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July 24, 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 Burry's Shipyard Inc: Court No. 22164**

An application is scheduled to be heard before you on Thursday, August 2, 2018, at 10 a.m. wherein Burry's Shipyard Inc. ("Burry's") seeks the following orders:

(a) an Order abridging the notice periods pursuant to the *Bankruptcy and Insolvency General Rules*, 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* ("*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 a Proposal in this proceeding, such extension to be up to and including September 12, 2018 (or a date to be determined by the Court);

(d) an order pursuant to Section 50.6 of the *BIA* approving the granting of interim financing security by Business Development Bank of Canada ("BDC"); and

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

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

**FACT SITUATION**

The overall circumstances of Burry's are summarized in the Application Notice and supporting affidavit of Glenn Burry, and further details will be set out in the 1st Report of Deloitte Restructuring Inc. ("the Proposal Trustee"), which we understand will be filed later this week.

The materials filed and to be filed describe in some detail the operations of Burry's, the circumstances leading up to filing of the Notice of Intention to Make a Proposal ("NOI"), and the restructuring efforts undertaken both before and since the filing of the NOI.

It is the opinion of the Proposal Trustee and the management of Burry's that more time is required to allow Burry's to proceed with the sales process described in the 1st Report of the Proposal Trustee, which process is supported by the senior secured creditors, Business Development Bank of Canada ("BDC") and Bank of Nova Scotia.

The sales process is anticipated to take until the end of October. This will necessitate further extensions and dates for same will be requested at the hearing.

On this hearing an extension has been requested to September 12th. The maximum permissible extension is to September 23rd (45 days from August 9th). The Court may wish to grant a longer extension than to September 12th.

The proposal Trustee will opine in the 1st Report that debtor in possession ("DIP") financing may be required during the restructuring process, and BDC has agreed to provide same.

The professional advisors of Burry's also seek an administrative charge, but that charge being limited to the sum of $50,000.

**ARGUMENT**

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

***The Extension***

Burry's 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.

Each of the three branches of the test which Burry's must satisfy are dealt with separately.

**Good faith and Due Diligence**

Burry's has clearly acted in good faith and with due diligence.

The filing of the NOI by Burry's was a prudent step given that:

(a) unsecured creditors might obtain judgments against Burry's, which might interfere with or otherwise prejudice the sales process; and

(b) court supervision of the sales process will benefit all stakeholders demonstrating that a fair and equitable process is being used, taking into account the interests and priorities of all.

The court's attention is drawn to *Re Convergix Inc.*[1], and particularly paragraph 39 thereof, as examples satisfying the court that Burry's is acting with good faith and due diligence. It is noted that Burry's has retained a trustee, has been working on a sales process with the assistance of the Proposal Trustee, and has the support of its senior secured creditors.

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

[1] 2006 NBQB 288 [Tab 1]

**Likelihood of a Viable Proposal**

There is evidence of the likelihood of a viable proposal being made. The proposal will be made using the fruits of the sale process. While it remains to be seen what that process will generate in terms of actual proceeds, it is clear there will likely be proceeds.

In *Re H & H Fisheries Ltd*[2]., the court considered what "viable" means in the context of section 50.4(9):

> 23 [22] "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (Re Baldwin Valley Investors Inc., [1994] 23 C.B.R. (3rd) 219). Again, the court must be satisfied on a balance of probabilities that HHFL would likely (*sic*). This at the very least 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.
>
> (emphasis added)

Here the reasonable level of effort is readily apparent in the progress made with the sales process both before and after the filing of the NOI, and the fact that senior secured creditors are "onside" with the process.

While a viable proposal will not likely be made in the next 45 days (the maximum possible extension) and a further extension will be required, it is clear that a viable proposal is a reasonable expectation.

[2] 2005 NSSC 346 [Tab 2]

### 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.

### Summary on the Issue

It is respectfully submitted that Burry's has adduced satisfactory evidence to show:

(a) that Burry's has acted, and is acting, in good faith and with due diligence;

(b) that Burry's 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.

***Dip Financing***

Section 50.6 of the *BIA* reads:

> 50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor,

having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and
(b) only property acquired for or used in relation to the business may be subject to a security or charge.

