Court File No. CV14-10401-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

Applicant

BOOK OF AUTHORITIES OF THE APPLICANT

Date: January 15, 2014

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(as of January 14, 2014)

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AND TO:	**GE VFS CANADA LIMITED PARTNERSHIP** Suite 200 2300 Meadowvale Blvd Mississauga, ON L5N 5P9 **Courtesy copy**	**AND TO:**	**THE DEPARTMENT OF JUSTICE** Suite 3400 130 King Street West PO Box 36 Toronto, ON M5X 1K6 **Diane Winters** Tel: 416-973-3172 Fax: 416-973-0810 Email: diane.winters@justice.gc.ca

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IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

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Applicant

BOOK OF AUTHORITIES OF THE APPLICANT

TAB 1

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

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

OVG Inc., Re

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

Ontario Superior Court of Justice

Stanley J. Kershman J.

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

Counsel: J. Fogarty, P. Masic, for Debtor

M. Rouleau, for Proposal Trustee

C. Peddle, for Royal Bank of Canada

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Practice and procedure

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

Time to file proposal was extended based on information contained in proposal trustee's report and based on submissions.

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

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

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

Statutes considered:

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

Generally — referred to

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

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

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

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

MOTION by bankrupt for authorization to borrow under credit facility, granting of interim financing charge against its property, and order to extend time to file proposal.

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

Introduction

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

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

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

was given to the interested parties.

Debtor and its Creditors

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

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

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

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

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

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

The Proposed DIP Facility

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

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

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

13 The Bank claims that based on the information provided by Ernst and Young Inc., that there will be a sub-

stantial shortfall to the Bank after collection of the accounts receivable and sale of the assets. The Court notes that the document of the estimate of realizable assets provided by Ernst and Young Inc. in the motion of record did not include the accompanying notes and assumptions mentioned therein.

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

The Proposed DIP Facility

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

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

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

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

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

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

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

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

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

Analysis

Statutory provisions

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

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

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

Consideration of the Various Factors

1) Likely Duration of the NOI Proceedings

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

2) Management of OVG's Affairs

26 The current management will continue to operate OVG.

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

3) Report of the Proposal Trustee

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

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

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

1) identifying a strategic partner,

2) restructuring its debts, or

3) an orderly liquidation of its assets.

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

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

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

4) Nature and Value of OVG's Property

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

5) Confidence of Major Creditors

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

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

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

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

Conclusion

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

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

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

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

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

39 In addition, in the event that there would be a drawdown of the secondary facility of $250,000.00 as contem-

plated by the March 11, 2013 letter, Court approval would have to be obtained.

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

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

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

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

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

42 I will remain seized of this matter.

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

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

45 Order accordingly.

Motion granted.

END OF DOCUMENT

TAB 2

2012 CarswellOnt 1059, 2012 ONSC 106, 213 A.C.W.S. (3d) 542, 89 C.B.R. (5th) 127

C

2012 CarswellOnt 1059, 2012 ONSC 106, 213 A.C.W.S. (3d) 542, 89 C.B.R. (5th) 127

Timminco Ltd., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc. (Applicants)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: January 3, 2012
Judgment: January 4, 2012
Docket: None given.

Counsel: A.J. Taylor, M. Konyukhova, K. Esaw for Applicants

S. Weisz for FTI Consulting Canada Inc.

A. Kauffman for Investissement Quebec

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Debtor company B was wholly-owned subsidiary of debtor company T — Debtor company T owned 51 per cent of Q partnership and together T and Q were in business of producing silicon — Several directors and officers of debtor company B were also directors and officers of Q partnership — Debtor companies B and T applied for relief under Companies' Creditors Arrangement Act ("CCAA") — Application granted — Debtor companies had total claims against them in excess of $89 million — Debtor companies required protection of CCAA to allow them to maintain operations while giving them necessary time to consult with stakeholders regarding future of business operations and corporate structure — Stay of actions against directors of debtor companies also granted — Stay of actions against directors extended to include stay in favour of directors and officers of debtor company who were also directors and officers of Q partnership — Extension of stay to directors and officers of Q partnership was appropriate due to intertwined nature of businesses of debtor companies and Q partnership — Stay would allow directors and officers to focus on restructuring of debtor companies.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Administration charge — Directors' and officers' charge — Debtor company B was wholly-owned subsidiary of debtor company T — Debtor company T owned 51 per cent of Q partnership and together T and Q were in business of producing silicon — Debtor companies had total claims against them in excess of $89 million — Debtor companies B and T applied for relief under Companies' Creditors Arrangement Act — Application granted — Administration charge in maximum amount of $1 million was appropriate given size and complexity of business to be restructured — Administration charge would secure fees and disbursements of counsel to debtor companies, monitor and monitor's counsel — Directors' and officers' charge in amount of $400,000 in favour of directors and officers of debtor companies was appropriate given complexity of business of debtor companies and corresponding potential exposure of directors and officers to personal liability — Directors' and officers' charge would also provide assurances to employees of debtor companies that obligations for accrued wages and termination and severance pay would be satisfied — Directors' and officers' charge would apply only to extent that existing directors' and officers' liability insurance was not adequate.

