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November 28, 2018

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

My Lord/Lady:

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

An application is scheduled to be heard before you on Tuesday, December 4, 2018, at 10 a.m. wherein the Applicants seek the following orders:

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

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

(c) an Order pursuant to Section 50.4(9) of the *BIA* extending the time to file Proposals in this proceeding, such extension to be up to and including January 18, 2019;

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

(d) An Order pursuant to Section 7.02 of the *Rules of the Supreme Court, 1986* and Section 3 of the *Bankruptcy and Insolvency General Rules,* for the administrative consolidation of the within proceedings; and

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

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

FACT SITUATION

The overall circumstances of the Applicants are summarized in the Application Notice and supporting affidavit of Brian Connolly, and further details will be set out in the 1st Report of Deloitte Restructuring Inc. ("the Proposal Trustee"), which we understand will be filed shortly.

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

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

Confectionery and Bazaar are the primary operating entities of a group of companies. Bazaar is a company wholly owned by Confectionary.

Confectionery operates a manufacturing facility from leased premises located in St. John's, Newfoundland and Labrador. This facility specializes in the

production of specialty paper products: specifically, break-open lottery and promotional products.

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

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

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

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

(i) working with the Proposal Trustee to complete statutory requirements, including giving notice to creditors and preparing the NOI Cash Flow;
(ii) meeting in person with both of the key customers, Atlantic Lottery Corporation and British Columbia Lottery Corporation;
(iii) holding preliminary discussions with potential lenders and equity sources;

(iv) working with the Proposal Trustee to answer questions of creditors and establish payment arrangements regarding post-filing obligations;

(v) working with the Proposal Trustee to organize discussions with the significant secured and unsecured creditors including Bank of Montreal, Atlantic Canada Opportunities Agency and Business Investment Corporation; and

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

On this hearing an extension has been requested to January 18, 2019. The maximum permissible extension is to that date (45 days from November 5, 2018).

The professional advisors of the Companies also seek an administrative charge, but that charge being limited to the sum of $100,000.

ARGUMENT

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

The administrative consolidation of the within proceedings

The companies did not attempt to file an NOI "jointly" with the Office of the Superintendent of Bankruptcy. Depending upon how the process progresses, the companies may seek to file a joint proposal. That is as yet undetermined.

As noted, the companies are very closely interrelated in that:

(a) one is the wholly owned subsidiary of the other;

(b) they are engaged jointly in the same business with the same ultimate customers;

(c) one is essentially the sales agent of the other; and

(d) they have the same major secured creditors.

The Court's attention is respectfully drawn to the cases of *Re Electro Sonic Inc*[3]. and *Re Mustang GP Ltd*[4]. Both cases dealt with similarly intertwined companies such as those in the case at bar.

In *Re Electro Sonic Inc.* the court stated:

> 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.

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[3] 2014 ONSC 942 (S.C.J.) [Tab 1]

[4] 2015 ONSC 6562 (S.C.J.) [Tab 2]

> 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.

And in *Re Mustang GP Ltd.* the court agreed:

> 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]).

It is respectfully submitted that there is nothing to distinguish the circumstances in the two cases cited to those extant here, and that consequently it is appropriate for this Court to grant the administrative consolidation of the two proceedings.

The Extension

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

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

As a starting point, a useful elucidation of the requisite approach to section 50.4(9) is to be found in *Re Lockhart Saw Ltd*[5]. and the cases cited therein:

> 5 The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forward a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: *Doaktown Lumber Ltd., Re* (1996), 39 C.B.R. (3d) 41 (N.B. C.A.) at paragraph 12.
>
> 6 In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this

[5] 2007 NBQB 93 [Tab 3]

> provision should be judged on a rehabilitation basis rather than on a liquidation basis: See *Cantrail Coach Lines Ltd., Re* (2005), 10 C.B.R. (5th) 164 (B.C. Master) and *Convergix Inc., Re*, [2006] N.B.J. No. 354 (N.B. Q.B.)

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

Good faith and Due Diligence

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

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

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

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

The court's attention is drawn to *Re Convergix Inc.*[6], and particularly paragraph 39 thereof, as examples satisfying the court that the Applicants are acting with good faith and due diligence. It is noted that the Applicants have retained a trustee, and they have been working on developing a proposal with the assistance of the Proposal Trustee.

Given the relatively brief interregnum between the filing of the NOI and this application it is submitted that it is clear the Applicants have acted in good faith and with due diligence.