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

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

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

(a) the period during which the debtor is expected to be subject to proceedings under this Act;
(b) how the debtor's business and financial affairs are to be managed during the proceedings;
(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
(e) the nature and value of the debtor's property;
(f) whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

The trustee's reports mentioned in subsection 50.6(5)(g) are those opining on the reasonableness of the cashflow statement.

In approaching this question, the Court's attention is respectfully drawn to *Re Colossus Minerals Inc.*[3], wherein the court dealt with similar considerations as to those extant in the case at bar. In that case the Ontario Superior Court of Justice approved DIP financing and an administration charge in a situation where a sale and investor solicitation process had begun. The court noted that the court had the authority under s. 50.6(1) of the *BIA* to authorize the DIP financing, subject to a consideration of the factors under s. 50.6(5). The court referred to the sale and investor solicitation process, the confidence of significant creditors in the process, the terms of the financing that were consistent with the terms of financing in similar proceedings, a liquidity crisis should the financing not be approved, and that the loan would permit the sale and investor solicitation process to continue. The court also noted that the trustee supported the motion.

All those factors are present on this application, and for the reasons accepted by the court in *Re Colossus Minerals Inc.* it is respectfully submitted that a DIP order should be granted here. While an actual advance of the DIP financing may not be required, prudence dictates the request for same so as not to prejudice the sales process as this matter goes forward.

In terms of an order, filed with this brief is an order providing for the DIP charge and the administrative charge discussed below. The order is based upon the Model Charging

[3] 2014 ONSC 514 [Tab 3]

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Order to be found in the Supreme Court of Nova Scotia Practice Memorandum No. 8. To assist the Court in its review of same, attached to this brief is a redline copy of the Model Charging Order[4] showing the changes made to produce the order sought on this application.

***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.

[4] [Tab 4]

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

This issue was also addressed in *Re Colossus Minerals Inc.* The court determined that the services of the professional advisors were essential to both a successful proceeding under the *BIA* as well as for the conduct of the sale and investor solicitation process.

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

All of which is respectfully submitted.

**BOYNECLARKE LLP**

Tim Hill, Q.C.
TH/jb

# TAB 1

*Case Name:*
**Convergix Inc. (Re)**

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

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

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

2006 NBQB 288

2006 NBBR 288

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

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

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

2006 CarswellNB 460

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

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

and 879332

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

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**P.S. Glennie J.**

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

(44 paras.)

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

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

**Statutes, Regulations and Rules Cited:**

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

Income Tax Act (Canada),

**Counsel:**

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

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## DECISION

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

### *OVERVIEW*

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

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

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

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

**Filing of Notice of Intention to make a Proposal**

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

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

**Extension Pursuant to Subsection 50.4(9) of the BIA**

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

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

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

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

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

***ANALYSIS***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The cost of reviewing and vetting all inter-corporate transactions of the Insolvent Corporations in order to prepare separate proposals would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.
(b) The cost of reviewing and vetting all arms-length creditors' claims to determine which Insolvent Corporation they are actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.
(c) The cost of reviewing and determining ownership and title to the assets of the Insolvent Corporations would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

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

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

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

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

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

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

**Extension of Time for Filing a Proposal**

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

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

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

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

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

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

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

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

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

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

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

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

***CONCLUSION AND DISPOSITION***

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

P.S. GLENNIE J.

cp/e/qw/qlbxm/qlbxs

# TAB 2

*Case Name:*
**H & H Fisheries Ltd. (Re)**

**IN THE MATTER OF the Bankruptcy of H & H Fisheries Limited**

[2005] N.S.J. No. 513

2005 NSSC 346

239 N.S.R. (2d) 229

18 C.B.R. (5th) 293

144 A.C.W.S. (3d) 407

2005 CarswellNS 541

Docket: SH B259148

Nova Scotia Supreme Court - In Bankruptcy and Insolvency
Halifax, Nova Scotia

**W.E. Goodfellow J.**

Heard: December 14, 2005.
Judgment: December 19, 2005.

(39 paras.)

