ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

Estate Number: 33-2618511
Court File No.: 33-2618511

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618512
Court File No.: 33-2618512

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF LIVEWELL FOODS CANADA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618510
Court File No.: 33-2618510

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ARTIVA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618513
Court File No.: 33-2618513

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VITALITY CBD NATURAL HEALTH PRODUCTS INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES OF DOMINION CAPITAL LLC
(Returnable March 4, 2020)

March 2, 2020

BENNETT JONES LLP
Barristers
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig (#57307I)
Tel: (416) 777-6254

Aiden Nelms (#74170S)
Tel: (416) 777-4642
Facsimile: (416) 863-1716

Counsel to Dominion Capital LLC

INDEX

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

Estate Number: 33-2618511
Court File No.: 33-2618511

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618512
Court File No.: 33-2618512

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF LIVEWELL FOODS CANADA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618510
Court File No.: 33-2618510

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ARTIVA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618513
Court File No.: 33-2618513

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VITALITY CBD NATURAL HEALTH PRODUCTS INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

INDEX

TAB	CASES CITED
9.	*Mustang GP Ltd., Re,* 2015 ONSC 6562
10.	*P.J. Wallbank Manufacturing Co, Re,* 2011 ONSC 7641
11.	*Colossus Minerals Inc, Re,* 2014 ONSC 514
12.	*1512759 Ontario Ltd, Re* (2002), OJ No. 4457
13.	*1252206 Alberta Ltd v Bank of Montreal,* 2009 ABQB 355
14.	*Canwest Publishing Inc., Re,* 2010 ONSC 222
15.	*Electro Sonic Inc, Re,* 2014 ONSC 942

TAB 1

1994 CarswellOnt 255
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Cumberland Trading Inc., Re

1994 CarswellOnt 255, [1994] O.J. No. 132, 23 C.B.R. (3d) 225, 45 A.C.W.S. (3d) 199

Re proposal of CUMBERLAND TRADING INC.

Farley J.

Judgment: January 24, 1994
Docket: Doc. 31-282225

Counsel: *Kevin J. Zych*, for secured creditor, Skyview International Finance Corporation.
Jeff Carhart, for debtor, Cumberland Trading Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Secured creditor moving for declaration that stay of proceedings no longer operated to prevent it from enforcing its security — Secured creditor not quantifying material prejudice to it resulting from continued operation of stay — Motion dismissed.
A secured creditor demanded payment in full of its operating financing loan to the debtor and gave notice of intention to enforce its security under the *Bankruptcy and Insolvency Act* (the "Act"). Two days before the expiration of the time to repay, the debtor filed a notice of intention to make a proposal. A stay of proceedings under s. 69 of the Act resulted. The secured creditor indicated that it would not approve any proposal the debtor might make; it held 95 per cent of the debtor's admitted secured creditors' claims and 67 per cent of all creditors' claims. It argued that the continued operation of the stay would be materially prejudicial to its rights.
The secured creditor brought a motion for a declaration that the stay provisions of ss. 69 and 69.1 of the Act no longer operated to prevent it from enforcing its security. It also moved for a declaration that the 30-day period to file a proposal provided in s. 50.4(8) was terminated and for an order removing the debtor's choice for trustee under the notice of intention to file a proposal and substituting another.
Held:

The motion for a declaration regarding the stay was dismissed; the motion for a declaration that the 30-day period was terminated and for an order substituting another trustee was allowed.
The secured creditor was not entitled to the benefit of s. 69.4(*a*). Its claim that it would be materially prejudiced by the continued operation of the stay was not supported by sufficient evidence. The secured creditor argued that the only way the debtor now had to finance its operations was by turning the secured creditor's accounts receivable and inventory into cash, thereby eroding the secured creditor's security. However, the secured creditor did not quantify the prejudice to it from these actions, nor did it quantify the expected deterioration of its security if the stay was not lifted.

Table of Authorities

Cases considered:

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.) — *referred to*

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.) — *not followed*

Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219 (Bktcy.) — *referred to*

Statutes considered:

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

s. 50.4(1)

s. 50.4(8)

s. 50.4(11)

s. 69

s. 69.1

s. 69.4

s. 244

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

***Farley J.*:**

1 Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of

Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

2 On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

3 Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and receivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

4 Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview

would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

5 Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal — as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

6 Cumberland relies upon *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail. In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

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

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

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

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

It does not seem to me that there is any gap in this sector of the legislation.

7 As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

> The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to restructure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the proposal, in accordance with the provisions of

> the Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

8 However we do not have any indication of what this proposal proposes to be — notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland would have to present "something" to get Skyview to change its mind — e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed — but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of *N.T.W.* that:

> C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. *As the insolvent companies have not had the opportunity to put forth this proposal, it is impossible to make the final determination*. In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured [sic; in reality unsecured] creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.
>
> [emphasis added]

9 However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by ... a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) ... if the court is satisfied that
>
> . . . . .
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> . . . . .
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "the insolvent person will not *likely* be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors ..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

10 Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (*a*) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (*b*) that it is equitable on other grounds to make such a declaration.

11 Is Skyview entitled to the benefit of s. 69.4(*a*) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., 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. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000

and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

12 I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

TAB 2

1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Farley J.

Judgment: February 3, 1994 *
Docket: Doc. 32-65038

Counsel: *Frank Bennett* , for debtor companies.
Larry Crozier , for secured creditor, Royal Bank of Canada.

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.
Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.
The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act* .
The companies appealed.
Held:

The appeal was dismissed.

The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).

Table of Authorities

Cases considered:

Cumberland Trading Inc., Re (1994), 23 C.B.R. (2d) 225 (Ont. Gen. Div. [Commercial List]) — *referred to*

Statutes considered:

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

s. 50.4(9)

s. 50.4(11)

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof 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 may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned 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.

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

> (11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period

mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

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

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

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

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

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

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in *The Concise Oxford Dictionary of Current English* , 7th ed. (1987; Oxford, The Claredon Press) means:

likely 1. such as *might well happen* , or turn out to be the thing specified; *probable* . 2. to be *reasonably expected* . [emphasis added]

I do not see the conjecture of the debtor companies' rough submission as being "*likely* ".

5 While one may well fault the Bank for its approach to this situation, one has to recognize that the onus is on the debtor companies to show that they have acted in good faith and with due diligence. I am satisfied that the Registrar correctly assessed the situation in that regard that the debtor companies could have and should have proceeded with laying the foundation for their proposal and in fact building on that foundation rather than relying on anything that may be forthcoming from the Bank. In particular, see Cohn, *Good Faith and the Single Asset Debtor* (1988) 62 Am. Bankr. L.J. 131 on which it appears the Registrar relied. However, it is noted that there was no examination of the jurisprudential principles therein.

6 I discussed the question of material prejudice in *Cumberland, supra* , at pp. 11-13 [pp. 231-232]. The debtor companies have provided no information in that regard for the 45 day extension period from February 28, 1994. The only information close to this is the cash-flow statement of the previous extension granted December 16, 1993. However, for this extension there was no information. It appears therefore, that the debtor companies did not even attempt to meet this condition.

7 I am therefore, of the view that on all three tests (one failure of a test being sufficient to disqualify a debtor company from being able to ask for an extension) the debtor companies have failed to overcome the onus on them. The Registrar was correct in the result on all counts, although I feel that he inadvertently used the wrong test in s. 50.4(9)(*b*), a quite understandable situation given the terminology used in the legislation.

8 I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(*c*).

9 The appeal is dismissed. Costs were agreed at $2,500 and are payable by the debtor companies jointly and severally to the Bank forthwith.

Appeal dismissed.

Footnotes

* This judgment is an appeal from the decision reported at 23 C.B.R. (3d) 219 at 223 .

TAB 3

2007 CarswellOnt 3796
Ontario Superior Court of Justice

Royalton Banquet & Convention Centre Ltd., Re

2007 CarswellOnt 3796, 33 C.B.R. (5th) 278

Royalton Banquet and Convention Centre Ltd.

Reg. A.M. Diamond

Heard: June 11, 2007
Judgment: June 14, 2007
Docket: 31-959422

Counsel: Richard Jones for Proponent / Applicant
Emilio Bisceglia for Respondent, Creditor Westplex Centre Inc.

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
Insolvent person filed notice of intention to make proposal — Section 50.4(8) of Bankruptcy and Insolvency Act required insolvent person either to file proposal or obtain extension of time to file proposal within 30 days — Insolvent person brought application for extension of time before end of 30-day period but decision was not released until day after 30-day period — Application dismissed — As decision was released on requested date, error in calculating time was that of insolvent person — Act did not allow 30-day period to be extended even though application was brought within 30-day period — Unlike other provisions in Act, s. 50.4(8) of Act did not include language indicating extension was permitted following expiration of 30-day period — Further, s. 50.4(10) of Act specifically precluded court from extending 30-day period referenced in s. 50.4(9), which was same 30-day period referenced in s. 50.4(8) — Insolvent person was therefore deemed to have made assignment in bankruptcy.
Table of Authorities
Cases considered by *Reg. A.M. Diamond*:
Benson v. Third Canadian General Investment Trust Ltd. (1993), 1993 CarswellOnt 166, 14 O.R. (3d) 493, 13 B.L.R. (2d) 265 (Ont. Gen. Div. [Commercial List]) — considered

Plancher Heritage Ltée / Heritage Flooring Ltd., Re (2004), 2004 NBQB 168, 2004 CarswellNB 358, 3 C.B.R. (5th) 60 (N.B. Q.B.) — followed

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

s. 50.4(8)(a) [en. 1992, c. 27, s. 19] — referred to

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

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

s. 135(4) — considered

s. 187(11) — referred to

s. 192 — referred to

s. 192(1)(j) — referred to

s. 192(1)(k) — referred to

***Reg. A.M. Diamond*:**

Introduction

1 The applicant seeks an extension of time to file a proposal under the *Bankruptcy and Insolvency Act* (BIA). On May 14, 2007 the applicant filed a Notice of Intention (NOI) to make a Proposal under section 50.4(1) of the BIA [1] . Pursuant to section 50.4 (8) of the BIA the debtor has 30 days from the date of filing its NOI to file a proposal or obtain an extension of time to file the proposal from the court. This matter was heard on June 11, 2007 on short service to the respondent despite the fact that the motion was booked with the court office on May 25, 2007.

Preliminary Issues

Jurisdiction

2 The jurisdiction of the Registrar in Bankruptcy is setout and limited to those powers setout in section 192 of the BIA. One of the things that a Registrar cannot hear, without consent of the parties, is an opposed application for a Division I Proposal. As this is an opposed application for

an extension of time for filing such a proposal, which, if not granted would, under section 50.4 (8) (a) of the BIA result in the assignment of the debtor into bankruptcy, I think it is appropriate that I first address my authority to deal with the matter.

3 Section 192 (1) (k) of the BIA grants to the registrar in bankruptcy the power and jurisdiction to "hear and determine any matter relating to practice and procedure in the courts". I am of the view that the question of whether to grant additional time to file a proposal under the BIA and, if so, how much time to grant, is an issue dealing with "the practice and procedure of the bankruptcy court" and thus falls within my jurisdiction.

4 Second, section 192 (1) (j) grants to the registrar in bankruptcy the power and jurisdiction to "hear and determine any matter with the consent of all parties". Both parties were represented by experienced and competent counsel and both counsel had no reservations in my hearing and determining this issue.

Timing

5 Counsel for the applicant advised the court that it was urgent that I release my reasons by today as he and the trustee had calculated that the thirty days from filing the NOI expired at the end of June14, 2007[2]. However, on reviewing the materials today it appears to me that the 30 days for filing their proposal expired at the end of the day yesterday, June 13, 2007. If I had been so advised I would have prepared these reasons before the expiry of the 30 days. The error is that of the applicant and the trustee.

6 This raises the question of whether, having brought the motion within the 30 days, the clock for the purposes of section 50.4 (8) is stopped or conversely is the applicant now out of time? Section 50.4 (8) reads:

> Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62 (1) within a period of **thirty days** after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9).
>
> (a) the insolvent person is, **on expiration** of that period or that extension as the case may be, deemed to have thereupon made an assignment; (emphasis added)
>
> (b) ...

7 The wording of section 50.4(8) must be contrasted to the wording of section 135 (4) of the BIA, which reads:

> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred

to in subsection (3) or such further time as the court may on **application made within that period** allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules. (emphasis added)

8 The general rule of statutory interpretation is that when parliament uses different language it intends different meanings. Section 135 (4) clearly contemplates the extension being granted after the expiry of the 30 days provided that the application for the extension was made within the 30 days. Section 50.4 (8) does not have the same saving language. Section 187 (11) grants to the court the power to "extend time either before of after the expiration thereof on such terms, if any, as it thinks fit to impose". However in subsection 50.4 (10) parliament specifically excluded the court from using this jurisdiction to extend the time under subsection 50.4 (9). The thirty days referenced in subsection 50.4 (9) is the same 30 days referenced in subsection 50.4(8), as result, I am of the view that I am specifically not empowered to extend the time past 30 days to allow for the filing of the proposal or the obtaining of an extension of that 30 days.

9 As a result I conclude that the applicant was deemed to have made and assignment in bankruptcy on June 13, 2007. It is not available to the applicant to file a proposal today. The applicant is bankrupt. Having said that, in the event that I am wrong with respect to the timing issue, I think it appropriate that I provide reasons as if the time did expire at the end of the day today.