Cases considered by *Morawetz J.*:

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

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — considered

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.03 [en. 2005, c. 47, s. 128] — considered

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

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

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Régimes complémentaires de retraite, Loi sur les, L.R.Q., c. R-15.1

en général — referred to

APPLICATION by debtor companies for relief under *Companies' Creditors Arrangement Act.*

2012 CarswellOnt 1059, 2012 ONSC 106, 213 A.C.W.S. (3d) 542, 89 C.B.R. (5th) 127

***Morawetz J.*:**

1 Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") apply for relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

2 Timminco produces silicon metal through Québec Silicon Limited Partnership ("QSLP") its 51% owned production partnership with Dow Corning Corporation ("DCC") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. Timminco also produces solar-grade silicon through Timminco Solar, an unincorporated division of Timminco's wholly-owned subsidiary BSI ("Timminco Solar"), for customers in the solar photovoltaic industry.

3 The Timminco Entities are facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume long-term supply contract at below market prices, a decrease in the demand and market price for solargrade silicon, failure to recoup their capital expenditures incurred in connection with development of their solar-grade operations, and inability to secure additional funding. The Timminco Entities are also facing significant pension and environmental remediation legacy costs and financial costs related to large outstanding debts. A significant portion of the legacy costs are as a result of discontinued operations relating to Timminco's former magnesium business.

4 Counsel to the Timminco Entities submits that, as a result, the Timminco Entities are unable to meet various financial covenants set out in their Senior Secured Credit Facility and do not have the liquidity needed to meet their ongoing payment obligations. Counsel submits that, without the protection of the CCAA, a shutdown of operations is inevitable, which would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers. Counsel further submits that CCAA protection will allow the Timminco entities to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.

5 The facts with respect to this application are set out in the affidavit of Mr. Peter A. M. Kalins, sworn January 2, 2012.

6 Timminco and BSI are corporations established under the laws of Canada and Quebec respectively and, in my view, are "companies" within the definition of the CCAA.

7 Timminco has its head office in the city of Toronto. The board of directors of Timminco authorized this application. Further, pursuant to a unanimous shareholder declaration which removed the directorial powers from the directors of BSI and consolidated the decision making with Timminco through its board of directors, the board of directors of Timminco has also authorized this filing on behalf of BSI. I am satisfied that the Applicants are properly before this court.

8 The affidavit of Mr. Kalins establishes that the Timminco Entities do not have the liquidity necessary to meet their obligations to creditors as they become due and, further, they have failed to pay certain obligations including, among other things, the interest payment due under the secured term loan and the interest payment due under the AMG Note on December 31, 2011.

9 The affidavit also establishes that the Timminco Entities are affiliate debtor companies with total claims against them in excess of $89 million.

10 The required financial statements and cash flow information are contained in the record.

11 The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the

debtor or its affiliates exceed $5 million. I am satisfied that the record establishes that the Timminco Entities are insolvent and are "debtor companies" to which the CCAA applies.

12 On an initial application in respect of a debtor company, s. 11.02(3) of the CCAA provides authority for the court to make an order on any terms that it may impose where the applicant satisfies the court that circumstances exist that make the order appropriate.

13 Counsel to the Applicants submits that the Timminco Entities require the protection of the CCAA to allow them to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.

14 In this case, in addition to the usual stay provisions affecting creditors of the debtor, counsel submits that, to ensure the ongoing stability of the Timminco Entities' business during the CCAA period, the Timminco Entities require the continued participation of their directors, officers, managers and employees.

15 Under s. 11.03, the court has jurisdiction to grant an order staying any action against a director of the company on any claim against directors that arose before the commencement of CCAA proceedings and that relate to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or refused by the creditors or the court.