*Bankruptcy and insolvency law -- Proposals -- Time for filing -- Company granted time extension to file proposal where company acted in good faith toward creditors, time extension might give company opportunity to make good on obligations to creditors.*

---

H&H owned and operated fish processing plant -- Had operating accounts with Bank of Nova Scotia -- Secured financing from Bank of Nova Scotia for receivables and inventory -- H&H had problems collecting accounts, cash flow problems -- Bank of Nova Scotia planned to use funds in operating accounts to pay down H&H's loan -- Move would effectively close plant -- H&H transferred operating accounts to another bank, contrary to letter of commitment with Bank of Nova Scotia -- H&H filed notice of intention to file proposal in bankruptcy in November 2005 --Payment of account made into Bank of Nova Scotia account of $95,000 -- H&H applied for extension of time to

file proposal -- Bank of Nova Scotia contested application -- Application allowed -- Trustee testified H&H acted in good faith towards creditors; court agreed -- Despite Bank's veto power as primary creditor, H&H was likely to make viable proposal if time extension granted -- Company representative testified coming months would be critical to H&H's business, court agreed -- Possibility of collection of accounts receivable in interim meant creditors might receive complete payment of loans -- Extension would not materially prejudice creditors.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 s. 50.4(9), s. 54(2.2)(3), s. 62(1.2)(2)

Interpretation Act, R.S.C. 1985, c. I-21 s. 10, s. 12

Court Summery:

Bankruptcy -- Notice of Intention to File a Proposal.

HHFL employs approximately 75 people in its fish processing facility located in Eastern Passage, Halifax. In May 2003 it became a customer of BNS. Agreement required HHFL to maintain banking accounts with BNS. However, when it became clear BNS was going to utilize funds, accounts receivable to pay down the loan to HHFL which would effectively close the plant, HHFL switched its operating accounts to CIBC. Since Notice of intention to file a proposal filed BNS received $95,000 U.S. and its interest due November 2005. HHFL applied under s. 50.4(9) of the Bankruptcy and Insolvency Act for an extension to January 30, 2006 to file a proposal.

Issue: Has HHFL met the requirement of satisfying all three conditions set out in s. 50.4(9) namely, that it has acted in good faith and with due diligence; that it would likely be able to make a viable proposal and that no creditor would be materially prejudiced if the extension being applied for were granted?

Result: A review of the various affidavits, evidence and arguments advanced and addressing them individually with the result that HHFL has met the onus upon it to satisfy the court on a balance of probabilities that all the three prerequisites of s. 50.4(9) have been established and the application for an extension of time to January 30, 2006 is granted. Such in the best interests and beneficial to BNS, all of the other creditors and the employees. However, certain conditions apply.

**Counsel:**

Victor J. Goldberg and Martha L. Mann for H & H Fisheries Limited

Stephen J. Kingston and Bob Mann, articled clerk, for the Bank of Nova Scotia

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DECISION

W.E. GOODFELLOW J.:--

BACKGOUND:

1 [1] H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

2 [2] Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

3 [3] HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS "to finance trade receivables and inventory". It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including "for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank". There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

4 [4] In November 2004 HHFL applied to increase its limit on its operating credit line from $400,000 to $1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

5 [5] In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of $1,100,000 to January 31, 2005 when the limit was reduced to $750,000.

6 [6] In February 2005, HHFL again requested access to the $1,100,000 credit limit to February 28, 2005 when again it would be reduced to $750,000 and this was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of $200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with $100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

7 [7] In June 2005 HHFL advised that as part of its 2005 fiscal year ending June 30, 2005, the company would write off the Emporio account which would give it an operating loss of $300,000 which would be partially set off by an SR&ED refund of $200,000, leaving a net loss of $100,000 for the fiscal year 2005.

8 [8] In September 2005 BNS received a copy of HHFL's unaudited financial statement for the year ending June 30, 2005 which showed a net loss of $596,043. This compared with a net loss of $21,003 for the year ending June 30, 2004.

9 [9] HHFL had problems with cash flow and operating and contrary to the letter of commitment started to deposit funds to its accounts with CIBC and this was acknowledged by the director of finance of the company in September 2005. There followed innumerable meetings, correspond-

ence between the parties and Mark S. Rosen, a licensed trustee in bankruptcy, who has consented to act as trustee for any proposal in this matter.

LEGISLATION:

**10**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

ss. 50.4(9):

Extension of Time for Filing Proposal

In order to obtain an extension, the debtor must establish the following three items

(a) that it is acting in good faith and with due diligence;
(b) that it would likely be able to make a viable proposal if an extension were granted; and
(c) that no creditor would be materially prejudiced.

s. 54(2.2)(3):

Related creditor - A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

62(1.2)(2):

On whom approval binding - A proposal accepted by the creditors and approved by the court is binding on creditors in respect of

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

but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto. (S.C. 1992, c. 27, s. 26).