Background

10 The respondent is the owner of a building designed and built to be used as a banquet hall. The applicant, is the respondent's tenant. There has been a lengthy history of disputes between the parties over the terms of the lease and in particular the applicant's duties to maintain the premises. This dispute culminated in a hearing before Mr. Justice Morawetz heard March 1, 2006. In short Morawetz J found for the respondent landlord. The respondent appealed and on April 5th 2007 the Court of Appeal dismissed the appeal. Based on the decision of the Court of Appeal and the applicant's alleged failure to comply with the order of Mr. Justice Morawetz the landlord brought a motion seeking *inter alia* termination of the lease. Before that motion could be heard the applicant filed its NOI.

11 The underlying cause of the disagreement between the applicant and the respondent is explained in paragraphs 2-4 of the reasons of Mr. Justice Morawetz where he finds that:

> [2] in January 2006, the principals of the [applicant] entered into an agreement, through a different corporation to acquire a second banquet hall, La Perla Banquet Hall, which is located a short distance away from the existing banquet hall that operates under the name of the applicant. When the [respondent] became aware of this acquisition plan, the [respondent]/ [applicant] relationship changed dramatically.

[3] The [respondent] became concerned that the [applicant] would be taking steps to abandon the leased premises and transferring the [applicant's] business to the newly acquired banquet hall. So far, notwithstanding a high degree of suspicion, there is no evidence to indicate that the [applicant] has been engaged in activity designed to transfer business from the existing banquet hall to the newly acquired banquet hall

[4] The [respondent] reacted by requiring strict compliance with the provisions of the Lease.

12 On the hearing of this motion the respondent lead uncontroverted evidence that the applicant is now engaged in moving potential business from the hall owned by the respondent to a new hall which is owned and currently being renovated by a company controlled by the same principals as the applicant. The evidence is that all new bookings that are attempted to be made using the applicant's phone number for dates after the start of September are for the new company at the new location. As a result, as of September the applicant will not be able to be sold as a going concern as it will have no bookings. Respondent's counsel submits that the applicant is using the courts and the bankruptcy system to simply "rag the puck" until their new place is available while at the same time running down the old location so that it will not be a competitor once they move.

Analysis

13 Section 50.4 (9) of the BIA reads in part:

(9) The insolvent person may, before the expiration of the **thirty day period mentioned in subsection (8)** or any extension thereof 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 may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the **expiration of the thirty day period mentioned 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. (emphasis added)

14 I agree with counsel for the respondent that in order to be granted an extension the applicant has the onus of demonstrating that it satisfies each of the three elements of the test. As found in *Plancher Heritage Ltée / Heritage Flooring Ltd., Re* (2004), 3 C.B.R. (5th) 60 (N.B. Q.B.)[3] "the debtor must prove on the balance of probabilities that an extension is justified...". I will deal with element of the test in turn.

Good faith

15 The evidence is that the applicant has, since at least January 2007, made some attempts to sell its business. The applicant's position as set out in its notice of motion it that:

> There are substantial outstanding disputes between [the applicant] and the respondent involving claims by the respondent that the applicant is required to make substantial expenditures on upgrading and refurbishing the premises. Those disputes must be resolved as part of any restructuring as a going concern of the business and undertaking of the applicant.

16 Counsel for the applicant conceded in oral submissions that it is impossible for the applicant and respondent to work together. Furthermore, as set out above, the uncontroverted evidence is that the principals of the applicant are in the process of moving all of its potential business to a new company at a new location. In light of this I cannot find that the applicant has satisfied the onus of demonstrating that it has acted in good faith with respect to making a proposal.

Due diligence.

17 As mentioned above the NOI was filed on May 14, 2007. At the end of the hearing I directly (over the objection of the respondent's counsel) asked the representative of the trustee what work had been done since May 14, 2007 in preparing the proposal. The trustee answered candidly and honestly that no work had been done on preparing the proposal. As a result I find that the applicant has not exercised the necessary due diligence to be granted an extension.

Likelihood

18 On its own material the applicant is deficient in this regard. In paragraph 11 of the affidavit of the president of the applicant he swears that the:

> [applicant] requires an extension of time to file its Proposal in order to continue efforts to resolve outstanding disputes and to determine the most advantageous terms for a restructuring and any possible related transactions. If [the applicant] is granted the extension, I am **hopeful** that [the applicant] will be able to make a viable proposal to its creditors within the extension period being sought. (emphasis added)

19 As I said at the hearing and as counsel agreed, being "hopeful" of winning the lottery is not the same thing as it being "likely". To quote Mr. Justice Farley in *Benson v. Third Canadian General Investment Trust Ltd.* [1993 CarswellOnt 166(Ont. Gen. Div. [Commercial List])] "If wishes were horses, then beggars will ride." There is no evidence before me that a proposal is likely. Counsel for the applicant conceded that based on the status of the relationship between the applicant and the respondent, the only type of proposal that is even conceivable at this time is a

liquidation proposal. That is not what is implied by the applicant's affidavit, and as a result I find that the granting of the extension will not likely result in a viable proposal.

Conclusion

20 I am of the view that the 30-day period to file a proposal expired yesterday, June 13, 2007 and as a result the applicant is bankrupt as of today and unable to file a proposal. However, if I am wrong with respect to the calculation of the 30-day period then, as set out above, the granting of an extension of time to file a proposal is a matter of discretion. In exercising that discretion I find that the Applicant should not be granted an extension. The Applicant's motion for leave to extend the time for filing a proposal pursuant to section 50.4(9) of the BIA is denied.

Application dismissed.

Footnotes

1 See exhibit A to the moving party's affadavit

2 The trustee's belief that the 30 days expires on June 14, 2007 was confirmed by telephone message from the trustee to the court off today (June 14, 2007) in which the trustee advised court staff that if they required these reasons by 3:30 pm today.

3 As cited in *Houlden & Morawetz* at E 1.2

TAB 4

2011 NBQB 240
New Brunswick Court of Queen's Bench

Kids' Farm Inc., Re

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

IN BANKRUPTCY AND INSOLVENCY

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

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

Michael J. Bray Reg.

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

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

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Bank issued notice of intention to enforce its security against applicant, debtor company — Applicant filed notice of intention to make proposal under Bankruptcy and Insolvency Act on July 27 — On August 26, applicant filed notice of motion seeking 45 day extension to file proposal — Bank requested hearing — At hearing on September 9, Bank argued that because extension was not granted within thirty days of filing of notice of intention to make proposal, debtor should be deemed to have made assignment — Application granted in part — Application for 45 day extension denied; extension granted until October 4 — Delay between filing of motion, hearing, and decision did not constitute deemed assignment — Language in s. 50.4(9) of Act states that

debtor must apply to court for extension prior to expiration of thirty day period, and this was done — No draft proposal had been filed — Court was given contradictory sworn testimony without adequate support — Court on s. 50.4(9) application will not examine secured creditor's motivations for its lack of support — Analysis was limited to objective evaluation of good faith and diligence, absence of material prejudice and whether projected proposal was viable — This was difficult to ascertain based on available evidence — There was adequate reason to postulate applicant was acting in good faith and with sufficient diligence — Applicant attested to meeting three required criteria with supporting evidence that questionably met burden of proof required to establish factors on balance of probabilities.

Table of Authorities

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

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

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

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

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

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

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

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

Farm Debt Mediation Act, S.C. 1997, c. 21

Generally — referred to

Rules considered:

Rules of Court, N.B. Reg. 82-73

R. 3 — referred to

R. 3.02(1) — referred to

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

Introduction

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

Facts

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

2 Green Grass Comfort Inc. ("GGC") is the proposed purchaser of the hay for pellet production at a plant to be constructed for this purpose on land presently owned by KFI.

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

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

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

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

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

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

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

Issues

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

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

Analysis

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

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

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

14 With the greatest respect to Deputy Registrar Diamond, I do not interpret the section in a similar manner. The language is clear in subsection (9) concerning the obligations incumbent upon the debtor. It must apply to the court for an extension prior to the expiration of the thirty day period. This was done. The court may grant the extension but may require notice to interested persons. Surely this notice presupposes that such interested persons have the right to appear and make representations before an order is granted. It would obviously be impractical in many if not most cases to do this appropriately in less than one day. One cannot postulate that Parliament legislated

a provision that would be incongruous in its practical application. The Act is a commercial code amenable to common-sense interpretation and the conclusions of such interpretation should be accepted unless clear language of the drafting otherwise dictates. Pursuant to Rule 3 of the Act, Rules of Court of New Brunswick not inconsistent with the Act and its associated Rules are may apply. In a motion such as that currently under consideration Rule 3.02(1) could be applied for an expedited hearing in a case of demonstrated urgency. Parliament could have clearly mandated limits to the court's discretion to deal with applications for extension. It did not do so with the exception of subsection 50.4 (10).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 It is unclear from the evidence, however, if the restructuring plan is dependent upon the pellet mill being built on the specified ten acres upon which it is alleged that the Bank refuses to discharge its mortgage, thereby stymieing any progress. If the plan is thus structured and no other property is available, affordable or otherwise appropriate to the requirements, it would appear that the Bank holds the trump card and has shown itself to be opposed to the proposal. The conclusion would be that a proposal is not viable.

33 The Court on a section 50.4(9) application will not examine a secured creditor's motivations for its lack of support. If triable issues are involved therein they belong in another forum. In this instance we are limited to an objective evaluation of good faith and diligence, the absence

of material prejudice and whether the projected proposal is viable. As previously noted, this is difficult to ascertain based on the available evidence.

Disposition

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

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

Application granted in part.

TAB 5

2000 CarswellOnt 2797
Ontario Court of Justice, General Division (In Bankruptcy)

Nortec Colour Graphics Inc., Re

2000 CarswellOnt 2797, 18 C.B.R. (4th) 84, 98 A.C.W.S. (3d) 977

In the Matter of the Proposal of Nortec Colour Graphics Inc.

Deputy Registrar Sproat

Heard: July 24, 2000
Judgment: August 2, 2000
Docket: Estate No. 31-375711

Counsel: *B. Cohen Q.C.*, and *J. Simpson*, for Nortec Colour Graphics Inc.
A. MacFarlane, for creditor, Heidelberg Canada Graphic Equipment Limited.
J. Carhart, for CIT Group (formerly Newcourt Financial).

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.10 Practice and procedure
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings

Headnote
Bankruptcy --- Proposal — Practice and procedure
Debtor defaulted on lease of printing equipment owned by creditor H — Debtor negotiated with G Co to establish partnership — Debtor was aware of necessity to obtain approval of proposal of key creditors and negotiated with key creditors, including creditor H — Creditor H agreed to amend terms of lease — Debtor filed notice of intention to file proposal — Debtor brought motion to extend time for filing proposal — Motion granted — Debtor exercised due diligence by attending to issue of leases well in advance of filing notice of intention, which permitted debtor to continue negotiations with G Co and with creditors — Evidence suggested debtor moved forward with formulation of proposal — No creditors came forward to say they would not support any proposal and evidence did not show debtor would not make viable proposal — Facts operated against finding of material prejudice to any creditor — To balance interests of debtor and creditors, debtor granted 15 additional days, not 45 requested.
Bankruptcy --- Practice and procedure in courts — Stay of proceedings

Creditor H owned highly specialized printing equipment, valued at $9.5 million, which it leased to debtor — Creditor H assigned leases to C on "with recourse" basis, so that in event of default creditor H was liable to C — C put creditor H on notice of default and creditor H commenced process of having leases reassigned — Debtor negotiated with G Co to establish partnership and negotiated with key creditors for approval of proposal, including creditor H — Creditor H agreed to amend terms of lease — Debtor's motion to extend time for filing proposal were granted — Creditor H brought cross-motion for order that stay of proceedings did not apply to creditor H — Cross-motion dismissed — Debtor exercised due diligence, by attending to issue of leases well in advance of filing notice of intention to file proposal, and evidence did not show debtor would not make viable proposal — Creditor H failed to establish material prejudice and failed to identify prospective purchasers of printing equipment — Creditor H failed to demonstrate that it was largest single creditor — Debtor's business would certainly fail if cross-motion were granted.

Table of Authorities

Cases considered by *Deputy Registrar Sproat*:

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 69(1) [rep. & sub. 1992, c. 27, s. 36(1)] — considered

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

***Deputy Registrar Sproat*:**

1 This is a motion by Nortec Colour Graphics Inc. ("Nortec") pursuant to s.50.4(9) of the BIA for an order extending the time for the filing of a proposal. Nortec filed a notice of intention to make a proposal on May 25, 2000. On June 23, 2000, prior to the expiry of the initial thirty day period within which to file the proposal, Nortec brought a motion for an order extending the proposal period by a further thirty day period. I granted that motion and ordered that, in the event that a further extension was required, the motion be brought on notice to the creditors.

2 This motion is opposed by Heidelberg Canada Graphic Equipment Limited ("Heidelberg"). Heidelberg is the owner of certain highly specialized printing equipment valued at about $9.5 million. Pursuant to three leases, Heidelberg leased the equipment to Nortec and, thereafter, assigned the leases to CIT Group Inc. ("CIT"), formerly Newcourt Financial. Heidelberg did so on a "with recourse" basis and, hence, in the event of Nortec's default, Heidelberg will be liable to CIT. CIT has already put Heidelberg on notice of the default. In the circumstances, Heidelberg

is in the process of having the leases reassigned to it, such that Heidelberg, and not CIT, will be the creditor of Nortec.

3 It may, on first impression, appear that Heidelberg is not a creditor of Nortec. However, CIT did appear on the motion and supported Heidelberg's opposition to the motion as well as Heidelberg's cross-motion. For the purposes of the motion and cross-motion, I accept Heidelberg's status as a creditor (in view of its arrangements with CIT) and, certainly, Nortec took no issue with Heidelberg's status.

4 At the commencement of argument of Nortec's motion to extend the proposal period, Heidelberg sought leave to file a cross-motion and affidavit in support thereof. The affidavit had been previously served upon Nortec's counsel and no issue was taken with respect to the filing of cross-motion. Accordingly, I permitted the cross-motion to be filed.