16 Counsel submits that there are several directors of BSI that also serve on the board of directors of Quebec Silicon General Partner Inc. ("QSGP") and several common officers (collectively, the "QSGP/BSI Directors").

17 Due to the intertwined nature of the Timminco Entities and QSLP's businesses and in order to allow these directors and officers to focus on the restructuring of the Timminco Entities, the Timminco Entities also seek to extend the stay of proceedings in favour of those directors and officers in their capacity as directors or officers of QSGP.

18 Counsel to the Timminco Entities submits that circumstances exist that make it appropriate to grant a stay in favour of the QSGP/BSI directors. In support of its argument, counsel relies on *Smoky River Coal Ltd., Re* (1999), 12 C.B.R. (4th) 94 (Alta. C.A.) where the court indicated that its jurisdiction includes the power to stay conduct which "could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement".

19 In these circumstances, I am prepared to accept this argument and grant a stay in favour of the QSGP/BSI directors.

20 The Applicants have also requested that the stay of proceedings be extended with respect to the QSLP Agreements. Mr. Kalins' affidavit establishes that BSI's viability is directly related to its relationship with QSLP and that the relationship is governed by the QSLP Agreements. The QSLP Agreements provide for certain events to be deemed to have taken place, for certain modification of rights, and to entitle DCC, QSLP, and/or QSGP to take certain steps for the termination of certain QSLP Agreements in the event BSI becomes insolvent or commences proceedings under the CCAA. Counsel submits that due to the highly intertwined nature of the businesses of BSI and QSLP and BSI's high dependence on QSLP, it is imperative for the Timminco Entities and for the benefit of their creditors that BSI's rights under the QSLP Agreements not be modified as a result of its seeking protection under the CCAA.

21 For the purposes of this initial hearing, I am prepared to accept this argument and extend the stay as requested.

22 The Applicants also request an Administration Charge and a D&O Charge.

23 The requested Administration Charge on the assets, property and undertaking of the Timminco Entities (the "Property") is in the maximum amount of $1 million to secure the fees and disbursements in connection with services rendered by counsel to the Timminco Entities, the Monitor and the Monitor's counsel (the "Administration Charge").

24 The Timminco Entities request that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefits Act* or the *Québec Supplemental Pension Plans Act* (collectively, the "Encumbrances") in favour of any persons that have not been served with notice of this application.

25 IQ has been served and does not object to the requested charge, other than to adjust priorities such that the first-ranking charge should be the Administration Charge to a maximum of $500,000 followed by the D&O Charge to a maximum of $400,000 followed by the Administration Charge to a maximum amount of $500,000. This suggested change is agreeable to the Timminco Entities and has been incorporated into the draft order.

26 Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge. Under s. 11.52, factors that the court will consider include: the size and complexity of the business being restructured; the proposed role of the beneficiaries of the charge; whether there is unwarranted duplication of roles; whether the quantum of the proposed charge appears to be fair and reasonable; the position of the secured creditors likely to be affected by the charge; and the views of the monitor. *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

27 In this case, counsel submits that the Administration Charge is appropriate considering the following factors:

(a) the Timminco Entities operate a business which includes numerous facilities in Ontario and Quebec, several ongoing environmental monitoring and remediation obligations, three defined benefit plans and an intertwined relationship with QSLP;

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the Timminco Entities' CCAA proceedings;

(c) there is no anticipated unwarranted duplication of roles;

(d) IQ was advised of the return date of the application and does not object; and

(e) the Administration Charge does not purport to prime any secured party or potential beneficiary of a deemed trust who has not received notice of this application.

28 The proposed monitor has advised that it is supportive of the Administration Charge.

29 I accept these submissions and find that it is appropriate to approve the requested Administration Charge. In doing so, I note that the Timminco Entities have stated that they intend to return to court and seek an order granting super-priority ranking to the Administration Charge ahead of the Encumbrances including, *inter alia*, any deemed trust created under provincial pension legislation on the comeback motion.

30 With respect to the D&O Charge, the Timminco Entities seek a charge over the property in favour of the Timminco Entities' directors and officers in the amount of $400,000 (the "D&O Charge"). The directors of the Timminco Entities have stated that, due to the significant personal exposure associated with the Timminco Entities'

aforementioned liabilities, they cannot continue their service with the Timminco Entities unless the Initial Order grants the D&O Charge.