Interpretation Act, R.C.C. 1985, c. I-21

Law Always Speaking

Law always speaking

10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Enactments Remedial

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

APPLICATION:

**11** [10] HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005. Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14th I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

ONUS:

**12** [11] The court, as directed by s. 50.4(9) above, must be satisfied on each application that:

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

**13** [12] The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

**14** [13] This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

**15** [14] Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?

**16** [15] There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above

that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protects its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

**17** [16] Does a breach of contract automatically constitute bad faith? The answer is, "not necessarily", but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating funds and at one point a signed invoice or record which was somewhat misleading with respect to the possibility of some relatively minor accounts having been directed to the CIBC in error.

**18** [17] The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to ones family or a pay-down on a mortgage or judgment on ones home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of "survival". Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than as I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

**19** [18] It is argued by HHFL that only its conduct since the filing of the Notice of intention November 3, 2005 should be considered and with respect, I am inclined to disagree. The manner in which a party conducts itself in the past, particularly the immediate past, is often an indicator of likely conduct in the immediate future. In addition, what you have here is a breach of the contract/commitment letter which occurred before November 3, 2005 and continued and overlapped the date of the filing of the Notice of intention.

**20** [19] The court does have the opinion of a respected trustee whose sworn testimony by affidavit has not been challenged and Mark S. Rosen, LLB, FCIRP, has been involved for some time and very active in endeavouring to come to grips with the challenge and has met with and communicated with officials of BNS, BDC and many of the unsecured creditors. After reciting in detail the extent of such activity he deposes in paragraph 14 of his affidavit of December 1, 2005 as follows:

> 14 I have been working with and receiving information from Messrs. Hartlen and Limpert as well as Harley Hiltz, the director of marketing and production for the Company, who at all times have been fully co-operative. From my experience and dealings with the Company, I believe that the Company has acted and is acting in good faith and with due diligence in working towards formulating a viable proposal. I believe that the Company would likely be able to make a viable proposal if the extension is granted.

My finding on this prerequisite is that by a relatively small margin HHFL has satisfied the court on a balance of probabilities that it has been and is likely to act in good faith. In reaching this conclusion I have not taken into account the representation made in oral argument that Mr. Hartlen has probably advanced $90,000 to $95,000 to HHFL recently because I do not recall seeing anything in the evidence, particularly documentation confirming this infusion and therefore I am unable to give it any weight.

**21** [20] The second wing of subparagraph (a) is in relation to due diligence and while the company has not acted in quite the timely manner it ought to have acted its deficiency in this regard is not severe and the cumulative evidence before me including the summary contained in Mr. Rosen's affidavit of December 1, 2005 and the volume of response which has been made to the BNS's requests and entitlement for documentation, combined with the efforts being made by the trustee in bankruptcy, Mark S. Rosen, to address a resolution constitutes satisfaction on a balance of probabilities of due diligence to this date.

**22** [21] Would HHFL likely to be able to make a viable proposal if the extension being applied for were granted?

**23** [22] "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (Re Baldwin Valley Investors Inc., [1994] 23 C.B.R. (3rd) 219). Again, the court must be satisfied on a balance of probabilities that HHFL would likely. This at the very least 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** [23] Lack of detail and assurance of this kind was considered in St. Isidore Meats Inc. v. Paquette Fine Foods Inc. [1997] O.J. No. 1863. In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):

> "... [T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future."

**25** [24] The BNS points to a number of specifics of what it considers a lack of effort that should result in a finding that there is little likelihood of HHFL making a viable proposal. BNS notes the fact that it has stated clearly that it no longer has any interest of being involved in the affairs of HHFL which will necessitate, in all probability, an alternate financial institution and to date no inquiries have been made by HHFL or the Trustee of any financial institution. The absence of this

step will take on weight depending upon the totality of the circumstances that exist at the time of the Notice of intention and that have developed since the Notice of intention was filed.