5 The cross-motion by Heidelberg seeks an order under s. 50.4(11) of the BIA terminating the proposal or, alternatively, an order under s. 69.4 of the BIA that the stay of proceedings does not apply to Heidelberg. Effectively, Heidelberg seeks to enforce its security in respect of the equipment to permit it to lease or sell the printing equipment.

The Motion to Extend the Proposal Period

6 Section 50.4(9) of the BIA provides for the jurisdiction of this court to extend the proposal period where the court is satisfied of the following factors:

1. the insolvent person has acted and is acting in good faith and with due diligence;
2. the insolvent person would likely be able to make a viable proposal; and
3. no creditor would be materially prejudiced if the extension were granted.

1. Has Nortec acted in good faith and with due diligence.

7 Nortec states that it has acted in good faith and has exercised due diligence. Nortec has had extensive negotiations with Grenville Printing ("Grenville") relative to Grenville's purchase of or investment in Nortec. At the time of the first motion to extend, Nortec had not finalized the structure of the transaction, although I accept that it was then expected that Nortec would be restructured by way of a newly established corporate entity. It later turned out that this structure would not be used. Instead, Nortec and Grenville determined to establish a partnership, which would provide certain tax benefits. This change in structure necessitated negotiation with the shareholders of Nortec (of which there are two principal shareholders) and their counsel, in addition to certain of Nortec's creditors.

8 Nortec has been aware from the outset of the necessity to obtain the approval of a number of its key creditors and, in this regard, Nortec and Grenville have been negotiating with Royal Bank of Canada ("RBC"), Canada Customs and Revenue Agency ("CCRA"), Nortec's landlord and Heidelberg. Insofar as Heidelberg is concerned, it appears that by May 2, 2000, well before the notice of intention was filed, Heidelberg was onside. Heidelberg had already agreed to amended terms of the leases relating to the equipment and was waiting to finalize the documentation in that regard.

9 Heidelberg suggests that because the documentation amending the terms of the leases for the printing equipment has not been finalized, this amounts to lack of due diligence. I do not find that this alone is sufficient for me to find that Nortec has failed to satisfy this aspect of the test. On the contrary, it seems to me that Nortec exercised due diligence by attending to the issue of the printing equipment leases well in advance of filing the notice of intention, which in turn has permitted Nortec to continue its negotiations with Grenville and other ceditors.

10 Although there have been a few obstacles along the way in terms of Nortec making a proposal, it seems to me that it, has taken steps to further the proposal process along. Grenville has taken an active role, with Nortec's consent, in negotiating with Nortec's creditors.

11 Heidelberg also claims that Nortec has not acted in good faith and has not exercised due diligence since negotiations with Grenville have stalled and are no further ahead today than one month ago. While it may be so, it does not mean there has been a lack of good faith or lack of due diligence. In my view, there is sufficient evidence to suggest that Nortec has been moving forward with the formulation of the proposal.

2. Will Nortec likely to make a viable proposal

12 Nortec suggests that it will likely make a viable proposal although it has not put forward a proposal yet. It appears that Nortec's major creditors, RBC, CCRA and the landlord are prepared to wait and to consider the proposal, once filed. "Viable proposal" as used in s. 50.4(9) of the BIA should be seen as one reasonable on its face to the reasonable creditor (*Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) at p. 221). None of Nortec's creditors have come forward to say that it will not support any proposal and the fact that Nortec continues to discuss the structure of Grenville's proposed purchase/investment in Nortec is indicative of Nortec's efforts to lay the foundation of its proposal.

13 Heidelberg argued that it is not likely that Nortec will make a viable proposal. There is no evidence in support of this position. At best, Heidelberg's evidence is that it is *reluctant* to lend further support to the process in view of the fact that Grenville withdrew from the process (emphasis added). Heidelberg does not go so far as to say it will refuse to approve any proposal. In any event, although Grenville withdrew from the process, it was only for one day and Grenville,

by its solicitors, agreed to continue discussions with Nortec and its principals relating to a new, proposed transaction. Thus, I do not see this argument, at this time, having merit.

3. Will any creditor be materially prejudiced?

14 Nortec submits that no creditor will be materially prejudiced, particularly since RBC and CCRA are content to take a "wait and see" approach and its landlord has consented to the extension. On the other hand, Heidelberg suggests that it is materially prejudiced since it is owed about $1 million on account of the leases of the printing equipment and since it has received inquiries relative to the purchase of the printing equipment now used by Nortec in its business. Heidelberg suggests that it should be permitted to lease or sell the printing equipment and that now would be an opportune time to do so. In support of this contention, Heidelberg suggests that there are few prospective purchasers in the market for the specialized printing equipment in question, these prospective purchasers would have to wait upwards of 8 months if the equipment were to be ordered today and that prospective purchasers require some lead time in which to plan for the integration of the printing equipment into its operations.

15 In my view, these facts operate against a finding of material prejudice. It seems to me that any prospective purchaser would need some time to integrate the new equipment into its operations and I see no reason why a transaction for the lease or sale of the printing equipment needs to be completed immediately.

16 In addition, I agree with submissions of counsel for Nortec that Heidelberg has failed to establish material prejudice. Of particular note, Heidelberg has not identified the prospective purchasers who have made inquiries (which would have permitted Nortec to test the allegation of material prejudice) and have not quantified the extent of the losses it will suffer as a result of Nortec's financial circumstances and the extension sought by Nortec.

17 Lastly, I wish to deal with the issue of Nortec's indebtedness to Heidelberg. Heidelberg claims that it is the largest single creditor of Nortec since it is owed about $1 million. It has filed one of the three leases covering the printing equipment as a sample lease. This lease calls for monthly payments of about $10,000. The other two leases were not filed and there was no evidence as to the total monthly obligation of Nortec. There was also no evidence of when default occurred.

18 On the other hand, Nortec claims that it owes about $382,000 to Heidelberg according to the notice of intention filed. This is in contrast to RBC total indebtedness of $890,000 (of which $350,000 is secured) and CCRA indebtedness of $300,000. There are also 6 debenture holders with total indebtedness of $385,000. Thus, I cannot say with certainty that Heidelberg is the largest single creditor as RBC, CCRA and the debenture holders (who have not opposed the extension) are collectively owed about $1,575,000.

4. Disposition of Nortec's motion

19 Nortec's business will most certainly fail if I refuse to grant Nortec's motion or alternatively, grant Heidelberg's cross-motion. Since I do not see any material prejudice to Heidelberg (or any other creditor for that matter), I am inclined to give Nortec some additional time to put forward a proposal. I am mindful of the need to balance the interests of Nortec and recognize the rights of creditors. That is to say, Nortec should not be permitted to carry on its business without regard to its creditors. While Nortec should be commended for acknowledging its financial predicament early on (as early as May 2, 2000), it should not be at the expense of Heidelberg or its other creditors. Heidelberg is, understandably, frustrated by the delays, now that almost 3 months since it initially agreed to revise the leases with Nortec. Thus, I am of the view that, while Nortec be given some additional time, it should not be the 45 days it requests. I am therefore granting Nortec's motion but extend the time for filing the proposal for 15 days. Thus, the deadline for the filing of the proposal is August 8, 2000.

The Cross-Motion to Terminate the Proposal Period

20 Given my determination of Nortec's motion, I need not consider Heidelberg's cross-motion under s. 50.4(11) of the *BIA*. I do note however that the arguments in response to Nortec's motion were the same arguments advanced by Heidelberg on its cross-motion. I have addressed these arguments above.

The Cross-Motion to Lift the Stay of Proceedings

21 The court has jurisdiction to lift the stay of proceedings imposed by s. 69(1) of the BIA if the creditor is materially prejudiced by the operation of the stay or if there are other equitable grounds upon which the stay should be lifted. In this case, neither of these factors are found. In the result, I have also dismissed Heidelberg's cross-motion

Costs

22 Nortec does not seek costs of its motion but seeks costs of Heidelberg's cross-motion fixed at $1,000. I agree with counsel for Heidelberg that its cross-motion was essentially a response to Nortec's motion and no additional time or materials were required in arguing the cross-motion. In the circumstances, I order no costs of the cross-motion.

Motion granted; cross-motion dismissed.

TAB 6

1997 CarswellOnt 2753
Ontario Court of Justice, General Division (In Bankruptcy)

Com/Mit Hitech Services Inc., Re

1997 CarswellOnt 2753, [1997] O.J. No. 3360, 43
O.T.C. 376, 47 C.B.R. (3d) 182, 73 A.C.W.S. (3d) 444

In the Matter of the Proposal of Com/Mit Hitech Services Inc. of the City of Ottawa, in the Province of Ontario

Farley J.

Judgment: July 25, 1997
Docket: Ottawa 33-097110

Counsel: *Michael J. MacNaughton*, for The Toronto-Dominion Bank.
Frank Bennett, for Com/Mit Hitech Services Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.b Termination of time period
Financial institutions
VI Loans and discounts
VI.11 Miscellaneous

Headnote
Bankruptcy --- Proposal — General
After banking relationship of 14 years, bank reviewed debtor company's financial position and offered amended arrangement — Rather than meeting bank's conditions, debtor company became involved in new enterprise — Bank requested repayment of outstanding loan from debtor company on ground it was in breach of credit conditions — Bank applied for termination of 30 day period for debtor to file proposal under s. 50.4(8) of Act prior to expiration of 30 days — Debtor company was cautioned by bank, and by not heeding bank's conditions they had not acted in good faith — Bank, as major creditor, had lost all faith in debtor company that was eroding its assets at considerable rate and 30 day period was terminated prior to its expiration — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 50.4(8), 50.4(11)(d), 244.
Banking and banks --- Loans and discounts — General
Bank requested repayment of outstanding loan from debtor company on ground it was in breach of credit conditions — Debtor company filed notice of intention to file proposal — Debtor company

cross-applied for continuation of line of credit from bank — Debtor company was in material breach of terms of demand loan — Bank was not required to continue line of credit intact given breach and demand — Bank was not required to advance any further money or credit under s. 65.1(4)(b) of Act and debtor's application was dismissed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 65.1(4)(b), 244.

The bank advised the debtor that it was in breach of its credit conditions in that the debtor's investment in leases exceeded 125 per cent of the total bank debt. It required the debtor to restore the debt to equity ratio by repatriating money invested in a bar, a carpet cleaning service, and two retail discount stores. The debtor complied with respect to the bar, but made additional investments in the acquisition of the assets of another carpet cleaning business.

The bank called its loan and sought a s. 244 notice under the *Bankruptcy and Insolvency Act*. The bank was the debtor's main creditor apart from a small tax liability. The bank sought a declaration under s. 50.4(11) that the 30 day period be terminated, or, alternatively, an order that s. 69 no longer operated in respect of the bank. The debtor cross-applied for an order restraining the bank from interfering with the banking relationship pending further order or the failure of the debtor to make a proposal and allowing the debtor to draw on its line of credit up to its limit. It also sought a reference to determine damages alleged to have been suffered because of the bank's action.

Held: The bank's motion was allowed; the cross-motion was dismissed.

Since the erosion of the debtor's assets would be no more than $35,000-40,000, no material prejudice to the bank was made out under s. 50.4(11)(d) or s. 69.4. Given the bank's position as 90 per cent creditor, it was in a veto position. In addition, the debtor had not been diligent nor had it acted in good faith in ignoring the conditions imposed by the bank.

The debtor was in material breach of the terms of a demand loan. The bank had continued to honour cheques for six days after its demand. The bank was not required to advance any more money or credit.

Table of Authorities

Cases considered by *Farley J.*:

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

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

Doaktown Lumber Ltd., Re (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(d) [en. 1992, c. 27, s. 19] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(2) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(3) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(4)(b) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

s. 69.4 [en. 1992, c. 27, s. 36] — considered

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

s. 244 — referred to

s. 244(2) — considered

***Farley J.*:**

1 Both sides requested that this motion and cross motion be heard on an urgent basis today. The motion by The Toronto-Dominion Bank ("Bank") was for an order pursuant to s. 50.4(11) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended ("BIA") for a declaration that the 30 day period provided for in s. 50.4(8) be terminated, or in the alternative for an order pursuant to s. 69.4 declaring that s. 69 no longer operates in respect of the Bank. Com/Mit Hitech Services Inc. ("Debtor") crossmotioned for an order (a) restraining the Bank from interfering with its banking relationship with the Debtor pending further order of the Court or upon failure of the Debtor to make a proposal pursuant to BIA; (b) allowing the Debtor to draw upon its line of credit up to the established present level of $2.75 million with the Bank including allowing the Debtor to issue cheques to its employees and retained cheques for services rendered and to be rendered by the proposal trustee and lawyers; and (c) directing a reference to determine the amount of damages caused by the Debtor by the (alleged) breach of the Bank's obligations pending the operation of the stay of proceedings. As to costs, the Bank's counsel advised that he felt $1,500 either way was appropriate; the Debtor's counsel (acknowledged that if the Bank were successful, the question of costs would be a Pyrrhic victory) advised that it should be $4,500 either way. In light of the very pressing situation I advised counsel that I would give my decision and reasons later today

(alterting them by phone). Given that I am otherwise involved in an all day hearing, these reasons will of necessity have to be short or rambling.