31 The CCAA has codified the granting of directors' and officers' charges on a priority basis in s. 11.51.

32 In *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 48, Pepall J. applied s. 11.51 noting that the court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after commencement of proceedings.

33 Counsel advises that the Timminco Entities maintain directors' and officers' liability insurance ("D&O Insurance") for its directors and officers and the current D&O Insurance provides a total of $15 million in coverage. Counsel advises that it is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers and the proposed order provides that the D&O Charge shall only apply to the extent that the D&O Insurance is not adequate.

34 The proposed monitor has advised that it is supportive of the D&O Charge.

35 The Timminco Entities have also indicated their intention to return to court and seek an order granting super priority ranking to the D&O Charge ahead of the Encumbrances.

36 In these circumstances, I accept the submission that the requested D&O Charge is reasonable given the complexity of the Timminco Entities business and the corresponding potential exposure of the directors and officers to personal liability. The D&O Charge will also provide assurances to the employees of the Timminco Entities that obligations for accrued wages and termination and severance pay will be satisfied. The D&O Charge is approved.

37 In the result, CCAA protection is granted to the Timminco Entities and the stay of proceedings is extended in favour of the QSGP/BSI directors and with respect to the QSLP Agreements.

38 Further, the Administration Charge and the D&O Charge are granted in the amounts requested.

39 FTI Consulting Canada Inc., having filed its consent to act, is appointed as Monitor.

40 It is specifically noted that the comeback motion has been scheduled for Thursday, January 12, 2012.

41 The Stay Period shall be until February 2, 2012.

42 The Applicants acknowledge that the only party that received notice of this application was IQ. Counsel to the Applicants advised that this step was necessary in order to preserve the operations of the Timminco Entities.

43 For the purposes of the initial application, this matter was treated as being an *ex parte* application. Accordingly, the comeback motion on January 12, 2012 will provide any interested party with the opportunity to make submissions on any aspect of the Initial Order. A total of three hours has been set aside for argument on that date.

Application granted.

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TAB 3

2012 CarswellOnt 1347, 2012 ONSC 234, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

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2012 CarswellOnt 1347, 2012 ONSC 234, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

Kitchener Frame Ltd., Re

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

In the Matter of the Consolidated Proposal of Kitchener Frame Limited and Thyssenkrupp Budd Canada, Inc. (Applicants)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Judgment: February 3, 2012
Docket: CV-11-9298-00CL

Counsel: Edward A. Sellers, Jeremy E. Dacks for Applicants

Hugh O'Reilly — Non-Union Representative Counsel

L.N. Gottheil — Union Representative Counsel

John Porter for Proposal Trustee, Ernst & Young Inc.

Michael McGraw for CIBC Mellon Trust Company

Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — General principles

Applicants KFL and BC were inactive entities with no operating assets and no material liquid assets — Applicants had significant and mounting obligations including pension and other non-pension post-employment benefit (OPEB) obligations to their former employees and surviving spouses of such former employees or others entitled to claim through such persons — Affiliates of BC provided up to date funding for pension and OPEB obligations, however, given that KFL and BC had no active operations status quo was unsustainable — KFL and BC brought motion to sanction amended consolidated proposal — Motion was granted — Proposal was reasonable — Proposal was calculated to benefit general body of creditors — Proposal was made in good faith — Proposal contained broad release in favour of applicants and certain third parties — Release of third-parties was permitted — Release covered all affected

claims, pension claims, and existing escrow fund claims — Release did not cover criminal or wilful misconduct with respect to any matters set out in s. 50(14) of Bankruptcy and Insolvency Act — Unaffected claims were specifically carved out of release — No creditors or stakeholders objected to scope of release which was fully disclosed in negotiations — There was no express prohibition in BIA against including third-party releases in proposal — Any provision of BIA which purported to limit ability of debtor to contract with its creditors had to be clear and explicit — Third-party releases were permissible under Companies' Creditors Arrangement Act (CCAA) and court should strive, where language of both statutes supported it, to give both statutes harmonious interpretation — There was no principled basis on which analysis and treatment of third-party release in BIA proposal proceeding should differ from CCAA proceeding — Released parties contributed in tangle and realistic way to proposal — Without inclusion of releases it was unlikely that certain parties would have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

Cases considered by *Morawetz J.*:

A. & F. Baillargeon Express Inc., Re (1993), 27 C.B.R. (3d) 36, 1993 CarswellQue 49 (Que. S.C.) — referred to

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

Allen-Vanguard Corp., Re (2011), 2011 CarswellOnt 1279, 2011 ONSC 733 (Ont. S.C.J.) — referred to

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 450, 2011 CarswellBC 841, 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]) — referred to

Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — followed

C.F.G. Construction inc., Re (2010), [2010] R.J.Q. 2360, 2010 CarswellQue 10226, 2010 QCCS 4643 (Que. S.C.) — considered

Canwest Global Communications Corp., Re (2010), 70 C.B.R. (5th) 1, 2010 ONSC 4209, 2010 CarswellOnt 5510 (Ont. S.C.J. [Commercial List]) — referred to

Cosmic Adventures Halifax Inc., Re (1999), 13 C.B.R. (4th) 22, 1999 CarswellNS 320 (N.S. S.C.) — considered

Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

Farrell, Re (2003), 2003 CarswellOnt 1015, 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]) — referred to

Kern Agencies Ltd., (No. 2), Re (1931), 1931 CarswellSask 3, [1931] 2 W.W.R. 633, 13 C.B.R. 11 (Sask. C.A.) — considered

Lofchik, Re (1998), 1998 CarswellOnt 194, 1 C.B.R. (4th) 245 (Ont. Bktcy.) — referred to

Magnus One Energy Corp., Re (2009), 2009 CarswellAlta 488, 2009 ABQB 200, 53 C.B.R. (5th) 243 (Alta. Q.B.) — referred to

Mayer, Re (1994), 25 C.B.R. (3d) 113, 1994 CarswellOnt 268 (Ont. Bktcy.) — referred to

Mister C's Ltd., Re (1995), 1995 CarswellOnt 372, 32 C.B.R. (3d) 242 (Ont. Bktcy.) — considered

N.T.W. Management Group Ltd., Re (1994), 29 C.B.R. (3d) 139, 1994 CarswellOnt 325 (Ont. Bktcy.) — referred to

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — referred to

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]) — referred to

Olympia & York Developments Ltd., Re (1997), 45 C.B.R. (3d) 85, 143 D.L.R. (4th) 536, 1997 CarswellOnt 657 (Ont. Bktcy.) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

Steeves, Re (2001), 25 C.B.R. (4th) 317, 208 Sask. R. 84, 2001 SKQB 265, 2001 CarswellSask 392 (Sask. Q.B.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

Pt. III — referred to

s. 50(14) — considered

s. 54(2)(d) — considered

s. 59(2) — considered

s. 62(3) — considered

s. 136(1) — referred to

s. 178(2) — referred to

s. 179 — considered

s. 183 — referred to

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

Generally — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

MOTION by applicants for court sanction of proposal under Bankruptcy and Insolvency Act which contained third-party release.

Morawetz J.:

1 At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

2 Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

3 The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

4 The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

5 KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

6 The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

7 Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

8 The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

9 On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

10 The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

11 On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

12 The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

13 An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

14 On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

15 The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

16 The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

17 Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

18 The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

19 In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer, Re* (1994), 25 C.B.R. (3d) 113 (Ont. Bktcy.); *Steeves, Re* (2001), 25 C.B.R. (4th) 317 (Sask. Q.B.); *Magnus One Energy Corp., Re* (2009), 53 C.B.R. (5th) 243 (Alta. Q.B.).

20 The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell, Re* (2003), 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]).

21 The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re*, [1998] O.J. No. 332 (Ont. Bktcy.). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One, supra.*

22 With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik, supra*, and *Farrell , supra.*

23 In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

24 With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

25 With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of

the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

26 On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

27 With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

28 The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

> (a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;
>
> (b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;
>
> (c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and
>
> (d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

29 The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

30 The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley* , *supra.* However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A. & F. Baillargeon Express Inc., Re* (1993), 27 C.B.R. (3d) 36 (Que. S.C.).

31 In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

32 The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

33 With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured intercompany claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

34 On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

35 With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

36 In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

37 There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

38 Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

39 There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

40 Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

41 The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

42 The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s.

50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

43 The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

44 No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

45 Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

46 In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the *BIA* would defeat the purpose of the legislation. See *N.T.W. Management Group Ltd., Re* (1994), 29 C.B.R. (3d) 139 (Ont. Bktcy.); *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd., Re* (1997), 45 C.B.R. (3d) 85 (Ont. Bktcy.).