**26** [25] There has been a considerable degree of activity before and since the Notice of intention was filed November 3, 2005. It seems in the total evidence available to the court through the affidavits filed that it is a reasonable inference to draw that it is highly unlikely that any financial institution would show any interest in filling the shoes of BNS until a determination is made with respect to this application for an extension of time to January 30, 2006. Since the Notice of intention has been filed the evidence is that HHFL has made a profit for November 2005 greater than that was anticipated. It had been anticipated that the profit would have been $7,000 and it appears to be approximately $19,600. There is an indication that the company is operating a new business model as a processing facility and there is evidence of the projected sales. In addition, there is evidence of a company, Pesca Pronta, having entered into a contract which by now would have had two substantial deliveries of lobster and in response to my inquiry during argument it appears that the first delivery has been paid for. HHFL advances the affidavit of Francesco Amoruso of Rome, Italy as to a possible solution and substitution by financial injection from that company, however, at this stage all that affidavit establishes is that an effort is being made by HHFL to address their situation. It further confirms that this is a busy, crucial period for HHFL but it does not at this point provide any comfort to be BNS or the court as to being a probable element of a viable proposal.

**27** [26] Paragraph 5 of Francesco Amoruso's affidavit merely states:

> I have had discussions with Mr. Hartlen with respect to a potential share investment in H & H by Pesca Pronta in the approximate amount of $400,000.00 Cdn. I am very interested in pursuing the investment opportunity but will require 30 days to discuss the situation with my brothers/partners. I am hopeful that the transaction can be finalized. In the meantime, my company will continue to deal with H & H.

**28** [27] To this point the court has not been advised nor has BNS of any further developments, inquiries or progress with respect to Amoruso's affidavit which can only be classified as a statement of interest.

**29** [28] HHFL has made a concerted effort to secure government financing by way of a grant. The company has spent $6,000 for the services of a consultant in the preparation of its grant application and on December 9, 2005 a science officer who is preforming the due diligence for the grant indicated her satisfaction with the scientific basis of the claim and that she would be making a positive recommendation. The only weight that can be given at this stage to the grant application is that it is another example of the efforts being made by HHFL and its proposed trustee but until the grant reaches the stage of being a balance sheet item it can be given no further weight.

**30** [29] BNS raises an objection to a determination that HHFL can satisfy the requirement pointing out that BNS and BDC as one class of secured creditor represent a substantial majority position of the secured claims. R. Hartlen Investments Inc. is bound by s. 54.2.2(3) as noted above.

**31** [30] BNS takes the position that it has a clear veto over any proposal that may be advanced and that it will not be supporting any proposal to secured creditors that might be filed by HHFL.

**32** [31] In Re Cumberland Trading Inc., [1994] O.J. No. 132, wherein Farley J. stated at para. 4:

> Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis, Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly, Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under BIA regime, one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-a-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality of a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

**33** [32] In that case Farley J. held that Skyview's position was satisfactory proof that the company would not likely be able to make a proposal that would be accepted by the creditors. In that case Skyview had 95% in value of Cumberland's admitted secured creditors and here the math appears to give BNS a virtual veto. HHFL counters that when you look at the funds in the company's bank accounts at the end of November 2005 of approximately $170,000 that such reduces the debt outstanding of BNS and again reiterates that BNS has since the Notice of intention being filed received approximately $90,000 U.S. on its account. BNS is correct in that the mere presence of money in a debtor's bank account does not reduce indebtedness unless it is applied to the indebtedness. Since the notice of intention was filed HHFL has paid the required interest to BNS for November 2005. In this case, it is clear from the evidence before me and particularly the affidavit of the Trustee that there is a recognition of the proposal providing either alternate financing, such as speculated in Mr. Amoruso's affidavit or approaching alternate financial institutions. It would seem reasonable to assume that the proposal that will be advanced if it has a means of essentially paying out by substitution injection of capital of BNS indebtedness then the proposal presumably would be acceptable. It is inconceivable that if the BNS indebtedness were satisfied that BNS should retain the right to apply a guillotine effect to the extreme prejudice of itself and all other interested parties including the probable closure of the plant. The second largest secured creditor is the Business Development Corporation and they are in agreement to the granting of an extension to HHFL.

**34** [33] In these circumstances, again by the a fairly narrow margin, I conclude that HHFL has met this prerequisite on a balance of probabilities. In doing so, I am not overlooking the considerable debt of HHFL that, while the projections for the next couple of months are favourable, clearly, the proposal will require addressing BNS.