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[6] 2006 NBQB 288 [Tab 4]

Likelihood of a Viable Proposal

There is evidence of the likelihood of a viable proposal being made, as opined by the Proposal Trustee.

Re Kocken Energy Systems Inc.[7] is a recent case where the senior secured creditor, coincidentally the Bank of Montreal, took the position that the bank would not vote in favour of any proposal, and thus there could be no likelihood of a viable proposal. Justice Moir in that case concluded:

> 19 Next is the requirement that a viable proposal is likely to be made.
>
> 20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.
>
> 21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.
>
> 22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least

[7] 2017 NSSC 80 [Tab 5]

> a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.
>
> 23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."
>
> 24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

The extension was granted, and ultimately the bank voted in favour of the proposal made[8].

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

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

No Creditor Would Be Materially Prejudiced

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

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

Summary on the Issue

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

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

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

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

Administrative Charge

The relevant parts of section 64.2 read:

> 64.2(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount

> that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

There is little caselaw on the point, and the granting of an administrative charge is common in insolvency proceedings. The charge is not intended to substitute for payments of professional fees by the insolvent as the matter progresses, but rather as a backstop to ensure that the professional fees are paid should the proposal process be unsuccessful. An administrative charge was addressed in *Re Colossus Minerals Inc*[9]. The court determined that the services of the professional advisors were essential to a successful proceeding under the *BIA*.

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

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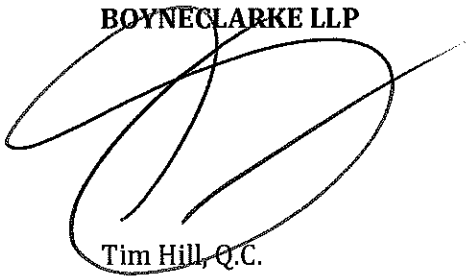
[9] 2014 ONSC 514 [Tab 7]

All of which is respectfully submitted.

BOYNECLARKE LLP



Tim Hill, Q.C.
TH/jb

TAB 1

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

Subject: Insolvency; Civil Practice and Procedure

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

APPLICATION by companies for administrative consolidation, administrative professionals charge, and authorization for proceedings in United States.

***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.

TAB 2

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

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.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

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

MOTION by debtors for approval of proposal.

***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 3

2007 NBQB 93
New Brunswick Court of Queen's Bench

Lockhart Saw Ltd., Re

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

In the Matter of the Proposal of Lockhart Saw Limited

P.S. Glennie J.

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

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

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

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

Headnote

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

Table of Authorities

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

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

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

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

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

CarswellNB 460 (N.B. Q.B.) — referred to

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

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

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

Statutes considered:

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

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

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

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

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

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

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

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

Overview

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

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

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

Analysis

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

41 (N.B. C.A.) at paragraph 12.

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

Acting in Good Faith and with Due Diligence

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

Ability to Make a Viable Proposal

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

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

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

Absence of Material Prejudice to Creditors

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

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

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

> what amounts to material prejudice must be decided on a case-by-case basis. It is a broad concept...the Bankruptcy Court being a court of equity must consider the impact of a stay on the parties. This will involve a weighing of the interest of the debtor against the hardship incurred on the creditor. This has been referred to as the "balance of hurt" test.

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

Disposition

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

Application granted.

Footnotes

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

TAB 4

2006 NBBR 288, 2006 NBQB 288
Cour du banc de la Reine du Nouveau-Brunswick

Convergix Inc., Re

2006 CarswellNB 460, 2006 CarswellNB 863, 2006 NBBR 288, 2006 NBQB 288, [2006] N.B.J. No. 354, 24 C.B.R. (5th) 289, 307 N.B.R. (2d) 259, 795 A.P.R. 259

Dans l'affaire des propositions concordataires de Convergix, Inc., de Cynaptec Information Systems Inc., d'InteliSys Acquisition Inc., d'InteliSys (NS) Co. et d'InteliSys Aviation Systems Inc.

P.S. Glennie J.