2 After a banking relationship of some 14 years, the Bank issued a request for repayment of its outstanding loan of $2.6 million on July 10, 1997 and a s. 244 notice pursuant to the BIA. On July 18th, the Debtor filed a Notice of Intention to File a Proposal. The Debtor as advised in its material "is in the business of leasing small equipment and has over approximately 700 leases in its portfolio extending over 5 years. In addition, it operates 2 stores [Crazy Chesters] which sell used computer equipment, office equipment and retail clothing at reduced prices." It also had an $174,000 investment in a bar called The Station and a $1.14 million investment in Clean Net Inc. ("Clean") which was involved in carpet cleaning equipment. These investments appear to have been made within the last year as no investments were shown on the May 31, 1997 balance sheet for the previous year (i.e. May 31, 1996). Thus the character of the Debtor as a borrower from the Bank changed significantly from when the banking relationship commenced and far more importantly from when the then existing loan arrangements were made in 1994. On Dec. 12, 1996 the Bank advised the Debtor that it was in breach of the credit conditions including that the Debtor's investment in leases be not less than 125% of the total Bank debt. On Jan 15, 1997 the Bank, after a review of the Debtor's financial position, offered an amended arrangement, which was accepted by the Debtor (and its President, Kim Gottdank, the majority shareholder, as guarantor). The new arrangement required that the "debt to equity level is to be restored to 3:1 by way of cash infusion/ repatriation by March 31, 1997 of monies invested in other related investments/ventures." The 125% ratio above was to be restored as well. The Station bar was to repatriate $150,000 by January 15, 1997 (apparently this did occur then or shortly after). Clean was to repatriate $1.2 million by March 31, 1997. The Debtor was to provide the Bank with a detailed plan for the liquidation of Crazy Chesters' inventory over the short term. None of these conditions except the Station one has occurred. Rather instead of divesting, it appears that the Debtor is in some way to be involved in a new carpet cleaning enterprise through the proposed acquisition by Clean.net Inc. ("New Clean") of the Easy Off assets. As Mr. Gottdank advised:

> 9. I am finalizing the purchase of a business known as "Easy Off" from an American public company. The business comprises the placing of carpet cleaning equipment on consignment to primarily major food chains which in turn rent the equipment to its customers and concurrently sell these customers cleaning solutions. "Easy Off" is well known in Canada for over 30 years and has an 80% share of the market place. It operates in over 2700 locations in Canada. The financing of the purchase is with Coventry Financial Corporation. The purchase will produce to COM/MIT a cash flow of a minimum of a $1,000,000.00 per year. This cash flow will be used to continue to service the Toronto Dominion Bank debt as well as pay some of its principal. I have made this known to the Bank on numerous occasions and supplied them all the documentation in connection with the purchase of "Easy Off". As a result of the demand and notice, the closing has been postponed to a date in August, 1997.

13. COM/MIT is prepared to grant the Bank additional security for its loan for a period of one year to obtain a new lender.

14. By giving the Bank increased first security over the new assets including accounts receivable and inventory, except for assets acquired through lease financing, the Bank will be in a better position than if the company were bankrupt.

3 Notwithstanding to my view ample evidence on the face of the material and by way of correspondence and by way apparently of discussion in a meeting, Mr. Gottdank advises:

15. Neither the Bank nor its lawyer, have given particulars of the defaults despite many requests.

4 It should be noted that aside from a very small tax liability, the overwhelming creditor is the Bank (given that there appears to be a negative accounts payable situation which may reflect prepayments of accounts). On any basis the Bank is in the position of being a 90% plus creditor of the Debtor. The Bank is very close to being in essence "all the creditors" of the Debtor.

5 S. 50.4(11) provides:

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

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

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

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

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

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

6 S. 69.4 provides:

A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court

may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

7 I considered the question of material prejudice as to s. 50.4(11) and s.69.4 in *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]). In this present case, there was no evidence as to value either on a going concern, liquidation or other basis. Based upon the worst cash flow information given by the Debtor, the erosion of assets would be approximately $50,000 per month. Thus before the Bank would have the opportunity of opposing an extension of time to make the proposal would only be another three weeks (with a possible erosion on that basis of some $35,000-$40,000). Given the relative magnitudes, I do not see that the Bank has made out the aspect of material prejudice. There was no specific argument as to s. 69.4(b) regarding "it is aquitable on other grounds to make such a declaration." Thus it would not appear to me that the Bank should succeed on the basis of s. 50.4(11)(d) or its alternate request for relief under s. 69.4.

8 However it should be noted that s. 50.4(11) is disjunctive as to its four grounds. As to (a), ordinarily one would not think it appropriate to terminate the situation after just one week if the Bank had pulled the plug without any prior cautioning. However, one must look at this in context. The Debtor was cautioned as far back as December 1996; a new banking relationship was forged in January 1997. Rather than trimming one's sails to accommodate the prevailing wind (aside from disposing of the bar), the Debtor did not pay heed to the other conditions imposed in January, 1997. Rather to the contrary, there is a proposal that there be a further investment in the carpet cleaning field and that the Bank should not expect to receive anything with respect to its loan except that which might evolve out of the cash flow of New Clean which might in some way be made available to Clean (the financing proposal of Coventry Financial Corporation is unclear as to how this is to be accomplished and what exactly the relationships would be). In going essentially in a 180º way against what was agreed to in January 1997, it appears to me that the Debtor is not acting in good faith and with due diligence.

9 As for (b) and (c), it must be recognized that the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the Debtor (and Mr. Gottdank). It was acknowledged by the Debtor that what it had proposed to date (see paragraphs 9, 13, 14 of Mr. Gottdank's affidavit above) was insufficient to sway the Bank and therefore there was no viability there. Nothing was even alluded to as to anything else that might be done; rather what was proposed was to wait until the 30 day period was up to give the Debtor breathing room. I would note that the question of additional assets coming

under the security of the Bank was a somewhat elusive concept notwithstanding the Coventry term sheet which suggested that half of its $4 million funding for the Easy Off assets would be funded by subordinated security. It would not seem to me that the Debtor can make out any valid case for opposing the Bank on the basis of s. 50.4(11)(b) or (c). See also *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) at pp 221-2; *Doaktown Lumber Ltd., Re* (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.) at pp. 136-7.

10 Thus on any of the grounds (s. 50.4(11) (a), (b) or (c)) I am of the view that the Bank has made out its case for termination of the 30 day period.

11 As to the Debtor's cross motion, I will deal with this more generally given the conclusion I have reached with respect to the Bank's motion. The Bank's extension of credit was on a demand basis. The Debtor is in material breach of the terms of that demand loan. There would not appear to me in the circumstances to be any requirement of continuing the line of credit intact including allowing the Debtor to call upon the unused portion thereof given the breach and additionally because of the demand. Section 244(2) of the BIA is aimed at providing enforcement of security not at the provision of new money. Section 65.1(4)(b) provides that s. 65.1(1),(2) and (3) do not require "the further advance of money *or* credit" (emphasis added). In respect of the demand, it should be noted that I am not commenting upon whether the line of credit should continue to exist during the "reasonable period of time to repay" period. However, in that regard I would note that the Bank continued to honour cheques for 6 days after its demand. But as well to my mind it is important to appreciate that there were material breaches of a number of important covenants and that it was a demand as opposed to term loan. I do not see that there is any validity to the Debtor s claim for relief; I would dismiss its cross motion.

12 The Bank is entitled to its requested costs of $1,500 payable forthwith.

Application granted; cross-application dismissed.

TAB 7

2015 ONSC 5139
Ontario Superior Court of Justice

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.

2015 CarswellOnt 12962, 2015 ONSC 5139, 257 A.C.W.S. (3d) 520, 30 C.B.R. (6th) 315

NS United Kaiun Kaisha, Ltd., Moving Party (Respondent in the Proposal) and Cogent Fibre Inc., Responding Party (Applicant in the Proposal)

Penny J.

Heard: August 12, 2015
Judgment: August 17, 2015
Docket: 31-2016058

Counsel: Doug Smith, Roger Jaipargas for NS United Kaiun Kaisha, Ltd.
Ken Kraft, Sara-Ann Van Allen for Cogent Fibre Inc.
Sam Babe for Proposal Trustee

Related Abridgment Classifications
Bankruptcy and insolvency
II Assignments in bankruptcy
II.4 Procedure on assignment
Headnote
Bankruptcy and insolvency --- Assignments in bankruptcy — Procedure on assignment
Debtor was woodchipping business and had five year shipping contract with creditor — Creditor was successful in arbitration, and next day debtor made notice in bankruptcy — Debtor had assets of approximately $261,000 and no operations, revenues or cash flow — Creditor was only significant non-contingent current creditor, although arbitration proceedings were in progress with another business — Debtor brought motion for extension of 30-day stay, creditor brought motion to terminate stay — Debtor's motion dismissed, creditor's motion granted — Debtor not acting in good faith, not using due diligence, and was not likely to make viable proposal — Unlikely that stay would allow for acceptable proposal to be put forth — Evidence of debtor was vague and there was no evidence of what it would be able to offer creditors in proposal — Debtor had not put forth outline of any plan or proposal despite no business being conducted — There was no attempt being made to rehabilitate business — Creditor had veto over proposal and refused to negotiate with debtor.
Table of Authorities
Cases considered by *Penny J.*:

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

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

Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — considered

Janodee Investments Ltd. v. Pellegrini (2001), 2001 CarswellOnt 1232, 25 C.B.R. (4th) 47 (Ont. S.C.J.) — considered

Statutes considered by *Penny J.*:

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

***Penny J.*:**

1 In a brief handwritten endorsement of August 12, 2015, I dismissed the motion of the debtor, Cogent Fibre Inc., for an extension of the 30- day stay under s. 50.4(9) of the *Bankruptcy and Insolvency Act* and allowed the motion of the judgment creditor, NS United Kaiun Kaisha, Ltd. for an order terminating the 30-day stay under s. 50.4(11) of the BIA, with reasons to follow. These are those reasons.

2 Cogent is in the woodchip business. It had a five-year shipping contract with NS United. There was a dispute which became the subject of an arbitration commenced in February 2012. An arbitral award was made against Cogent for Cdn$15.3 million in January 2015. In July 2015, the District Court for the Southern District of New York confirmed the award. The day after the release of the confirming judgment, Cogent filed its NOI.

3 In an affidavit sworn in collateral bankruptcy proceedings in New York, Mr. Montrop, a director of Cogent, deposed that Cogent's management decided to wind down Cogent's business well before the release of the arbitral award or confirming judgment. It did so, he said, on the basis not only of pending maritime arbitrations but other factors including a "hostile market."

4 Mr. Montrop's evidence is, however, that Cogent was prompted to file its NOI on the basis of its "belief" that NS United "will expeditiously seek to record the judgment and proceed with collection actions."

5 The evidence is that Cogent currently has assets of approximately $261,000 and has no operations, revenues or cash flow. The professional fees of these proceedings are being paid by its parent corporation.

6 Cogent currently has one material, non-contingent creditor — NS United. There are no secured creditors. Another maritime shipping company, NYK, also instituted arbitration proceedings against Cogent. NYK alleges it is owed about $10.9 million. There has been no hearing and there is, obviously, no decision or award. Those proceedings are currently stayed. The NYK claim is entirely contingent. There is no evidence that NYK it at all interested in whatever it is that Cogent has discussed. I was advised that NYK takes no position on the motions before me. It is conceded by Cogent that NS United has a veto over any proposal.

The Cogent Motion to Extend

7 Section 50.4(9) sets out a three-part, conjunctive test for the grant of an extension of the 30-day stay. The court may grant an extension, not to exceed 45 days, if satisfied on the evidence tendered in the application that:

> (i) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (ii) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (iii) no creditor would be materially prejudiced if the extension being applied for were granted

8 There is no doubt that the intent of the BIA proposal sections is to give the insolvent person an opportunity to put forward a plan. The purpose of the legislation is rehabilitation, not liquidation. Insolvent companies should have the chance to put forward their proposal.

9 I am not satisfied, however, on the evidence provided by Cogent that it has acted and is acting in good faith and with due diligence. I am also not satisfied on the evidence provided by Cogent that it would likely be able to make a viable proposal if the extension being applied for were granted.

10 I say this principally of the basis of the vague, somewhat vacuous, affidavit evidence of Mr. Montrop filed in support of the Cogent motion and in response to the NS United motion.

11 His evidence amounts to this:

> (a) Cogent has engaged in settlement discussions with NYK with a view to making a proposal to NYK;
>
> (b) Cogent has offered to meet with NS United;
>
> (c) Cogent is working towards a proposal; and

(d) Cogent requires additional time to continue discussions with NYK and NS United.

12 There is not a hint of what Cogent has to offer NYK and not a hint of what kind of proposal Cogent has in mind. Counsel for Cogent argues that because the settlement discussions are without prejudice, it cannot disclose them. I do not find that argument persuasive. Nothing prevents Cogent from describing its plan or what it hopes to achieve in a proposal.

13 Although Cogent has offered to meet with NS United, NS United has no interest in meeting with Cogent and has not done so.

14 Cogent says it is working towards a proposal but, in the face of this motion, has not provided even a hint of what that proposal might look like. At its highest, it involves talking to the two shipping companies and hoping to make a deal. Counsel made submissions about possible tax losses which may have value but there was not a mote of evidence to this effect.

15 In this case, the 30-day stay expires at midnight on August 14, 2015. Cogent has taken the position, on these motions, that if its request for an extension is denied, it will file a proposal of some kind on Monday, August 17, 2015. That, it suggests, would automatically extend the stay for another 21 days.

16 I find it difficult to understand how Cogent could plan to file a proposal on Monday, August 17 but was unable to provide at least the outline of this proposal on Wednesday, August 12. There was no explanation given for this apparent contradiction.

17 In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

18 In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

19 Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.

20 The 30-day stay (or any extension thereof) is meant to give the debtor time to deal with multiple parties, many moving pieces and potentially complex business and financial arrangements. Here, there is no active business. There are no complex financial arrangements. There are no assets. There are only two material creditors, at least one of which, NS United, has

a veto over any proposal. There are, in effect, almost no moving pieces. In the face of a motion to terminate the stay, one would have thought the debtor would be motivated to come up with the best evidence it could of what its proposal might be and, specifically, why an extension is necessary to further the development of that proposal. Yet the debtor has chosen to put forward no concrete evidence but to rely on vague, conclusory assertions.