**35** [34] The third step is: Will any creditor be materially prejudiced if the extension being applied for were granted? As noted, there has been some improvement in the position of BNS since the Notice of intention was filed in that it has received approximately $95,000 U.S. which the Bank's solicitor points out came direct to it and not through any exercise of direction by HHFL. BNS has also received the November 2005 interest. In this case there are only two significant unrelated secured creditors, BNS and BDC. BDC consents to the extension of time but I am mindful of the fact that its security is a first charge over the fixed assets which are by themselves not likely to significantly decrease in value but on the other hand would probably have some measure of increased value by virtue of an operating going concern and also there is an indication of additional land being acquired from government by HHFL. I do agree with BNS that additional land, even if

the obtaining of it is imminent, does not by itself provide any comfort to the Bank which has as its security a first charge on trade receivables and inventory. What does come through from the totality of the evidence is that this is a busy and likely profitable time for the industry and Mr. Rosen, in his affidavit, deposes at paragraphs 11 and 12:

> 11 I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
>
> 12 In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

**36** [35] I struggle with what constitutes material prejudice and there is some guidance in Re Cumberland Trading Inc. above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

> Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one - i.e., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor quo person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause ....

**37** [36] In the case before the court, the accounts receivables as of November 31, 2005 amounted to $956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.

**38** [37] This section of the Act contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

CONDITIONS:

**39** [38] During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

W.E. GOODFELLOW J.

cp/e/qw/qlmxt/qlmll

# TAB 3

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**

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**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**

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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

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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

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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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# TAB 4

| | |
|---|---|
| Estate No: | 51-2397788 |
| Court No: | 22164 |
| District: | Newfoundland & Labrador |
| Division No: | 01- Newfoundland & Labrador |

**2018 01G**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**TRIAL DIVISION (GENERAL)**
**IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF the Bankruptcy & Insolvency Act, RSC. 1985, c. B-3, as amended

AND IN THE MATTER OF the Proposal of Burry's Shipyard Inc.

## Charging Order

Upon the application of Burry's Shipyard Inc. ("the Applicant") for an Order pursuant to Section 50.6 of the *Bankruptcy and Insolvency Act* ("*BIA*") approving the granting of interim financing security to the Applicant by Business Development Bank of Canada ("BDC"), and for an order pursuant to Section 64.2 of the *BIA* declaring that the professional advisors of the Applicant shall have a charge over the assets of the Applicant in respect of fees and expenses, and upon reading the affidavits of Glenn Burry and Tim Hill, Q.C., and the 1st Report of the Deloitte Restructuring Inc. ("the Proposal Trustee") filed, and upon hearing Tim Hill, Q.C., the solicitor for the Applicant, and it appearing to the court that it is appropriate to issue an order:

**IT IS ORDERED THAT:**

**Service**

1. The service of the notice of application~~/*notice of motion*]~~ and the supporting documents as set out in the Affidavit of Service is deemed adequate~~[1]~~ so that the

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~~[1] The Applicant should seek to have service validated if it was done in a manner other than as authorized by the *Civil Procedure Rules*.~~

PL# 146406/7778944_17778944

[~~*application/motion*~~*application*] is properly returnable today and further service thereof is hereby dispensed with.

~~**Interpretation**~~

~~2. All capitalized words used in this Order that are not otherwise defined in this Order have the meanings ascribed to them in the Initial Order.~~

~~**Restructuring**~~

~~3. The Applicant may, subject to compliance with section 36 of the CCAA, and in addition to the powers granted in the Initial Order, dispose of redundant or non-material assets not exceeding $ in any one transaction or $ in the aggregate.~~

~~**Directors' and Officers' Indemnification and Charge**~~

~~4. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings,[2] except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's negligence or actionable misconduct.~~

~~5. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge")[3] on the Property, which charge shall not~~

---

~~[2] The broad indemnity language from section 11.51 of the CCAA has been imported into this paragraph. The granting of the indemnity (whether or not secured by a Directors' Charge), and the scope of the indemnity, are discretionary matters that should be addressed with the Court.~~

~~[3] Subsection 11.51(3) provides that the Court may not make this security/charging order if in the Court's opinion the Applicant could obtain adequate indemnification insurance for the director or officer at a reasonable cost.~~

exceed an aggregate amount of $ , as security for the indemnity provided in this Order. The Directors' Charge shall have the priority set out herein.