Audience: 27 juillet 2006
Jugement: 1 août 2006
Dossier: 12381, 12382, 12383, 12384, 12385; Estate No. 51-879293, 879309, 879319, 879326, 879332

Avocat: R. Gary Faloon, c.r., pour les requérantes

Sujet: Insolvency

Classifications d'Abridgment connexes

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

Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles

Sommaire

Bankruptcy and insolvency --- Proposal — Approval by court — General principles
Insolvent corporations were wholly owned subsidiaries, had one directing mind, one bank account, and operated as one entity to provide reservation systems for airlines — Insolvent corporations filed joint proposal pursuant to Bankruptcy and Insolvency Act, but superintendent of bankruptcy did not accept filing of joint proposal and required court order — Insolvent corporations brought application for order permitting them to file joint proposal and order seeking extension of time for filing proposal — Application granted — Filing of joint proposal is permitted under Act and formal court order is not required — Interrelatedness of insolvent corporations, lack of prejudice to their creditors, and court review inherent in Division 1 proposal made joint proposal most efficient, beneficial, and appropriate approach — Evidence revealed that joint proposal was in best interests of insolvent corporations and their creditors since insolvent corporations were interrelated and operated as single entity — Cost of reviewing inter-corporate transactions, creditors' claims against specific corporations, and ownership and title of assets of insolvent corporations would be unduly expensive and counter-productive.

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Insolvent corporations were wholly owned subsidiaries, had one directing mind, one bank account, and operated as one entity to provide reservation systems for airlines — Insolvency was allegedly caused by unexpected loss of major client and 30 day

period of protection was insufficient time to assess market and have creditors and lenders consider business plan — Insolvent corporations brought application for order permitting them to file joint proposal and order seeking 45 day extension for filing proposal pursuant to s. 50.4(9) of Bankruptcy and Insolvency Act — Application granted — Insolvent corporations demonstrated good faith and diligence since they had business plan, professional advice for restructuring, were diligent in working on restructuring, and met with principal outside creditor to advise it of proceedings — Affidavit evidence demonstrated that insolvent corporations would likely be able to make viable proposal since core business existed, management appeared committed to ongoing viability, and debts could likely be serviced by restructured entity — Proposed extension would not materially prejudice creditors of insolvent corporations since they continued to pay equipment leases and had sufficient cash to meet ongoing liabilities — Collateral of secured creditors was comprised of equipment and software and its value was unlikely to be eroded as result of extension — Bankruptcy would yield little recovery for unsecured creditors.

Table des précédents

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

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

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

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

Howe, Re (2004), 49 C.B.R. (4th) 104, 2004 CarswellOnt 1253 (Ont. S.C.J.) — followed

Nitsopoulos, Re (2001), 25 C.B.R. (4th) 305, 2001 CarswellOnt 1994 (Ont. Bktcy.) — followed

Pateman, Re (1991), 1991 CarswellMan 17, 5 C.B.R. (3d) 115, 74 Man. R. (2d) 1 (Man. Q.B.) — considered

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

Statutes considered:

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

s. 2 "person" — considered

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

s. 54(3) — referred to

s. 66.12(1.1) [en. 1997, c. 12, s. 46(1)] — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

APPLICATION by insolvent companies for order permitting them to file joint proposal and extend time for filing proposal.

P.S. Glennie J. **[oralement]:**

1 La question à trancher en l'espèce est de savoir si des sociétés insolvables liées ont le droit de déposer une proposition concordataire commune en vertu de la *Loi sur la faillite et l'insolvabilité*. Pour les motifs suivants, je conclus que de telles sociétés ont le droit de le faire.

APERÇU

2 Chacune des requérantes, Convergix Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co. et InteliSys Aviation Systems Inc. (les sociétés insolvables), est une filiale entièrement détenue d'InteliSys Aviation Systems of America Inc. (IYSA).

3 À toutes fins pratiques, les sociétés insolvables fonctionnent comme une seule entité depuis 2001. Elles ont une seule âme dirigeante et les mêmes dirigeants. Elles maintiennent également un seul compte de banque.

4 Les sociétés insolvables sont considérées comme des sociétés liées selon les dispositions de la *Loi de l'impôt sur le revenu du Canada.*

5 Tous les paiements aux créanciers des sociétés insolvables, y compris certains créanciers principaux comme l'Agence de promotion économique du Canada atlantique, ont été faits par l'une des sociétés insolvables, InteliSys Aviation Systems Inc. (InteliSys), même si des conventions de prêt ont pu être conclues avec d'autres sociétés insolvables. En outre, tous les employés des sociétés insolvables sont payés par InteliSys.