21 It is this failure to give even a hint of what a proposal might look like, or to provide any content for the bald and conclusory statement that more time is needed to further negotiations (particularly where it is unclear that there are any negotiations), which leads me to the conclusion that Cogent has not met its onus of proving, on a balance of probabilities, that it has acted in good faith and with due diligence and that it is likely to be able to make a viable proposal if only it is given more time.

22 I am also driven to the conclusion that Cogent's emphasis on so-called "rehabilitation" is empty rhetoric in this case. The evidence filed by Cogent in the New York bankruptcy court makes it clear that there is no ongoing effort to "rehabilitate" this company. Management had already decided to wind down its operations before the NS United arbitration award was granted. The summary balance sheets filed by the proposal trustee indicate that Cogent is already well under way with its "wind-down." It went from $3.27 million in assets in 2013 to $5.024 million in 2014 to $261,476 in 2015.

23 Counsel for the debtor submitted in oral argument that perhaps the company could be restarted. There is no evidence whatsoever to support such a contention - indeed, all of the evidence is very much to the contrary.

24 For these reasons the debtor's motion to extend the stay under s. 50.4(9) is dismissed.

The NS United Motion to Terminate

25 Section 50.4(11) of the BIA provides that where a debtor files a notice of intention to make a proposal, a creditor can apply to the court to terminate the initial 30-day stay on one or more of four disjunctive grounds:

> (i) the insolvent person has not acted, or is not acting, in good faith and with due diligence;
>
> (ii) the insolvent person will not likely be able to make a viable proposal before the expiration of the 30-day period;
>
> (iii) the insolvent person will not likely to be able to make a proposal, before the expiration of the 30-day period that will be accepted by the creditors; or

(iv) the creditors as a whole would be materially prejudiced if the application to terminate was rejected by the court.

26 NS United took the position that Cogent had not discharged its onus of proving it was acting in good faith and with due diligence on the motion to extend but did not positively assert this ground on the motion to terminate. NS United relies on the second and third grounds of s. 50.4(11).

27 It is clear from the very existence of s. 50.4(11), as well as judicial authority, that while an insolvent debtor is entitled to an automatic stay simply by filing a notice of intention to make a proposal, the BIA does not guarantee an insolvent person a stay without review. There is no absolute immunity from creditors. Section 50.4(11) of the BIA empowers the court to terminate the 30-day stay where the statutory conditions for doing so are met.

28 With respect to the probability of filing a viable proposal at all, I again refer to the paucity of evidence about what a proposal might look like. The debtor has utterly failed to provide even a hint of its plan for a proposal. The facts before the court, from Cogent management's own sworn statement, are that Cogent was already being "wound down" before the arbitral award prompted its filing of a NOI. The evidence before the court, therefore, is that management's plan is not to "rehabilitate" this company.

29 As mentioned earlier, Cogent's stated intention to file a proposal of some sort on the last day, in order to buy another 21 days, seems to me not only disingenuous but to highlight the lack of any concrete proposal. There is simply no evidence to suggest there is any plan in the offing at all, much less one that would probably appear reasonable to a reasonable creditor.

30 Cogent's gambit boils down to this: its proposal depends on negotiating a compromise with its only material, non-contingent creditor. That creditor, however, will not, and is under no obligation to, negotiate any compromise with Cogent.

31 On the second ground, likely to be acceptable to creditors, I agree with Cogent that the mere fact that NS United has a veto power over any proposal is not dispositive on a motion to terminate under s. 50.4(11). It is, however, one factor to be taken into account.

32 What adds credibility to NS United's position that it will, under no circumstances, agree to any proposal is the complete paucity of evidence that any plan is even possible, much less viable and likely to be accepted by creditors.

33 Counsel for Cogent sought to distinguish between the "harsher" line taken by the Ontario courts in cases such as *Cumberland Trading Inc., Re* [1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List])] and the more "liberal" approach taken in B.C. and other provinces in cases like *Cantrail Coach Lines Ltd., Re* [2005 CarswellBC 581 (B.C. Master)] and *Enirgi Group Corp. v. Andover Mining Corp.* [2013 CarswellBC 3026 (B.C. S.C.)] Counsel argued that the more liberal

approach is more in keeping with the rehabilitative purpose of the proposal sections of the BIA and current views of how these provisions should be applied.

34 I am not convinced these cases are in conflict. The exercise of the discretion under ss. 50.4(9) and (11) of the BIA is highly fact dependent. *Cumberland*, for example, was a case where a proposal had already been filed; the issue was whether to terminate the 21-day stay. The facts of *Cantrail* and *Enirgi* can also be readily distinguished from the present case. In *Cantrail*, the debtor presented evidence of a pending proposal under which the objecting creditor might be paid out in full. In *Enirgi*, likewise, there was evidence that the debtor had significant assets - in other words, the debtor had something to work with.

35 Here, the debtor has essentially nothing to work with, which might explain why it has been so reluctant to come forward with anything concrete. Cogent has no active business, no revenue, no cash flow and effectively no assets. The inference to be drawn from the complete absence of any hint of a concrete proposal is, in these circumstances, that there is no basis for a viable plan and certainly no basis for a conclusion, on a balance of probabilities, that there is likely to be any proposal that would be acceptable to the veto-empowered creditor NS United.

36 Lax J. said in *Janodee Investments Ltd. v. Pellegrini* [2001 CarswellOnt 1232 (Ont. S.C.J.)] (April 12, 2001), "the proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors."

37 Cogent admits that its only hope for a proposal is to negotiate a compromise with NS United; yet NS United has no interest, and no obligation to engage, in that negotiation.

38 Even applying what counsel for Cogent describes as the more "liberal" or debtor-friendly approach, on the evidence, NS United has discharged its burden under s. 50.4(11). NS United has, I find, proven on a balance of probabilities that it is not likely that Cogent will be able to make a viable proposal and, even if that were likely, the proposal will not likely be accepted by the requisite level of creditor support.

39 For these reasons, NS United's motion to terminate the 30-day stay is granted.

40 No order as to costs.

Motion by creditor granted, motion by debtor dismissed.

TAB 8

2013 ONSC 1794
Ontario Superior Court of Justice

OVG Inc., Re

2013 CarswellOnt 3289, 2013 ONSC 1794, 228 A.C.W.S. (3d) 26

In the Matter of the Bankruptcy of OVG Inc. of the Town of Renfrew in the Province of Ontario

Stanley J. Kershman J.

Heard: March 12, 2013
Judgment: March 25, 2013
Docket: Ottawa BK-33-1718184

Counsel: J. Fogarty, P. Masic, for Debtor
M. Rouleau, for Proposal Trustee
C. Peddle, for Royal Bank of Canada

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.10 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Practice and procedure
Bankrupt was glazing and glass manufacturing company which filed notice of intention to make proposal ("NOI") on February 22, 2013 — Bankrupt brought motion for authorization to borrow under credit facility from W Inc., as well as granting of interim financing charge against its property in favour of W Inc. — Bankrupt further sought order to extend time to file its proposal to May 8, 2013 — Motion granted — Evidence established that if DIP financing was not approved, bankrupt would not be able to fund its ongoing business operations and restructuring efforts during NOI proceedings, and would close its doors — While bank would be prejudiced by advance of $100,000, prejudice would be minimal — It was appropriate to authorize bankrupt to entering into DIP facility with W Inc. to extent of first tranche of $100,000 and to grant proposed interim financing charge to extent of $100,000 — Closing fee of $25,000 was payable by $15,000 upon drawdown of first tranche of $100,000, and $10,000 if there was second tranche under primary facility and provided that second tranche drawdown was allowed by court — In event there would be drawdown of secondary facility of $250,000 as contemplated by letter, court approval would have to be obtained — Time to file proposal was extended based on information contained in proposal trustee's report and based on submissions.

Table of Authorities

Cases considered by *Stanley J. Kershman J.*:

Dessert & Passion inc. (Faillite) c. Banque Nationale du Canada (2009), 58 C.B.R. (5th) 224, 2009 QCCS 4669, 2009 CarswellQue 10378, [2009] R.J.Q. 2822 (C.S. Que.) — followed

P.J. Wallbank Manufacturing Co., Re (2011), 2011 CarswellOnt 15300, 2011 ONSC 7641, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

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

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

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

***Stanley J. Kershman J.*:**

Introduction

1 OVG Inc., ("Company" or "OVG") is a glazing and glass manufacturing company that was established in 1978. The Company filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") on February 22, 2013. Doyle Salewski Inc. ("DSI") was appointed as the proposal trustee. OVG moves under section 50.6 of the BIA for authorization to borrow under a credit facility from Waygar Capital Inc. ("Waygar") as well as the granting of an Interim Financing Charge ("IFC") against its property in favour of Waygar.

2 It also seeks an order to extend the time to file its Proposal to May 8, 2013.

3 The motion was brought on short notice. Based on the affidavit of service filed, the Court is satisfied that notice was given to the interested parties.

Debtor and its Creditors

4 The Company was established 1978 and is located in Renfrew, Ontario and employs approximately 60 people.

5 According to the affidavit of Shawn McHale, president of OVG Inc., the Company has struggled to maintain workflow while financing 10% construction lien holdbacks on larger projects.

6 In addition, the Company has suffered significant losses on 2 projects in the fiscal years 2011 and 2012, further constraining cash flow. These constraints in cash flow have caused the Company difficulty in maintaining sufficient levels of materials to complete work in process.

7 OVG has one secured creditor namely the Royal Bank of Canada ("RBC") which is owed in the range of between $3,200,000.00 and $3,400,000.00. The Bank opposes the granting of a DIP lending facility. It does not oppose the extension of time for filing for the proposal.

8 Based on the creditor list prepared by DSI, secured creditors are owed in excess of $3,400,000.00. CRA is owed approximately $55,000.00 for source deductions. In addition, CRA is owed other monies for HST of approximately $250,000.00. The claims of unsecured creditors, while not totaled on the list of creditors, are approximately $6,800,000.00.

9 The Company has prepared cash flow statements for the period of February 25, 2013 to May 24, 2013, in conjunction with Welch and Co. Business Advisors.

The Proposed DIP Facility

10 The RBC is no longer providing credit to OVG. The Company's account was transferred to the Special Loans Division on May 1, 2012. On May 24, 2012 the Bank entered into a letter agreement wherein it changed the rate of interest on the operating and demand loans to RBC Prime + 4.5%. On September 21, 2012 the Bank retained the services of Ernst and Young Inc. to assist in the analysis of the viability of the Company.

11 In his affidavit, Peter Gordon of the Bank states that he met and spoke with representatives of the Company numerous times to discuss its financial difficulties. According to the Bank, financial reporting provided by the Company shows that it is losing substantial amounts of money and is projected to lose even more money in the future.

12 On February 12, 2013 demand letters and Notices of Intent to Enforce Security were sent by email to counsel for the Company and the guarantors. As of that date, the Company was indebted to RBC in the amount of $3,454,155.81.

13 The Bank claims that based on the information provided by Ernst and Young Inc., that there will be a substantial shortfall to the Bank after collection of the accounts receivable and sale of the assets. The Court notes that the document of the estimate of realizable assets provided by Ernst and Young Inc. in the motion of record did not include the accompanying notes and assumptions mentioned therein.

14 The Bank does not believe that the Company can be viably restructured.

The Proposed DIP Facility

15 By a letter dated March 11, 2013 prepared by Waygar to OVG and signed by OVG, there is an offer of DIP financing. The Court notes that the letter specifically states that it is not a commitment letter. It has not been signed by Waygar. The Court believes that it has not been signed by Waygar due to the short timeframes involved. The letter includes a primary lending facility of $250,000.00 including $100,000.00 to "fund payroll this Thursday March 14, 2013."

16 The letter also provides for a secondary lending facility of $250,000.00 as necessary to finance additional working capital requirements.

17 The interest rate for the primary facility is 18%. The standby rate for the secondary facility is 9%, which increases to 18% once it is drawn down. There is a closing fee of $25,000 payable when the first funds are drawn down.

18 Furthermore, two deposits are required to be paid by the Company to Waygar. The first is for $12,500.00 and is chargeable against the lender's field examination, financial analysis and appraisal expenses.

19 The second deposit is for $12,500.00 which will be required to apply against legal and closing expenses.

20 At the hearing of the motion, Company counsel indicated that $12,500.00 worth of the deposit was already in hand. This would mean that out of the initial $100,000.00 advance, $25,000.00 would be held back for the closing fee and $12,500.00 would be held back for the deposit described above. This would mean that there would be $62,500.00 available to the Company ($100,000.00 - $25,000.00 - $12,500.00),

21 The Court is aware that the March 11, 2013 letter is not a commitment letter but it is satisfied that on the basis of the oral representations made by Mr. Fogarty at the motion, that Waygar is committed to the DIP Facility.

22 As to the primary DIP amount, it is set up for two tranches, one for $100,000.00 and the second for $150,000.00. The Court notes that the purpose for the money set out in the letter is for payroll. In reality, based on the information provided at the hearing, $42,000.00 is for payroll and the balance is for purchase of equipment. The Court has advised of a case in Ontario dealing with DIP financing: *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.).

