist in generating a much larger pool of funds that will then be accessed to fund a plan of arrangement that stands a good chance of being successfully endorsed by the creditors.
14. Since the date of the most recent extension of the stay of proceedings, the Applicants have focused their efforts on improving the Orr Centre and significantly increasing its value to a prospective purchaser. If the facilities can be improved and the cash flows increased, the property will go from being a liability to an attractive investment opportunity for a developer looking to purchase the Campus. It is expected that further progress can be made during the next extension period in terms of increasing the revenue streams and stabilizing and decreasing the cost associated with operating the Campus.

15. Granting the extension of the stay will allow the work in progress to continue. It is for the benefit of all creditors and stakeholders that the Applicants' facilities and properties are improved. These improvements, it is hoped, will facilitate a more constructive Plan which is more likely to be supported by the creditors. In any event, any potential for prejudice is far outweighed by the potential benefits, and there is therefore a sufficient basis upon which to grant the extension sought.

ii. The Applicants are acting in good faith and with due diligence

16. Although "good faith" and "due diligence" are not defined terms in the CCAA, there is judicial authority suggesting that "good faith" involves honesty, an absence of intent to defraud, and observance of reasonable commercial standards of fair dealings towards all stakeholders involved in the CCAA process (*San Francisco Gifts Ltd., Re*, 2005 ABQB 91 at paras 14-17, 42 Alta LR (4th) 337 [TAB 3]).

17. Other factors that the Courts have considered when evaluating "good faith" and "due diligence" includes the number of parties involved, the reasonableness of any delays, and the debtors willingness to comply with or consider the Monitor's recommendations (*Skeena Cellulose Inc., Re*, 2001 BCSC 1423 at paras 14-16, 29 CBR (4th) 157 [TAB 4]).

18. In addition to the steps outlined in the Previous Affidavits, the Applicants have, among other things, conducted the following activities diligently and in good faith since the Third Extension, namely:

(a) In relation to the 825 Land:

(i) Continued to work alongside Dream to finalize the Amended Willows Concept Plan. This has involved numerous studies and assessments. It is hoped by all parties involved in the 825 development that the Amended Willows Concept Plan will be before the City of Saskatoon for review in the summer of this calendar year with approval forthcoming in early to mid-2018.

(b) In relation to the 33330 Land:

- (i) The Applicants have engaged Webb Surveys to complete a Real Property Report & Sketch Plan and topographical Map. These reports will be used as part of a rezoning application.
- (ii) CIR Commercial Realty Inc. was engaged to assume control of property management for the purposes of improving cash-flow and reducing operating costs.
- (iii) Welldone Mechanical was retained to assess and repair the deficient HVAC equipment on the Campus.
- (iv) Wright Construction has been retained to provide an assessment regarding the costs associated with demolishing the Connaught Dormitory and the Lewvan Dormitory on the Campus and complete the necessary repairs to the SALPN and daycare units.

19. Any delays that have resulted following the Third Extension are associated with the commercial reality of the land development in the province of Saskatchewan. The Applicants and their consultant have worked diligently to ensure that the restructuring process advances expeditiously and in a cost-efficient manner given the nature of the assets and the long term strategies that have been adopted in order to very significantly increase their value.

20. In addition to the foregoing evidence, the Monitor has opined in its Fifth Report that the Applicants have acted and are continuing to act in good faith and with due diligence.

iii. How long should the Stay of Proceedings be extended?

21. The Applicants have requested that the Stay of Proceedings be extended until 11:59 p.m. on December 24, 2017.

22. The Applicants submit that such a length of time is necessary for the remaining studies to be finalized, the rezoning applications to be made, and the necessary construction and demolition to be completed.
23. It is therefore submitted that it is appropriate and reasonable in the circumstances to extend the Stay of Proceedings until 11:59 p.m. on December 24, 2017.

B. Need for Further DIP Financing

24. The relevant provisions of the CCAA that relate to DIP Financing are reproduced below:

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

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

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

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

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

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

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

25. The New Brunswick Court of Queen's Bench succinctly summarize the judicial application of section 11.2 of the CCAA in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 6, [2005] NBJ No 570 [Tab 5]:

[16] In order for DIP financing with super-priority status to be authorized pursuant to the CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors whose security is being eroded. See *United Used Auto & Truck Parts Ltd. (Re)* 1999 CanLII 5374 (BC SC), [1999] B.C.J. No. 2754 (S.C.) affirmed 2000 BCCA 146 (CanLII), [2000] B.C.J. No. 409 [C.A.]