Dépôt d'un avis de l'intention de faire une proposition

6 Le 27 juin 2006, les sociétés insolvables ont tenté de déposer un avis commun de l'intention de faire une proposition conformément à la *Loi sur la faillite et l'insolvabilité* (la *Loi*) au Bureau du surintendant des faillites (le surintendant). Dans une lettre datée du 28 juin 2006, le surintendant a donné avis qu'il n'accepterait pas le dépôt de la proposition commune.

7 Le 29 juin 2006, chacune des requérantes a déposé auprès du surintendant un avis de l'intention de faire une proposition. Chacune des sociétés insolvables a déposé auprès du surintendant un sommaire mensuel des prévisions d'évolution de l'encaisse et un rapport du syndic sur l'état de l'évolution de l'encaisse.

Prorogation demandée en vertu du paragraphe 50.4(9) de la Loi

8 IYSA est tenue de déposer des rapports trimestriels à la Securities and Exchange Commission des États-Unis, dont le siège est à Washington. Il s'agit d'une valeur cotée en bourse qui peut être négociée hors cote sur le système NASDAQ. Les requérantes disent qu'il faut tenir compte des répercussions qu'entraîne pour IYSA la situation financière des sociétés insolvables. Elles affirment que la période de protection initiale de 30 jours prévue par la *Loi* n'est pas suffisante pour déterminer toutes les répercussions de la situation sur IYSA et prendre des mesures en conséquence.

9 Les requérantes affirment que leur insolvabilité a été causée par la perte inattendue de leur principal client, qui représentait plus de 25% de leurs revenus réunis. Elles disent qu'il leur faut du temps pour évaluer le marché et déterminer si ces revenus peuvent être remplacés et, le cas échéant, combien de temps cela prendrait.

10 Les sociétés insolvables et Grant Thornton Limited ont dressé un plan d'entreprise, qui a été présenté aux investisseurs et aux prêteurs. Ces sociétés auront besoin d'une période plus longue que la période de protection initiale de 30 jours prévue par la *Loi* pour que ces prêteurs et ces investisseurs puissent étudier le plan d'entreprise et prendre des décisions en matière de prêts et d'investissements.

11 L'avocat des requérantes avise la Cour que le surintendant ne s'oppose pas au dépôt de propositions communes par des sociétés liées mais que cela exige une ordonnance de la Cour.

12 Les sociétés insolvables maintiennent des systèmes pour plusieurs compagnies aériennes. Elles s'occupent de tous les aspects de la gestion des réservations, y compris par l'entremise de centres d'appels et de sites Web, et fournissent les capacités nécessaires au contrôle à l'arrivée et à l'embarquement des passagers. Le volume total des réservations est d'environ 1 300 par jour et constitue une source de revenus de 520 000 $ par jour. Les requérantes affirment que la perte de revenus, même pour une seule journée, serait catastrophique. Elles soutiennent qu'un tort considérable serait causé aux diverses compagnies aériennes clientes. Elles disent aussi qu'il faudrait au moins 30 jours pour mettre en marche un autre système de réservations en ligne.

ANALYSE

13 Il n'existe aucune décision publiée portant sur la question de savoir si des sociétés liées peuvent faire une proposition commune régie par la section I en vertu de la *Loi*. Il existe deux décisions, dont l'une concerne des associés (*Howe, Re*, [2004] O.J. No. 4257; 49 C.B.R.(4th) 104; 2004 CarswellOnt 1253 (C. sup.)) et l'autre concerne des particuliers (*Nitsopoulos, Re*, [2001] O.T.C. 430; [2001] O.J. No. 2181; 25 C.B.R.(4th) 305; 2001 CarswellOnt 1994 (C. des faill. Ont.)).

14 L'article 2 de la *Loi* dispose que les sociétés sont assimilées à des personnes.

15 En interprétant la portée de la partie de la *Loi* qui porte sur les propositions concordataires, je garde à l'esprit les propos suivants de l'ouvrage de L.W. Houlden et G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, troisième édition révisée (2006, fascicule 6, pages 1-6 et 1-6.1):