6. Notwithstanding any language in any applicable insurance policy to the contrary, (a) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with this Order, and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge.

**Administrative Charge**

72. The MonitorProposal Trustee, counsel to the MonitorProposal Trustee and the Applicant's counsel shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Propertyproperty of the Applicant, which charge shall not exceed an aggregate amount of $50,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the MonitorProposal Trustee and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out herein.

**DIP Financing and Charge**

8. 3 The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from BDC (the "DIP Lender") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $300,000 (the "DIP Facility") unless permitted by further order of this Court.

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9. 4 The DIP Facility shall be substantially on the terms and subject to the conditions set forth in the draft commitment letter of offer between the Applicant and the DIP Lender dated July 24, 2018 (the

DIP Term Sheet") annexed hereto as Schedule "A", as same may be amended from time to time with the MonitorProposal Trustee's written consent provided any amendment may not affect a secured creditor's rights without further order of this Court.

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10. 5 The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and other security documents, guarantees, and other definitive documents (collectively, the "DIP Documents"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the DIP Lender under the DIP Term Sheet as and when the same become due and are to be performed, notwithstanding any other provision of this Order or the Initial Order.

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11. 6 The DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "DIP

Lender's Charge") on the Property property of the Applicant as security for any and all obligations of the Applicant under or pursuant to the DIP Facility and the DIP Term Sheet, which charge shall not exceed the aggregate amount owed to the DIP Lender under the DIP Facility and the DIP Term Sheet. The DIP Lender's Charge shall have the priority set out herein.

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12. 7Notwithstanding any other provision of this Order or the Initial Order:

a. the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or the DIP Term Sheet or any of the DIP Documents;

b. upon the occurrence of an event of default under the DIP Term Sheet or DIP

Documents or the DIP Lender's Charge, the DIP Lender, upon 10-days' notice to the Applicant and the ~~Monitor~~Proposal Trustee, may with leave of the Court exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the DIP Term Sheet, DIP Documents and the DIP Lender's Charge; and

c. the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the ~~Property~~property of the Applicant.

~~13. The Applicant is enjoined from making a proposal under the *Bankruptcy and Insolvency Act* by which any advance made under the DIP Term Sheet or the DIP Documents could be repaid at less than one hundred cents on the dollar, or by which any claims or other rights of the DIP Lender under any agreement related to the DIP Facility could be compromised, unless the DIP Lender agrees otherwise in writing.~~

**~~Critical Suppliers and Charge~~**

~~14. Each of the entities listed in Schedule "B" hereto is a critical supplier of the Applicant as contemplated by section 11.4 of the CCAA (each, a "Critical Supplier"), provided that such designation shall not constitute a finding or determination that such entities are critical suppliers to any affiliate of the Applicant.~~

~~15. Each Critical Supplier shall continue to supply the Applicant with goods or services on terms and conditions that are consistent with existing arrangements and past practices.~~

~~16. The Applicant shall make prompt payment for goods or services supplied to them by a Critical Supplier. For greater clarity, an Applicant who receives goods or services from a Critical Supplier on and after the date of this Order shall make payment to such Critical Supplier for such goods or services on the next date on which such Applicant ordinarily issues cheques, provided that such date is at least two days, and no more than seven days,~~

~~after the date on which such Applicant receives from such Critical Supplier an invoice for the purchase price of the goods or services supplied.~~

~~17. No Critical Supplier may require the payment of a deposit or the posting of any security in connection with the supply of goods or services to the Applicant after the date of this Order.~~

~~18.~~14. ~~Each Critical Supplier shall be entitled to the benefit of and is hereby granted a charge (together, the "Critical Supplier Charge") on the Property in an amount equal to the purchase price of the goods and services supplied by such Critical Supplier and received by the Applicant after the date of this Order less all amounts paid to such Critical Supplier in respect of such goods and services. The Critical Supplier Charge shall have the priority set out herein.~~

**Validity and Priority of Charges Created by this Order**

~~19.~~ 8 The priorities of the ~~Directors' Charge, the~~ Administration Charge~~, the Critical Supplier Charge~~ and the DIP Lender's Charge as among them, and as against the existing security held by any secured creditor prior to the issuance of this Order (the "Existing Security"), shall be as follows:

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a. First – Administration Charge;

b. Second – DIP Lender's Charge; and

~~c. Third – Directors' Charge;~~

~~d. Fourth – Critical Supplier Charge; and~~

~~e.~~c. ~~Fifth~~ Third – Existing Security in such priority as they currently have.[4]

~~20.~~ 9The filing, registration, or perfection of the ~~Directors' Charge,~~ the Administration Charge~~, the Critical Supplier Charge~~ and the DIP Lender's Charge (collectively, the "Charges") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title, or interest filed, registered, recorded, or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record, or perfect.

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~~21.~~ 10Each of the Charges, all as constituted and defined herein, shall constitute a charge on the ~~Property~~ property of the Applicant and such Charges shall rank in priority to all other security interests, trusts, liens, charges, and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

~~22.~~ 11Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, ~~the Existing~~ Existing ~~Security~~ Security or any of the Charges, unless the Applicant also obtains the prior written consent of the ~~Monitor~~Proposal Trustee, its existing secured creditors, and the beneficiaries of the Charges (the "Chargees"), or further order of this Court.

~~23.~~ 12The Charges, the DIP Term Sheet, and the DIP Documents shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by i) the pendency of these proceedings and the declarations of insolvency made herein; ii) any application for a bankruptcy order issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or iv) any

[4] ~~The wording about ranking of Charges is for illustration purposes only. This ranking may be subject to determination and negotiation, and should be tailored to the circumstances of the case before the Court.~~

negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt, or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease, or other agreement (collectively, an "Agreement") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

~~a.~~ a neither the creation of the Charges nor the execution, delivery, perfection, registration, or performance of the DIP Term Sheet or the DIP Documents shall create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

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~~b.~~ b none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant entering into the DIP Term Sheet, the creation of the Charges, or the execution, delivery or performance of the DIP Documents; and

~~c.~~ c the payments made by the Applicant pursuant to this Order, the DIP Term Sheet or the DIP Documents, and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements, or other challengeable, voidable, or reviewable transactions under any applicable law.

~~24.~~ 13Any Charge created by this Order over leases of real property in Canada shall only be a Charge on the Applicant's interest in such real property leases.

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~~25.~~ 14The ~~Monitor~~Proposal Trustee, in addition to its prescribed rights and obligations under the ~~CCAA and under the Initial Order~~BIA, is hereby directed and empowered to:

~~a.~~ a assist the Applicant, to the extent required by the Applicant, in its dissemination, to the DIP Lender and its counsel on a [weekly ~~/monthly/other~~] basis of financial and other information as agreed to

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between the Applicant and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender; and

~~b.~~ b advise or assist the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the ~~Monitor~~Proposal Trustee and delivered to the DIP Lender and its counsel on a periodic basis, but not less than [weekly~~/monthly/other~~] , or as otherwise agreed to by the DIP Lender.

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~~26.~~ 15 Any amounts actually advanced or expended pursuant to any of the Charges shall have the priority as provided for herein regardless of the time of advance or the use to which funds were actually put.

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**Service and Notice**

~~27~~16. The Applicant and the ~~Monitor~~Proposal Trustee shall serve a copy of this Order on all secured creditors of the Applicant and shall be at liberty to serve this Order on such other ~~Persons~~ persons as it determines is appropriate. All such service shall be made in accordance with the provisions of the ~~Initial Order~~*BIA*.

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**General**

~~28. The aid and recognition of any court, tribunal, or regulatory or administrative body having jurisdiction outside Nova Scotia is hereby requested to give effect to this Order and to assist the Applicant, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals, or regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to~~

assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

29. Each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

30. 17. Any interested party, including the Applicant and the MonitorProposal Trustee, may apply to this Court to vary or amend this Order on such notice provided for under the *Civil Procedure RulesBIA* or on such notice as this Court may order.

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31. 18 This Order and all of its provisions are effective as of 12.01 [*a.m./p.m.*] [*Atlantic Standard/Atlantic Daylight Saving*] Time on the 2nd day of August, 2018.

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Dated the day of August, 2018, at St. John's, Newfoundland and Labrador.

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Deputy Registrar

Issued , 20