[17] DIP financing ought to be restricted to what is reasonably necessary to meet the debtors urgent needs while a plan of arrangement or compromise is being developed.

...

[19] A Court should not authorize DIP financing pursuant to the CCAA unless there is a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself. In this case the Monitor has advised the Court that there is a reasonable prospect that Simpson's Island and Tidal Run will be able to make such arrangements with their creditors.

26. DIP Financing has proven to be particularly useful in CCAA proceedings involving complex real property assets that are currently under construction or in the midst of development (*League Assets Corp., Re*, 2013 BCSC 2043 at paras 42-45 [Tab 6]).
27. The Applicants require a secondary DIP Facility of \$500,000.00 to complete the next stage of the reorganization. This financing will be used to cover the projected cash-flow deficiency during the next phase of this

restructuring initiative. These additional fees are required to retain essential professionals and consultants and to manage on-going construction demolition costs.

28. The Applicants respectfully submit that this Honourable Court ought to grant the DIP Facility for the following reasons:

(a) Notice of this application has been provided to the secured creditors of the within proceeding.

(b) Affinity Credit Union, the largest secured creditor, has supported the development strategies for both 825 and 33330, as well as the associated Secondary DIP Facility that is required to bring the respective with strategies to fruition.

(c) Liquidating the assets in their current condition would be highly inefficient from both a cost and value perspective in light of the pending developments, rezoning applications and repairs that are scheduled to take place in the coming months which will very significantly increase the pool of funds available to fund a plan of arrangement.

(d) There is no reason to believe that any creditor will be materially prejudiced by the Secondary DIP Facility as the value of the assets will only increase with the passage of time given the strategies that have been implemented and will continue to be implemented in the future.

(e) A third-party property manager has been retained to improve cash-flow and instill tenant and creditor confidence in the daily management and operations of the Applicants.

C. **Sealing of the Confidential Calyniuk Affidavit**

29. The Applicants have requested that this Honourable Court exercise its discretion and grant an order sealing the Confidential Calyniuk Affidavit.
30. Sealing orders are granted in CCAA proceedings where the publication of certain commercial information would prejudice the stakeholders. The Courts have acknowledged that keeping certain information confidential is essential where public disclosure would “jeopardize the very purpose of the proceeding.” (*Fairview Donut Inc. v The TDL Group Corp.*, 2010 ONSC 789 at para 45, 100 OR (3d) 510 [Tab 7]).
31. The two-part test for granting a sealing order is laid out in the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 [*Sierra Club*] [Tab 8]. This test was subsequently applied successfully in *Canwest Global Communications Corp., Re*, 2009 CanLII 55114 (ON SC), CBR (5th) 72 (Ont SCJ) [Tab 9]:

[51] ... Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

32. The Applicants respectfully submit that the contents of the Confidential Calyniuk Affidavit satisfy the test enumerated in *Sierra Club* for the following reasons:
- (a) In the ordinary course of business, communications between a developer

and a municipal authority would not be public record;

- (b) Disclosing the nature of the aforementioned communications at this stage of the restructuring may cause undesirable exchanges between the developer and municipal authority down the road along with other unintended negative consequences;
- (c) The developer's plan will be made public as part of the rezoning application process at a future date, at which time any party or member of the public that feels it is will be prejudiced or affected may be heard;
- (d) There is no reason believe the contents of the Confidential Calyniuk Affidavit has the ability to prejudice the process in unforeseen ways; and
- (e) It includes certain information relative to value that may be commercially sensitive if made available to the general public.

V. CONCLUSION AND RELIEF REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of May, 2017.

McDOUGALL GAULEY LLP

Per: 

Solicitors for the Applicants

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TABLE OF AUTHORITIES

LEGISLATION

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

JURISPRUDENCE

1. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379
2. *Federal Gypsum Co., Re*, 2007 NSSC 347, 40 C.B.R. (5th) 80 (NSSC)
3. *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 at paras 14-17, 42 Alta LR (4th) 337
4. *Skeena Cellulose Inc., Re*, 2001 BCSC 1423, 29 CBR (4th) 157
5. *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 6, [2005] NBJ No 570
6. *League Assets Corp., Re*, 2013 BCSC 2043 at paras 42-45
7. *Fairview Donut Inc. v The TDL Group Corp.*, 2010 ONSC 789, 100 OR (3d) 510
8. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522
9. *Canwest Global Communications Corp., Re*, 2009 CanLII 55114 (ON SC), CBR (5th) 72 (Ont SCJ)