> La **Loi** ne devrait pas être interprétée de façon exagérément étroite et légaliste: voir **Mercure c. Marquette & Fils**, [1977] 1 R.C.S. 547; 65 D.L.R.(3d) 136; 10 N.R. 239, **Olympia and York Developments Ltd. (Re)** (1997), 143 D.L.R.(4th) 536; 45 C.B.R.(3d) 85; 1997 CarswellOnt 657 (Div. gén. Ont.), **Sun Life Assurance Co. of Canada c. Revenue Canada (Taxation)**, 45 C.B.R.(3d) 1; 47 Alta L.R.(3d) 296; 1997 CarswellAlta 254; [1997] 5 W.W.R. 159; 144 D.L.R.(4th) 653 (C.A.), **County Trucking Ltd., Re** (1999), 10 C.B.R.(4th) 124; 1999 CarswellNS 231 (C.S.N.-É.). Il faudrait en donner une interprétation raisonnable qui en appuie le cadre législatif; il faudrait éviter un résultat absurde: voir **Handelman, Re** (1997), 48 C.B.R.(3d) 29; 1997 CarswellOnt 2891 (Div. gén. Ont.).
>
> La **Loi** confie l'administration quotidienne aux gens d'affaires, c'est-à-dire les syndics de faillite et les inspecteurs. Son intention est que l'administration soit pratique et non légaliste, et la **Loi** devrait être interprétée de manière à réaliser cette intention: voir **Rassell (Re)** (1999), 177 D.L.R.(4th) 396; 1999 CarswellAlta 718; 12 C.B.R.(4th) 316; 71 Alta. L.R.(3d) 85; 237 A.R. 136; 197 W.A.C. 136 (C.A.).

16 Dans l'affaire *Howe*, susmentionnée, les débiteurs ont présenté une motion en vue d'obtenir une ordonnance prescrivant au surintendant d'accepter le dépôt d'une proposition commune régie par la section I ainsi que d'un bilan commun, d'un certificat d'évaluation commun et d'un état de l'évolution de l'encaisse commun.

17 Le surintendant a admis que le dépôt par les débiteurs d'une proposition commune régie par la section I était approprié, car les dettes étaient essentiellement les mêmes et le dépôt commun était dans l'intérêt supérieur des débiteurs et de leurs créanciers. Toutefois, le surintendant a comparu à l'audition de la motion pour faire des observations sur sa politique relative au dépôt de propositions communes régies par la section I. La politique prescrivait que le surintendant refuserait le dépôt d'une proposition qui ne satisfait pas à première vue aux critères d'admissibilité énoncés dans la *Loi*. La politique prévoyait en outre que le surintendant refuserait le dépôt d'une proposition commune régie par la section I si une ordonnance autorisant un tel dépôt n'était pas obtenue par le syndic ou les débiteurs.

18 La registraire Sproat a rejeté la position énoncée par le surintendant dans sa politique. Elle a statué que celui-ci n'avait pas le pouvoir de refuser le dépôt d'une proposition du moment que celle-ci respectait les dispositions du paragraphe 50(2) de la *Loi*, qui portent sur le dépôt des documents.

19 La registraire a examiné la jurisprudence portant sur la recevabilité des propositions communes régies par la section I de la *Loi*. Elle a conclu que, même si les dispositions de la *Loi* n'autorisent pas celles-ci explicitement, on pourrait

raisonnablement les interpréter de telle sorte qu'elles permettent à un syndic de déposer auprès du séquestre officiel une proposition commune régie par la section I. À cet égard, elle a cité ses propres observations dans la décision *Re Shireen Catharine Bennett*, dossier no 31-207072T, où elle avait affirmé:

> Il me semble que la décision du juge Farley dans l'affaire **Nitsopoulos, Re** (2001), 25 C.B.R.(4th) 305 (C.S. Ont.) est claire quant au fait que la **Loi sur la faillite et l'insolvabilité** n'interdit pas le dépôt d'une proposition commune et [Y] ne l'autorise pas en termes formels non plus. À mon avis, il serait conforme au but de la **Loi**, et également très efficace et économique, d'élargir la décision **Nitsopoulos, Re** en statuant que des propositions communes peuvent être déposées. [Y] Je ne suis pas convaincue qu'une ordonnance officielle de la Cour soit nécessaire pour autoriser le dépôt d'une proposition commune. Il me semble que les abus éventuels peuvent être évités de la manière décrite au paragraphe 9 de **Nitsopoulos, Re**, c'est-à-dire au moment d'une demande d'autorisation de la Cour [Y] et on peut trancher à ce moment la question de savoir s'il y a abus.
>
> Alors, pour résumer, aucune ordonnance n'est nécessaire pour le dépôt d'une proposition commune régie par la section I. Si le syndic a des difficultés concernant le dépôt, l'affaire pourra être inscrite de nouveau sur ma liste, et le surintendant devra se présenter à la date convenue.