23 The case has been reviewed by the Court and the Court bases its analysis in part on the *Wallbank* case.

Analysis

Statutory provisions

24 Section 50.6 of the BIA, in part, provides as follows:

> 50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> (...)
>
> **Priority**
>
> (3) The court may order that the security or charge rank in priority over t he claim of any secured creditor of the debtor.
>
> (...)
>
> **Factors to be considered**
>
> (5) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Consideration of the Various Factors

1) Likely Duration of the NOI Proceedings

25 The evidence does not show when the Proposal will be filed. The Court has been asked for an extension of the Proposal to May 8, 2013. The Company requires the DIP facility to continue operating.

2) Management of OVG's Affairs

26 The current management will continue to operate OVG.

27 There are 60 employees at OVG in Renfrew, Ontario which is an economically depressed area.

3) Report of the Proposal Trustee

28 In its March 8, 2013 report, the Proposal Trustee stated that it was satisfied that OVG is proceeding in good faith with its proposal, and supported the need for DIP financing.

4) Would the Loan Enhance the Prospects of a Viable Proposal

29 According to the Proposal Trustee, OVG is developing a restructuring plan which may either involve:

1) identifying a strategic partner,

2) restructuring its debts, or

3) an orderly liquidation of its assets.

30 OVG has filed cash flow projections for the period ending May 24, 2013. The cash flow projections support Mr. McHale's statement that without the proposed DIP financing, the Company will not be able to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with this assessment saying as follows:

> In the event that the DIP loan is not approved by the Court, the Proposal Trustee is of the view that this may result in a material adverse change and furthermore, that the Company may be required to cease operations which will severely compromise the Company's ability to complete its proposal to its Creditors.

31 The evidence is clear that if the DIP financing is not approved, OVG will close its doors.

4) Nature and Value of OVG's Property

32 While OVG filed evidence about its current indebtedness, it did not file any detailed historical evidence about its balance sheet or profit and loss position. The current value of its assets is unclear. The evidence suggests that OVG has been operating at a loss for at least 2011-2012.

5) Confidence of Major Creditors

33 The only major creditor in attendance at the motion was the Bank who opposed the DIP financing. There is no evidence that any other creditors either opposed or approved of the DIP financing request. The Court notes that only 4 or 5 creditors were advised of the motion.

6) Prejudice to Creditors as a Result of the Interim Financing Charge

34 Like any DIP financing, the Interim Financing Charge will impact all of the creditors' positions to some degree and will potentially reduce the amount recoverable by the RBC. In the event that OVG's business would close because of the failure to approve the DIP financing and the Interim Financing Charge, on balance, the benefit to stake holders of the proposed DIP facility significantly outweighs any prejudice to the Bank.

35 While the Bank would be prejudiced by the advance of $100,000.00, the Court considers the prejudice to be minimal.

Conclusion

36 Having considered all of the factors involved with the DIP financing, the Court is satisfied that it is appropriate to authorize OVG to enter into the DIP Facility with Waygar Capital Inc. to the extent of the first tranche of $100,000.00 and to grant the proposed Interim Financing Charge to the extent of $100,000.00.

37 This Court orders that the closing fee of $25,000.00 should be payable as follows:

1) $15,000.00 upon the drawdown of the first tranche of $100,000.00;

2) $10,000.00 if there is a second tranche under the primary facility and provided that the second tranche drawdown is allowed by the Court.

38 The authority for dividing the payment of the closing fee is the case of *Dessert & Passion inc. (Faillite) c. Banque Nationale du Canada*, 2009 QCCS 4669, 58 C.B.R. (5th) 224 (C.S. Que.).

39 In addition, in the event that there would be a drawdown of the secondary facility of $250,000.00 as contemplated by the March 11, 2013 letter, Court approval would have to be obtained.

40 The time to file the Proposal is extended to May 8, 2013 based on the information contained in the Proposal Trustee's report and based on the submissions made at the motion.

41 The following documents will be sealed as they contain information prepared by Ernst and Young Inc. that may be prejudicial to the Company if it becomes public record.

1) Affidavit of Peter Gordon Sworn, paras 18-21;

2) Exhibit P of the Affidavit of Peter Gordon Sworn, March 5, 2013;

3) Respondent's Factum dated March 8, 2013, paras 10-12.

42 I will remain seized of this matter.

43 The matter will be brought back on next week on a date, time and place to be advised.

44 Motion materials for the motion next week are to be served on all of the parties set out in the notice of motion brought by the Company.

45 Order accordingly.

Motion granted.

TAB 9

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
In September 2015, debtors filed intention to make proposal — Debtors were indirect subsidiaries of HP Inc. — SE Ltd. was competitor of HP Inc., and it expressed interest in purchasing debtors' business as going concern — SE Ltd. offered to make DIP loan of up to $1 million to fund projected shortfall in cash flow — Debtors brought motion for orders consolidating their proposal proceeding, authorizing debtors to enter into an interim financing term sheet with SE Ltd. as DIP lender, approving DIP term sheet and granting SE Ltd. super priority charge to secure all of debtors'

obligations to SE Ltd. under DIP term sheet, granting charge not to exceed $150,000 in favour of debtors' legal counsel to secure payment of their reasonable fees and disbursements, granting charge up to $2,000,000 in favour of debtors' directors and officers, approving process for sale and marketing of debtors' business and assets, approving agreement of purchase and sale between SE Ltd. and debtors and granting debtors extension of time to make proposal to their creditors — Motion granted — Consolidation of debtors' notice of intention proceedings was appropriate — It avoided multiplicity of proceedings, associated costs and need to file three sets of motion materials — Three debtors were closely aligned and shared accounting, administration, human resources and financial functions — Debtors' assets were to be marketed together and form single purchase and sale transaction — DIP term sheet was approved and super priority granted — Administration charge was granted — Involvement of professional advisors was critical to successful restructuring — Process was reasonably complex and their assistance was self evidently necessary to navigate to completion — Debtors had limited means to obtain that professional assistance — Directors' of officers' charge was warranted — It was only required in event that sale was not concluded and wind down of facility was required — Directors and officers whose participation in process was critical might not continue their involvement if relief was not granted — Sale process and stalking horse agreement were approved — It permitted sale of debtors' business as going concern — Stalking horse bid established floor price for debtors' assets — Process seemed fair and transparent and there was no viable alternative — Proposal trustee supported process and agreement — Time to file proposal was extended so sale process could be carried out.

Table of Authorities

Cases considered by *H.A. Rady J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed

Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

Comstock Canada Ltd., Re (2013), 2013 ONSC 4756, 2013 CarswellOnt 9796, 4 C.B.R. (6th) 47, 25 C.L.R. (4th) 175 (Ont. S.C.J.) — considered

Electro Sonic Inc., Re (2014), 2014 ONSC 942, 2014 CarswellOnt 1568, 14 C.B.R. (6th) 256 (Ont. S.C.J. [Commercial List]) — considered

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, *(*sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered

Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH (2012), 2012 ONSC 175, 2012 CarswellOnt 2891 (Ont. S.C.J.) — considered

P.J. Wallbank Manufacturing Co., Re (2011), 2011 ONSC 7641, 2011 CarswellOnt 15300, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 13 — considered

s. 14 — considered

s. 15 — considered

s. 16 — considered

s. 17 — considered

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

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

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

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

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2005, c. 47, s. 36] — considered

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

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 64.2(2) [en. 2005, c. 47, s. 42] — considered

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

s. 244(1) — considered

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

Generally — referred to

s. 36 — considered

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

***H.A. Rady J.*:**

Introduction

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

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

(b) administratively consolidating the debtors' proposal proceeding;

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

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

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

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

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

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

Preliminary Matter

2 As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

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

Background

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

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

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

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

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

9 The plant employs twelve part and full time employees.

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

11 Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying

$1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

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

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

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

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

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

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

in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

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

> i. the sale process will be commenced immediately following the date of the order approving it;
>
> ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;
>
> iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;
>
> iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;
>
> v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;
>
> vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;
>
> vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;
>
> viii. the closing of the sale transaction will take place within one business day from the sale approval date;
>
> ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

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

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

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

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

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

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

(a) *Harvest Ontario Partners:*

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

(b) *Harvest Power Mustang Generation Ltd.*

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

(ii) BMO in respect of accounts; and

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

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

Analysis

a) the administrative consolidation

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

b) the DIP agreement and charge

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

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

50.6(3) ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

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

50.6(5) ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,

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

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

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

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

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

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

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

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

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

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

[I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

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

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

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

c) administration charge

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

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

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

d) the D & O charge

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

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

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

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

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

• the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;

• it is required only in the event that a sale is not concluded and a wind down of the facility is required;

• there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;

• the proposal trustee and the proposed DIP lender are supportive;

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

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

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

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

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

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

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

(d) Is there a better viable alternative?

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

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

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

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

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

39 In *Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH*, 2012 ONSC 175 (Ont. S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

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

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

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

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

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

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

f) Extension of time to file a proposal

41 It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

42 For these reasons, the relief sought is granted.

Motion granted.

TAB 10

2011 ONSC 7641
Ontario Superior Court of Justice

P.J. Wallbank Manufacturing Co., Re

2011 CarswellOnt 15300, 2011 ONSC 7641, [2011] O.J. No. 5922, 211 A.C.W.S. (3d) 17, 88 C.B.R. (5th) 281

In the Matter of the Proposal of P.J. Wallbank Manufacturing Co. Limited

D.M. Brown J.

Heard: December 21, 2011
Judgment: December 21, 2011
Docket: CV-11-0123-OTCL

Counsel: J. Fogarty, S.-A. Wilson for Applicant
G. Moffat for General Motors LLC
T. Slahta for TCE Capital Corporation

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors

Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors
Bankrupt was manufacturer of springs and was key supplier to GM LLC (GM) — On December 12, 2011, bankrupt filed Notice of Intention (NOI) under Bankruptcy and Insolvency Act (BIA) — GM provided immediate funding to bankrupt pursuant to accommodation agreement — GM agreed to provide additional DIP financing pursuant to DIP credit facility (proposed facility) and interim financing charge (proposed charge) — Bankrupt brought motion under s. 50.6 of BIA for authorization to borrow under proposed facility and to grant proposed charge — Motion granted — Bankrupt likely would not be subject to NOI proceedings past end of February, 2012 — Although current management would continue to operate bankrupt, accommodation agreement placed significant restrictions on company's operations — Absent approval of proposed facility, bankrupt would close its doors — Report of proposal trustee supported proposed facility — Certain customers supported bankrupt's proposal efforts — As to creditors, GM supported motion at bar,

and other creditors did not oppose it — Terms of proposed charge's priority minimized prejudice to other creditors — Given that immediate cessation of bankrupt's activities would result from failure to approve proposed facility and charge, benefit to all stakeholders significantly outweighed any prejudice — Proposed treatment of professional fees advanced by GM under accommodation agreement was consistent with s. 50.6(1) of BIA — GM confirmed that amounts advanced to date under accommodation agreement would not be subject to proposed charge.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

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

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

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

***D.M. Brown J.*:**

I. Overview of motion for approval of DIP financing

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

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

II. The Debtor and its creditors

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

4 Wallbank has several secured creditors. It owes Danbury Financial Services Inc. about $720,000.00 under a credit facility. Until September, 2011, TCE Capital Corporation factored Wallbank's accounts receivable, but stopped as a result of a default on that facility. Wallbank owes TCE approximately $700,000.00. Both Danbury and TCE have registered financing statements against Wallbank over all classes of collateral except "consumer goods". Wallbank owes P. & B.

W. Holdings Inc., the trustee of a family trust, $724,500; the Trust has subordinated its interest in Wallbank's property to each of Danbury and TCE. Wallbank owes $74,180.53 to three remaining secured creditors: Xerox Canada Inc., Anthony Wallbank and Edward Wallbank. All three have subordinated their security in favour of Danbury and TCE.

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

III. The proposed DIP Facility

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

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

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

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

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

> (i) absent an event of default, GM agrees to refrain from re-sourcing the component parts made by Wallbank for up to 60 days;
>
> (ii) GM agrees to pay for post-filing orders on a "net 7 days prox" basis;

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

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

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

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

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

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

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

IV. Analysis

A. The statutory provisions

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

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

. . .

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

. . .

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

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

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

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

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

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

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

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

B. Consideration of the various factors

B.1 Likely duration of NOI proceedings

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

B.2 Management of Wallbank's affairs

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

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

B.3 Enhancement of prospects of a viable proposal

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

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

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

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

B.4 Report of the Proposal Trustee

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

B.5 Nature and value of Wallbank's property

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

B.6 Confidence of major creditors

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

22 As to creditors, GM, of course, supports Wallbank's motion. The Trust has indicated that it does not oppose the order, but without prejudice to its right to move to vary the order at some later date. In light of changes made to the proposed DIP Order as a result of negotiations amongst

the parties, Danbury does not oppose the order sought. Xerox was served earlier today with the motion materials, but has not communicated any position to Wallbank's counsel.

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

> (i) The order would be without prejudice to TCE's asserted position with respect to its ownership of factored receivables;
>
> (ii) Wallbank, TCE and GM will agree on a process for the collection and remittance of accounts receivable; and,
>
> (iii) GM waives its rights of set-off relating to pre-November 30, 2011 accounts receivable purchased by TCE, save and except for Allowed Set-Offs as defined in section 2.4(B) of the Accommodation Agreement.

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

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

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

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

B.8 Conclusion

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

Motion granted.

Footnotes

1 DIP Facility Term Sheet.

TAB 11

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

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

***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.

TAB 12

2002 CarswellOnt 3975
Ontario Superior Court of Justice

1512759 Ontario Ltd., Re

2002 CarswellOnt 3975, [2002] O.J. No. 4457,
118 A.C.W.S. (3d) 173, 38 C.B.R. (4th) 159

In the Matter of the Proposal of 1512759 Ontario Limited Operating as the Post Group

Ground J.