20 En conséquence, la registraire a ordonné au surintendant d'accepter le dépôt de la proposition commune. La Cour a statué en outre qu'une proposition commune régie par la section I était autorisée par la *Loi* et que le surintendant devait en accepter le dépôt même en l'absence d'une ordonnance de la Cour autorisant le dépôt.

21 Dans la décision *Nitsopoulos*, susmentionnée, un créancier de M. Nitsopoulos et un créancier de Mme Nitsopoulos ont présenté chacun une motion pour demander une ordonnance interdisant le dépôt d'une proposition commune.

22 Cette proposition regroupait en une seule classe les créanciers non garantis des Nitsopoulos, qu'ils soient créanciers du mari, de l'épouse ou des deux. Le juge Farley a indiqué que la question à trancher consistait à savoir si la *Loi* autorisait le dépôt d'une proposition commune régie par la section I.

23 Il a observé une importante distinction entre une proposition de consommateur régie par la section II et une proposition régie par la section I. Cette dernière doit être approuvée par la Cour pour prendre effet. Par contre, une proposition régie par la section II n'a pas besoin d'être expressément approuvée par la Cour à moins que le séquestre officiel ou toute autre partie intéressée, dans les 15 jours suivant l'acceptation par les créanciers, ne demande que la proposition soit révisée. Le juge Farley a affirmé que le rôle du surintendant des faillites relativement aux instructions n'est pas indispensable, étant donné qu'une révision sera automatiquement effectuée par la Cour pour déterminer si les conditions de la proposition sont équitables, raisonnables et généralement avantageuses pour les créanciers. Il a conclu que cette révision comporterait un examen semblable à celui que prévoit le paragraphe 66.12(1.1) de la *Loi*, examen qui permettrait de déterminer si une proposition commune devrait être autorisée.

24 Le juge Farley a conclu que la *Loi* ne devrait pas être interprétée de façon à interdire le dépôt d'une proposition commune régie par la section I.

25 À mon avis, le dépôt d'une proposition commune est autorisé par la *Loi*, et, dans la présente affaire, le dépôt d'une proposition commune par les sociétés liées est autorisé. La *Loi* ne devrait pas être interprétée de façon à interdire le dépôt d'une proposition commune. De plus, je ne suis pas convaincu qu'une ordonnance expresse de la Cour soit nécessaire pour autoriser le dépôt d'une proposition commune.

26 En l'espèce, la preuve par affidavit révèle divers faits qui appuient l'idée que le dépôt commun est dans l'intérêt supérieur des sociétés insolvables et de leurs créanciers.

27 Je suis convaincu que les sociétés insolvables fonctionnent essentiellement comme une seule entité depuis 2001. Les paiements à tous les créanciers sont effectués par InteliSys, même si des conventions de prêt ont pu être conclues avec d'autres sociétés insolvables. La comptabilité inter-sociétés des sociétés insolvables peut ne pas afficher ces paiements ou ces transactions.

28 En parvenant à la conclusion que le dépôt commun est approprié en l'espèce, j'ai tenu compte des facteurs suivants:

a) Le coût d'un examen approfondi de toutes les transactions inter-sociétés des sociétés insolvables en vue de préparer des propositions distinctes serait excessif et irait à l'encontre de l'objectif recherché, qui est de restructurer les sociétés insolvables et d'assainir leur situation.

b) Le coût d'un examen approfondi de toutes les réclamations des créanciers sans lien de dépendance pour déterminer de quelles sociétés insolvables ils sont créanciers serait excessif et irait à l'encontre de l'objectif recherché, qui est de restructurer les sociétés insolvables et d'assainir leur situation.

c) Le coût d'un examen visant à déterminer la propriété des actifs des sociétés insolvables et le droit à ces actifs serait excessif et irait à l'encontre de l'objectif recherché, qui est de restructurer les sociétés insolvables et d'assainir leur situation.

29 En outre, certaines des sociétés insolvables n'ont que des dettes envers des parties liées. Aux termes du paragraphe 54(3) de la *Loi*, un créancier lié peut voter contre une proposition, mais non en faveur. En conséquence, InteliSys (NS) Co. et InteliSys Acquisition Inc. ne peuvent pas obtenir sans une ordonnance de la Cour les voix nécessaires à l'approbation de propositions distinctes.