Heard: November 14, 2002
Judgment: November 14, 2002
Oral reasons: November 14, 2002
Written reasons: November 18, 2002
Docket: 31-OR-411660

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.b Termination of time period
Headnote
Bankruptcy --- Proposal — General
Debtor company filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Prior to expiry of 30-day period for making proposal, debtor company's largest and only secured creditor brought application pursuant to s. 50.4(11) of Act for declaration of termination of period for making proposal — Application granted — Debtor company was unlikely to be able to make viable proposal before expiration of 30-day period — Debtor company was highly unlikely to be able to make proposal within 30-day period that would be accepted by creditors — Debtor company's largest and only secured creditor had stated that it would not support any proposal made by current management of debtor company — Debtor company had defaulted on three different loans over past year — No evidence existed of any expression of interest from, or any approaches to, new lenders or equity investors — Financial condition of debtor company did not make it very attractive investment — In order to survive, debtor company had to resort to financing at 30 per cent interest rate and on very onerous terms — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50.4(11).
Table of Authorities
Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(a)-50.4(11)(d) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — referred to

Ground J. **(orally):**

1 The test under Subsection 50.4 (11) of the *Bankruptcy and Insolvency Act* for the termination of the 30-day period to make a proposal is that the court must be satisfied that one of the situations in clauses (a) to (d) of the subsection exists. I am not entirely satisfied that Mr. Marshall has established bad faith on the part of The Post Group in giving the Notice of Intention or in instituting the lawsuit. Obviously bad blood had developed between the parties and The Post Group was taking such action as it saw necessary in an attempt to save its business and fend off liquidation of the business through the enforcement of the security held by OLE Canada Inc. ("OLE").

2 With respect to clauses (b) and (c) however, the test is that it is not likely that The Post Group will make a variable proposal within the next 10 days or, it is not likely that The Post Group will make a proposal within the next 10 days that will be accepted by the creditors. OLE is the only secured creditor. It is not disputed that, whatever amount is ultimately determined as the amount owing to OLE, that amount will dwarf the other creditors. OLE has stated that, for good reasons, it will not support any proposal made by the current management. Although it is theoretically possible that The Post Group could come up with a new lender or equity investor in the next 10 days prepared to advance sufficient funds to pay off the OLE loan, that is, in my view, highly unlikely. The Post Group has defaulted on three different loans over the past year. There is no evidence of any expression of interest from, or even of any approaches to, new lenders or equity investors. The financial condition of The Post Group, even taking it at its highest, does not make it a very attractive investment. In order to survive this long, The Post Group has had to resort to financing at a 30% interest rate and on very onerous terms and that, of itself, speaks volumes.

3 Therefore, on a balance of probabilities based on the evidence before this court, I am satisfied that it is unlikely that The Post Group will be able to make a viable proposal before the expiration of the 30-day period and that it is highly unlikely that The Post Group will be able to make a proposal within the 30-day period that will be accepted by the creditors. Accordingly, an order will issue:

1. declaring that the 30-day period provided to 1512759 Ontario Limited operating as The Post Group to file a proposal pursuant to the *Bankruptcy and Insolvency Act* is immediately terminated,

2. terminating the stay of proceedings in favour of 1512759 with respect to OLE and appointing the Fuller Landau Group Inc. as Trustee in Bankruptcy of 1512759.

4 Costs payable to OLE on a partial indemnity scale, out of the estate, as a first charge against the estate. Counsel for OLE to make brief written submissions to me on or before December 15, 2002, as to quantum.

Application granted.

TAB 13

2009 ABQB 355
Alberta Court of Queen's Bench

1252206 Alberta Ltd. v. Bank of Montreal

2009 CarswellAlta 900, 2009 ABQB 355, [2009] A.W.L.D. 3099, [2009] A.W.L.D. 3100, [2009] A.J. No. 648, 178 A.C.W.S. (3d) 309

In the Matter of a Notice of Intention to Make a Proposal filed by 1252206 Alberta Ltd. under Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

1252206 Alberta Ltd. (Applicant) and Bank of Montreal (Respondent)

Bank of Montreal (Applicant) and 1252206 Alberta Ltd. (Respondent)

M.B. Bielby J.

Heard: June 4, 2009
Judgment: June 10, 2009
Docket: Edmonton BE03-1203160

Counsel: Jeffrey Lee for 1252206 Alberta Ltd.
Kenneth Lenz for Echo Merchant Fund Ltd.
Ray Rutman, Roberto de Guzman for Bank of Montreal
Darren R. Bieganek for Trustee, Meyers Norris Penny Limited

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy and insolvency --- Proposal — General principles
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Table of Authorities
Cases considered by *M.B. Bielby J.*:
Bearcat Explorations Ltd., Re (2004), 2004 CarswellAlta 1183, 3 C.B.R. (5th) 167 (Alta. Q.B.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — referred to

Com/Mit Hitech Services Inc., Re (1997), 47 C.B.R. (3d) 182, 1997 CarswellOnt 2753 (Ont. Bktcy.) — considered

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

Farmpure Seeds Inc., Re (2008), 322 Sask. R. 280, 48 C.B.R. (5th) 137, 2008 SKQB 381, 2008 CarswellSask 639 (Sask. Q.B.) — referred to

Manderley Corp., Re (2005), 2005 CarswellOnt 1082, 10 C.B.R. (5th) 48 (Ont. S.C.J.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — referred to

s. 62(2)(b) — referred to

s. 69.1(1)(b) [en. 1992, c. 27, s. 36(1)] — referred to

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

Generally — referred to

***M.B. Bielby J.*:**

Decision

1 The 30-day period following the filing of a Notice of Intention to make a proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, ("the BIA") was terminated early pursuant to the provisions of s. 50.4(11) of that legislation. The Court concluded that the insolvent debtor would not likely be able to make a viable proposal before the expiry of that period and that it would not be likely, before the expiry of that period, to make a proposal that would be accepted by its creditors. The debtor's companion application for approval for $1.1 million in Debtor-in-Possession (DIP) financing to rank ahead of the sole secured creditor and for an extension of time to file a proposal was dismissed.

2 The Respondent Bank is the sole secured creditor, owed approximately $2.9 million. It also holds 97% of the unsecured debt. The debtor was incorporated to build a single residential real estate project. In support of its applications it outlined a planned proposal which would permit it to use the DIP financing to complete the real estate project. If sold, the sale proceeds might allow it to repay the Bank prior to the expiry of the period within which the debtor was required to produce a proposal.

3 The Bank maintained it would vote against this proposal if produced and that it would not approve any other proposal advanced by the debtor because it had lost confidence in its management. That management made misrepresentations to it in the past, including misrepresenting that it had received deposits from purchasers.

4 The debtor's plan would see its proposal, in effect, be completed before the creditors were given an opportunity to vote upon it. Support for such initiatives is not within the legislative intent of the proposal provisions of the BIA which is to permit the restructuring of businesses to permit them to remain in operation for the benefit of both themselves and their creditors, rather than to pass a further financing risk onto unwilling creditors to the ultimate benefit of only the debtor and its shareholders.

Facts

5 These are the reasons for a decision made by me in open court on May 4, 2009.

6 The Applicant company is indebted to the Respondent Bank in the approximate amount of $2.9 million borrowed pursuant to a demand loan made July 16, 2007 ("the loan agreement"). That debt is secured by a general security agreement, a demand collateral mortgage registered on lands which were purchased with a portion of the borrowed money and various personal guarantees. The lands in question comprise 38 serviced lots in Edmonton, Alberta upon which the Applicant originally planned to build a 38-unit wood-framed duplex project.

7 It was incorporated solely for the purpose of constructing and selling this project. Therefore, the ultimate acceptance and implementation of any proposal would not serve to ensure it was able to continue to do business in the long term as it had no such intention.

8 The Applicant commenced construction on only 12 of the planned units. Those are said to be 40% to 45% completed to date. Construction stopped sometime last autumn due to a shortfall of funds in the hands of the Applicant. The loan agreement required the loan from the Bank to be repaid in full by December 1, 2008. It was not.

9 On April 20, 2009 the Bank demanded the Applicant repay the loan within 10 days. It responded on May 7, 2009 by filing a Notice of Intention under s. 50.4 of the BIA. Meyers Norris

Penny Limited agreed to act as its trustee. The Applicant now applies for an order allowing it to borrow up to $1.1 million in DIP financing from a third party lender, Echo Merchant Fund Ltd., on the basis that funding will assume priority ahead of that held by the Bank.

10 The Applicant has obtained an evaluation from Glen Cowan & Associates as of April 16, 2009 which, although not directly in evidence, indicates:

a. the 26 serviced lots have a fair market value of approximately $2.54 million;

b. the 12 partially constructed units have a fair market "as is" value of approximately $1.79 million;

c. should the construction on these 12 units be completed they will then have an aggregate market value of $3.695 million;

d. should that construction be completed the aggregate value of the 26 serviced lots and 12 completed units will be approximately $6.235 million.

11 The Applicant outlined the contents of the proposal it hoped to eventually be in a position to make if the DIP financing were granted and it was allowed the extension it sought. That proposal would involve using the $1.1 million in DIP financing, or part of it, to complete the 12 units. It would hope to sell at least two of those units per month for the next six months at prices of at least $300,000 a unit. Its own shareholders would inject equity of $175,000 in December 2009 and of $400,000 in January 2010. In December 2009 the DIP financing would be repaid in full. In January 2010 a land loan would be obtained from an as yet unidentified lender in the amount of $1 million to be secured against the 26 bare land lots. The Bank would be paid in full at that time. Thus all creditors would be repaid in full by, or shortly after, the 6-month period established in s. 50.4(9) of the BIA, the maximum period to which the current stay could be extended. The shareholders of the Applicant would also be repaid their shareholders' equity in full and would earn a $2.2 million profit generated if the Cowan & Associates valuations proved correct.

12 The Applicant owes minimal unsecured debt to 10 trade creditors in the aggregate amount of $28,670.19. Two potential purchasers have provided it with deposits totaling $59,625. The Bank holds 100% of its secured debt and 97% of its unsecured debt.

13 The Bank opposed this application. It brought a counter-application asking for the immediate termination of the 30-day period for making a proposal with the result that the assets of the Applicant would be liquidated forthwith.

14 It did so because it believed the Applicant had breached its obligations under the loan agreement. In particular that agreement provided that the funding would be initially advanced by the Bank on condition that the Applicant provide confirmed presales of the 12 units to arm's length purchasers in the total amount of $3.888 million with the provision of non-refundable purchasers'

deposits of a minimum of 5% of the purchase price for most units. The Applicant also agreed to seek and obtain the Bank's approval to all changes or cancellations to those presale agreements.

15 The Bank was not provided with the actual presale agreements until September 24, 2008; it now challenges some of them as colorable. Further, each of the presale agreements purported to provide for the payment of deposits by the purchasers but the Applicant did not receive most of those deposits. When examined on his affidavit tendered in support of the Applicant's application, Terry Regenwetter admitted that deposits were in fact received by the Applicant on only three of the 12 presales. Those deposits were used to pay for certain construction costs without the knowledge or permission of the Bank. He also testified that nine of the presale contracts were cancelled by the Applicant due to construction delays without his having approached the Bank for its consent to those cancellations.

16 Mr. Regenwetter testified that the Applicant has approached five other lenders in order to obtain financing to finish the townhouse units but no lender has been willing to provide financing which would be subordinate to that of the Bank, even at a high interest rate.

17 Assuming for the moment that I have inherent jurisdiction to order that creditors advancing DIP financing take priority over the debtor's secured lenders in this BIA proceeding, such an order should be granted only after concluding that, on balance, the prejudice to secured creditors created by removing their priority claim to the debtor's assets is outweighed by the value of the opportunity to bring greater value to the enterprise as a whole than would be afforded by liquidation at the hands of the secured creditor. In conducting that balancing exercise I must consider the following:

> a. will the benefit afforded by the DIP financing clearly outweigh the prejudice to the creditors whose security is being subordinated to the financing; see *Bearcat Explorations Ltd., Re* (2004), 3 C.B.R. (5th) 167 (Alta. Q.B.);
>
> b. will the benefit afforded by the DIP financing bring greater value to the enterprise as a whole than bankrupting the Applicant and liquidating its assets through that bankruptcy; further considerations here include whether the major secured creditor tendered evidence demonstrating that its security would realistically be at risk during the period of financing, whether there was a demonstrated significant net value in the assets after the security registered against it was taken into account, whether the sale of the assets as would be provided for in the ultimate proposal would likely pay out all secured creditors and the DIP lender and whether the unsecured creditors would benefit only if the DIP financing allows the business to be continued so that it can be sold as a going concern; see *Manderley Corp., Re* (2005), 10 C.B.R. (5th) 48 (Ont. S.C.J.); *Farmpure Seeds Inc., Re*, 2008 CarswellSask 639 (Sask. Q.B.);

c. can limitations be placed upon the advancement of DIP financing to minimize its impact on the secured creditors, such as limiting the amount of drawdowns on that financing rather than allowing it to be advanced in one tranche; see *Manderley Corp., Re*;

d. is the DIP financing required to permit the Applicant's business to survive the proposal period; see *Farmpure Seeds Inc., Re*.

18 The Bank argued that if circumstances exist which justify the granting of an order terminating the stay created by the Applicant filing its Notice of Intention on May 7th then DIP financing must not be approved, the stay must be terminated and the Applicant therefore placed into bankruptcy notwithstanding the results of any balancing exercise. I accepted that if circumstances exist which justify terminating the stay forthwith then no proposal could be created which would allow the Applicant to continue to operate, with the result that any balancing of interests undertaken could not ultimately justify the granting of priority to any DIP financing, nor to extending the time for the filing of a proposal.

19 Section 50.4(11) of the BIA governs the circumstances under which early termination can be ordered. It provides:

> (11) The court may, on an application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected ...