30 À mon avis, la seule conclusion possible à la suite de ces considérations est qu'une proposition commune est la solution la plus efficiente, la plus avantageuse et la plus appropriée en l'espèce.

31 Étant donné le raisonnement suivi dans les décisions *Howe* et *Nitsopoulos*, les liens mutuels entre les sociétés insolvables, la révision nécessairement effectuée par la Cour pour toute proposition régie par la section I et l'absence de tout préjudice aux créanciers des sociétés insolvables, je conclus que celles-ci devraient être autorisées à déposer une proposition commune.

32 Dans la décision *Pateman (Bankrupts), Re*, [1991] M.J. No. 221; 74 Man.R.(2d) 1 (C.B.R.), le juge Oliphant a fait cette remarque: J'ai de graves réserves quant à la possibilité de faire des propositions communes, sauf dans le cas d'associés, mais, puisque je n'ai pas à trancher cette question, je la laisse de côté pour l'instant.

33 À mon avis, les sociétés en l'espèce sont effectivement associées parce qu'elles ont des liens mutuels si étroits. Elles ont le même compte de banque et la même âme dirigeante, et leurs bureaux sont au même endroit.

34 Je suis d'avis que le dépôt d'une proposition commune par les sociétés liées est autorisé par la *Loi* et que, eu égard aux faits de l'espèce, une ordonnance autorisant un tel dépôt devrait être rendue. Une telle ordonnance est conforme aux principes qui sous-tendent l'interprétation de la *Loi* et est dans l'intérêt supérieur de toutes les parties prenantes des sociétés insolvables.

Prorogation du délai de dépôt d'une proposition

35 Les requérantes demandent également, conformément au paragraphe 50.4(9) de la *Loi*, une ordonnance prorogeant de 45 jours, soit jusqu'au 10 septembre 2006, le délai de dépôt d'une proposition.

36 Les articles de la *Loi* qui portent sur les propositions sont conçus pour donner à une société insolvable la possibilité de présenter une proposition, pourvu que la Cour soit convaincue que les dispositions du paragraphe 50.4(9) sont respectées: voir *Doaktown Lumber Ltd. c. BNY Financial Corp. Canada* (1996), 174 R.N.-B.(2e) 297; 444 A.P.R. 297; 39 C.B.R.(3d) 41 (C.A.), au paragraphe 12.

37 Une prorogation peut être accordée si les sociétés insolvables convainquent la Cour qu'elles satisfont aux critères suivants par prépondérance des probabilités:

a) les sociétés insolvables ont agi C et continuent d'agir C de bonne foi et avec toute la diligence voulue;

b) elles seraient vraisemblablement en mesure de faire une proposition viable si la prorogation était accordée;

c) la prorogation ne saurait causer de préjudice grave à l'un ou l'autre des créanciers des sociétés insolvables.

38 Dans l'examen des demandes faites conformément au paragraphe 50.4(9) de la *Loi*, il faut appliquer une norme objective, et les affaires examinées en application de cette disposition devraient être jugées en vue d'un assainissement de la situation des sociétés plutôt que de leur liquidation: voir *Cantrail Coach Lines Ltd., Re*, [2005] B.C.T.C. Uned. 182; 10 C.B.R.(5th) 164; 2005 BCSC 351.

39 Je suis convaincu que les mesures prises par les sociétés insolvables démontrent leur bonne foi et leur diligence. Ces mesures sont notamment les suivantes:

a) Les sociétés insolvables ont retenu les services professionnels de Grant Thornton Limited pour les aider dans leur restructuration.

b) Les sociétés insolvables ont établi un plan d'entreprise.

c) Les sociétés insolvables travaillent avec diligence à la restructuration.

d) Depuis le dépôt des cinq avis d'intention de faire une proposition, des représentants des sociétés insolvables et de Grant Thornton Limited ont rencontré des représentants de l'APECA, le principal créancier externe des sociétés insolvables, pour les aviser des procédures en cours.

e) Des représentants des sociétés insolvables ont rencontré des investisseurs externes.

40 Le critère servant à déterminer si des personnes insolvables seraient vraisemblablement en mesure de faire une proposition viable si une prorogation leur était accordée consiste à savoir si la personne insolvable serait vraisemblablement (et non certainement) en mesure de présenter une proposition qui semble raisonnable à première vue pour un créancier raisonnable. Le critère ne consiste pas à savoir si un créancier déterminé serait prêt à appuyer la proposition. Dans l'affaire *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R.(3d) 219 (Div. gén. Ont.), le juge Farley était d'avis que viable veut dire raisonnable à première vue pour un créancier raisonnable et que vraisemblablement n'est pas une exigence de certitude mais signifie que la chose pourrait bien arriver , est probable , qu' on peut raisonnablement s'y attendre . Voir aussi *Scotia Rainbow Inc. (Bankrupt) et al. c. Bank of Montreal* (2000), 186 N.S.R.(2d) 153; 581 A.P.R. 153; 18 C.B.R.(4th) 114 (C.S.).

41 La preuve par affidavit démontre en l'espèce que les sociétés insolvables seraient vraisemblablement en mesure de faire une proposition viable, car il semble exister une activité fondamentale pouvant servir de base à une entreprise commerciale; la direction est la clé de la viabilité continue de l'entreprise, et elle semble déterminée à en assurer la viabilité continue; de plus, le service des dettes impayées aux créanciers garantis peut vraisemblablement être assuré par une entité restructurée.

42 Je suis convaincu que la prorogation proposée ne causerait pas de préjudice grave aux créanciers des sociétés insolvables. Ma conclusion à ce sujet est fondée sur les faits suivants: les sociétés insolvables continuent de payer les baux de matériel, et le matériel continue d'être assuré, maintenu en bon état et bien préservé par les sociétés insolvables; la dette principale des sociétés insolvables est une dette inter-sociétés; la garantie subsidiaire des créanciers garantis consiste essentiellement dans le matériel et les logiciels, dont il est improbable que la valeur soit amoindrie par suite de la prorogation; d'après le sommaire mensuel des prévisions d'évolution de l'état de l'encaisse, les sociétés insolvables ont des liquidités suffisantes pour faire honneur à leurs obligations courantes d'ici la fin septembre 2006, et, dans l'éventualité d'une faillite, les créanciers non garantis des sociétés insolvables ne récupéreraient vraisemblablement rien ou pas grand-chose.

43 En conséquence, je conclus à partir des faits de l'espèce que chacune des dispositions du paragraphe 50.4(9) de la *Loi* est respectée et qu'une prorogation du délai de dépôt d'une proposition devrait être accordée.

CONCLUSION ET DISPOSITIF

44 En conséquence, je rends une ordonnance prévoyant que les sociétés insolvables peuvent déposer une proposition commune conformément aux dispositions de la *Loi* et que, conformément au paragraphe 50.4(9) de la *Loi*, le délai de dépôt d'une proposition est prorogé de 45 jours, soit jusqu'au 10 septembre 2006.

TAB 5

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

2017 NSSC 80
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

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

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

Gerald R.P. Moir J.

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

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

Subject: Insolvency

Related Abridgment Classifications

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

Headnote

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

Table of Authorities

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

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

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

Statutes considered:

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

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

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

s. 178 — considered

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

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

Introduction

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

Facts

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

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

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

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

Kocken and Bank of Montreal Breakdown

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

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

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

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

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

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

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

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

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

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

Recent Developments

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

Disposition

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

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

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

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

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

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

18 I am satisfied on the first threshold.

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

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

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

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

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

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

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

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

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

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

Motion granted with conditions.

End of Document

TAB 6

2017 NSSC 215
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

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

In the Matter of the Proposal of Kocken Energy Systems Incorporated

Gerald R.P. Moir J.

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

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

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

Subject: Insolvency

Related Abridgment Classifications

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

Headnote

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

ADDITIONAL REASONS to judgment reported at *Kocken Energy Systems Inc., Re* (2017), 2017 NSSC 80, 2017

CarswellNS 187 (N.S. S.C.), extending bankrupt's time to file proposal in bankruptcy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

End of Document

TAB 7

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

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

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

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

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

H.J. Wilton-Siegel J.

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

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

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XX Miscellaneous

Headnote

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

Table of Authorities

Statutes considered:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Background

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

DIP Loan and DIP Charge

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

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

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

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

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

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

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

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

Administration Charge

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

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

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

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

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

Directors' and Officers' Charge

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

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

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

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

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

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

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

The SISP

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

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

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

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

26 Lastly, the Proposal Trustee supports the proposed SISP.

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

Engagement Letter with the Financial Advisor

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

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

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

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

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

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

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

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

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

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

Extension of the Stay

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

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

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

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

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

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

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

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