20 The Applicant admitted to being insolvent. I was satisfied that it would not likely be able to make a viable proposal nor one which would be accepted by its creditors. The Bank thus made out the criteria under s. 50.4(11) (b) and (c). The order for early termination was granted.

21 Section 62(2) of the BIA sets criteria for the approval of a proposal which the Applicant cannot meet without the approval of the Bank. It provides:

> (2) A proposal accepted by the creditors and approved by the court is binding on creditors in respect of ...
>
> > (b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in the value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal ...

22 The Bank is the only secured creditor and thus holds 100% of the majority in number and value of the secured debt. It stated that is because it had lost faith in the management of the Applicant and gave good reasons for that loss of faith, i.e. the misrepresentations in relation to the taking of deposits from the presale purchasers. Therefore, even if a proposal was made it will not be viable in that it would not be binding on the Bank which would vote against it. The Bank could then proceed to liquidate on the Applicant's only asset, the developed and undeveloped land which is the subject of its mortgage; see s. 69.1(b) of the BIA. The Applicant could not then carry on in business.

23 Precedent can be found for early termination of a stay in the decision of Farley J. of the Ontario General Division in *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]) where the Court was similarly presented with a termination application by a secured creditor that represented 95% of the value of the secured claims and 67% of all creditors claims. The secured creditor asserted that there was no proposal which the debtor could make which it would approve.

24 Justice Farley noted that a proposal need not be in progress nor proposed before an application under s. 50.4(11) could be brought. A creditor need not wait to see what a proposal contains before it can take the position to vote against it. In allowing the termination application he stated at para. 9:

> ... I do not see anything in the BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming.

25 Similarly in *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.) Justice Farley allowed the creditor's application recognizing it was the overwhelming creditor and thus in a veto position with respect to any proposal. He stated at para. 9:

> As for [s. 50.4(11)] (b) and (c) the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the Debtor....

26 Similarly here the Bank is the overwhelming creditor, is in a veto position and advises it has lost all confidence in the Applicant.

27 I am not troubled by the effect of refusing the Applicant's applications for DIP financing and a stay extension because its plans are not reflective of the legislative purpose for enactment of the proposal provisions of the BIA. Rather than aiming at restructuring a viable enterprise so that jobs can be maintained and a business preserved, the effect of allowing its application for DIP financing would have been to remove control from a secured lender of the means of recovery upon its loan. It would allow the insolvent debtor another opportunity to complete this building project without the party bearing the greatest risk, the secured creditor, having any control over the decisions made in relation to same. It would impose, in effect, a lending regime on the Bank which no other lender has been prepared to entertain.

28 While in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.) the British Columbia Court of Appeal was considering the legislative purpose behind the proposal provisions of the BIA's companion legislation, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, rather than the BIA, the description of legislative purpose given there applies to the BIA as well. The Court held, at para. 28:

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

29 There, as here, the creditors had lost confidence in a debtor which was seeking to reorganize to allow it control over completing a real estate development. The Court went on to say:

> 37. The failure of the chambers judge to consider the fundamental purpose of the CCAA and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the CCAA should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.
>
> 38. ...What the Debtor Company was endeavoring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor

company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

30 That is essentially what the Applicant hoped for here. With the DIP financing in place it hoped to finish construction of the 12 units, sell them and use the proceeds to pay off the Bank during the period of the stay without any proposal being developed or at least voted upon.

31 Applicant's counsel sought to distinguish the *Cliffs Over Maple Bay* decision by arguing that he has already presented a plan for a proposal and that that proposal would go to a vote, albeit at a point where it would be able to repay the Bank in full. He thus considered the requirement for a vote on a proposal as a technicality.

32 The Court in *Cliffs Over Maple Bay* was not concerned with the absence of a technical requirement, however. It was concerned with a scenario which would see a proposal implemented through the use of DIP financing before any creditor would be able to cast a negative vote against it. That, in substance, is exactly what the Applicant proposed here.

33 If DIP financing were given priority over the Bank's debt here there would be no guarantee that the Applicant will be able to complete the project and sell the units at the projected profit. It was unable to do so in 2008. Five lenders have refused its applications for refinancing which suggests that they were not convinced of the profitability of this venture.

34 Any social benefits which might ensue from putting the Applicant in funds to finish this project itself are more than set off by the negatives. The Applicant argued that the completion of the project would increase taxes paid to the City of Edmonton, would offer tradesmen employment and would remove an unsightly partially finished development from the view of its neighbors. Allowing the Applicants to proceed, however, does not guarantee this plan would have been successful. It would not only be the Bank which would be impacted by failure. These residences would have been marketed at prices designed to attract often young, first time buyers who would put down deposits on a presale basis and terminate their leases on rental accommodation in anticipation of moving in by the stated completion date. If that did not happen those purchasers will be seriously impacted. Even if given possession they would face the risk of builders' liens being filed by unpaid trades. Had it been necessary to consider the question of whether permitting the Applicant to complete and sell the 12 partially completed units would likely bring greater value to the enterprise as a whole than would be the case if the proposal were made and accepted I might well have not concluded that it did. Rather, the Applicant's valuation shows that the Bank and other creditors will most likely be fully repaid and a surplus produced in an orderly liquidation of the real estate in question. DIP financing with priority over the Bank can only cause uncertainty and prejudice to those creditors with no corresponding benefit.

35 The purpose for requesting DIP financing here was not simply to provide operating funds to allow the Applicant to prepare a proposal and keep its business in operation in the meantime. That

business has not been in operation since late 2008. It has not been able to find any other lender, at any cost, who would assume the risk after replacing the Bank's financing or as a subordinate lender to the Bank. Its application was an attempt to do indirectly what it had not been able to achieve directly.

Conclusion

36 The application for approval of DIP financing in priority to the security held by the Bank was therefore refused. The application to extend the time for the making of a proposal was similarly refused. The time granted to the Applicant to make a proposal was terminated as of the date the applications were argued, May 4, 2009.

TAB 14

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings

and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

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

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

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

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

CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

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

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

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

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

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

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

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

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the

Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue

derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues

decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the

solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*[6] and *Lehndorff General Partner Ltd., Re*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Anvil Range Mining Corp., Re*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to

declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities

and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

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

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re*[15], I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts*

of Justice Act[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it 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; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

TAB 15

2014 ONSC 942
Ontario Superior Court of Justice [Commercial List]

Electro Sonic Inc., Re

2014 CarswellOnt 1568, 2014 ONSC 942, 14 C.B.R. (6th) 256, 237 A.C.W.S. (3d) 585

In the Matter of the Notice of Intention to Make a Proposal of Electro Sonic Inc.

In the Matter of the Notice of Intention to Make
a Proposal of Electro Sonic of America LLC

D.M. Brown J.

Heard: February 10, 2014
Judgment: February 10, 2014
Docket: 31-1835443, 31-1835488

Counsel: H. Chaiton for Applicants, Electro Sonic Inc. and Electro Sonic of America LLC
I. Aversa for Royal Bank of Canada

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.10 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Practice and procedure
Companies were owned by same parties and were involved in distribution of electronic and electrical parts — One company was Ontario corporation and other was Delaware corporation — On February 6, 2014, both companies filed notices of intention to make proposals pursuant to s. 50.4 of Bankruptcy and Insolvency Act (BIA) — Companies applied for administrative consolidation, administrative professionals charge, and authorization for proceedings in United States — Application granted — Court ordered administrative consolidation of two proceedings — There was possibility of applicants applying together at future dates for relief such as stay extensions and sale approvals, and companies shared same lender — Applicants were granted administrative charge in amount of $250,000 on property of companies to secure payment of reasonable fees and expenses of legal advisors and proposal trustee — Factors taken into account included: senior secured did not oppose granting of charge, operations of two companies were highly integrated, and Ontario company technically met BIA definition of "insolvent person" — Proposal trustee was authorized to apply to United States Bankruptcy Court for relief pursuant to

Chapter 15 of United States Bankruptcy Code — Proposal trustee was most appropriate person to act as representative in respect of any proceeding under BIA for purpose of having it recognized in jurisdiction outside Canada.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Callidus Capital Corp. v. Xchange Technology Group LLC (2013), 2013 ONSC 6783, 2013 CarswellOnt 15133 (Ont. S.C.J. [Commercial List]) — referred to

Van Breda v. Village Resorts Ltd. (2012), 17 C.P.C. (7th) 223, 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 91 C.C.L.T. (3d) 1, 343 D.L.R. (4th) 577, 429 N.R. 217, 10 R.F.L. (7th) 1, *(*sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note), 291 O.A.C. 201, *(*sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572 (S.C.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 2(1) "insolvent person" — considered

s. 50(1) — considered

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

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 279 — referred to

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 3 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04(1) — referred to

***D.M. Brown J.*:**

I. Motions for administrative consolidation of NOI proceedings, an Administrative Professionals Charge and authorization to initiate Chapter 15 proceedings

1 Electro Sonic Inc. ("ESI") is an Ontario corporation with its registered office in Markham, Ontario. Electro Sonic of America LLC ("ESA") is a Delaware limited liability corporation which carries on business from a facility in Tonawanda, New York. Both companies are owned by the Rosenthal family. Both companies are involved in the distribution of electronic and electrical parts.

2 On February 6, 2014, both companies filed notices of intention to make proposals pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. MNP Ltd. was appointed proposal trustee.

3 Both companies applied for three types of relief: (i) the administrative consolidation of the two proceedings; (ii) the approval of an Administrative Professionals Charge on the property of both companies to secure payment of the reasonable fees of the legal advisors; and, (iii) authorization that the proposal trustee could act as foreign representative of the NOI proceedings and could apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code* (the "Code"). At the hearing I granted the orders sought; these are my reasons for so doing.

II. Administrative consolidation

4 Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits: *Bankruptcy and Insolvency General Rules*, s. 3; *Ontario Rules of Civil Procedure*, Rule 1.04(1). One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court. Administrative consolidation of two bankruptcy proceedings would be analogous to bringing two separate civil actions under common case management.

5 In the present case, the evidence disclosed that the operations of ESI and ESA are highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions, including payroll. As well, ESI has been the sole customer of ESA in 2013 and 2014.

6 Given the possibility of the applicants applying together at future dates for relief such as stay extensions and sale approvals, and given that both companies share the same lender — Royal Bank of Canada — it made sense to order that both bankruptcy proceedings be consolidated for the purposes of future steps in this order. For those reasons, I granted the administrative consolidation order sought.

III. Administrative Charge

7 The applicants seek a charge in the amount of $250,000 on the property of ESI and ESA to secure payment of the reasonable fees and expenses of the legal advisors retained by the applicants, MNP and its legal counsel (the "Administrative Professionals"). The applicants sought an order granting such an Administrative Professionals Charge priority over security interests and liens,

save that the Charge would be subordinate to the security held by RBC and all secured claims ranking in priority thereto.

8 The applicants filed evidence identifying their creditors, as well as the results of searches made under the Personal Property Registration systems in Ontario and British Columbia and under the Uniform Commercial Code in respect of ESA. The applicants complied with the service requirements of *BIA* s. 64.2(1).

9 RBC did not oppose the Charge sought, but advised that it might later bring a motion to lift the stay of proceedings to enable it to enforce its security or to appoint an interim receiver.

10 As noted, ESA is a Delaware corporation with its place of business in New York State. ESA filed evidence that it has a U.S. dollar bank account in Canada, although it did not disclose the amount of money in that account.

11 *BIA* s. 50(1) authorizes an "insolvent person" to make a proposal. Section 2 of the *BIA* defines an "insolvent person" as, *inter alia*, one "who resides, carries on business or has property in Canada". That statutory definition would seem to establish the criteria upon which an Ontario court can assume jurisdiction in proposal proceedings, rather than the common law real and substantial connection test articulated by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.).

12 In the present case, I took into account several factors in granting a Charge over the property of both applicants, including property in New York State:

> (i) the senior secured for both companies, RBC, did not oppose the granting of the Charge;
>
> (ii) according to the results of the UCC search, the other secured creditor of ESA which has filed a collateral registration is ESI, a related company, which seeks the Charge;
>
> (iii) the operations of ESI and ESA are highly integrated;
>
> (iv) ESA has filed evidence of some assets in Canada, thereby technically meeting the definition of "insolvent person" in the *BIA*: *Callidus Capital Corp. v. Xchange Technology Group LLC*, 2013 ONSC 6783 (Ont. S.C.J. [Commercial List]), para. 19; and,
>
> (v) the proposal trustee intends to apply immediately for recognition of these proceedings under Chapter 15 of the *Code* which will afford affected persons in the United States an opportunity to make submissions on the issue.

IV. Proposal trustee as representative in foreign proceedings

13 The proposal trustee was the most appropriate person to act as a representative in respect of any proceeding under the *BIA* for the purpose of having it recognized in a jurisdiction outside Canada: *BIA*, s. 279. It followed that the proposal trustee should be authorized to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *Code*.

Application granted.

Estate Number: 33-2618511/Court File No.: 33-2618511
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618512/Court File No.: 33-2618512
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF LIVEWELL FOODS CANADA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618510/Court File No.: 33-2618510
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ARTIVA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618513/Court File No.: 33-2618513
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VITALITY CBD NATURAL HEALTH PRODUCTS INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
Proceeding Commenced at Ottawa

BOOK OF AUTHORITIES OF DOMINION CAPITAL LLC

(Motion Returnable March 4, 2020)

BENNETT JONES LLP
3400 First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Sean H. Zweig (LSO #57307I)
Tel: (416) 777-6253
Aiden Nelms (LSO#74170S)
Tel: (416) 777-4642
Fax: (416) 863-1716

Counsel to Dominion Capital LLC