47 Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24 (S.C.C.). This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

48 Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

49 Subsection 62(3) of the *BIA* reads as follows:

> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

50 Counsel submits that there are two possible interpretations of this subsection:

> (a) It prohibits third party releases — in other words, the phrase "does not release any person" is interpreted to mean "cannot release any person"; or
>
> (b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor — in other words, the phrase "does not release any person" is interpreted to mean "does not release any person without more"; it is protective not prohibitive.

51 I agree with counsel's submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

52 Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

53 The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.).

54 Further, I agree with counsel's submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

55 In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

56 The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

> 179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

57 The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

58 Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role — namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

59 Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's

directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

60 I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

61 Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.); and *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160 (Ont. C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List])) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

62 On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

63 The Applicants further submit that creditors' interests — including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release — are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

64 The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

65 In *Kern Agencies Ltd., (No. 2), Re* (1931), 13 C.B.R. 11 (Sask. C.A.), the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

66 In *Mister C's Ltd., Re* (1995), 32 C.B.R. (3d) 242 (Ont. Bktcy.), the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities, favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

67 *Cosmic Adventures Halifax Inc., Re* (1999), 13 C.B.R. (4th) 22 (N.S. S.C.) relies on *Kern* and furthermore the

Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

68 The fourth case is *C.F.G. Construction inc., Re*, 2010 CarswellQue 10226 (Que. S.C.) where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds — either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

69 In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc.* I agree.

70 The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

71 Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corp., Re*, 2011 ONSC 733 (Ont. S.C.J.).

72 Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

73 I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

74 The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

75 At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply "despite any other Act of Parliament". The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a "true" trust. The court was required to determine which federal provision should prevail.

76 By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

77 Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

78 It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

79 The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

80 In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

> (a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> (b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;
>
> (c) the Plan (Proposal) cannot succeed without the releases;
>
> (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and
>
> (e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

81 These requirements have also been referenced in *Canwest Global Communications Corp., Re* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) and *Angiotech Pharmaceuticals Inc., Re* (2011), 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]).

82 No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

83 The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured intercompany loans in the amount of approximately $120 million.

84 Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases, counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

85 The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

86 Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

87 I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately $120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

88 I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

89 The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

90 I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

91 I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

92 For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalfe* criteria and should be approved.

93 In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

Motion granted.

END OF DOCUMENT

TAB 4

2009 CarswellOnt 6184, 59 C.B.R. (5th) 72

C

2009 CarswellOnt 6184, 59 C.B.R. (5th) 72

Canwest Global Communications Corp., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants

Alan Merskey for Special Committee of the Board of Directors

David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders

Edmond Lamek for Asper Family

Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada

Hilary Clarke for Bank of Nova Scotia

Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not

improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

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

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

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

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

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

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

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

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

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

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

s. 23 — considered

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

s. 137(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

Pepall J.:

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[FN1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*[FN2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting

shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant

to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[FN3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[FN4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a

debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*[FN5]; *Smurfit-Stone Container Canada Inc., Re*[FN6]; and *Calpine Canada Energy Ltd., Re*[FN7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*[FN8] and *Global Light Telecommunications Inc., Re*[FN9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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

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

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

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

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

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

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

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the con-

fidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

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

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

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

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court ap-

proval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*[FN10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case

scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*[FN11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[FN12]provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the

holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

FN1 R.S.C. 1985, c. C. 36, as amended

FN2 R.S.C. 1985, c.C.44.

FN3 R.S.C. 1985, c. B-3, as amended.

FN4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

FN5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

FN6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

FN7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

FN8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

FN9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

FN10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

FN11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

FN12 [2002] 2 S.C.R. 522 (S.C.C.).

END OF DOCUMENT

TAB 5

Re iMarketing Solutions Group, 2013 ONSC 2223 (CanLII)

CITATION: Re iMarketing Solutions Group, 2013 ONSC 2223
COURT FILE NO.: CV-13-10067-00CL

DATE: 20130415

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF iMARKETING SOLUTIONS GROUP INC. and the Companies referred to in Schedule "A"(the "Applicants")	))))))	*Robert I. Thornton* and *Danny M. Nunes*, for the Applicants *Matthew P. Gottlieb*, for Duff & Phelps Canada Restructuring Inc. *Virginie Gauthier and Daniel Pearlman*, for Shotgun Fund Limited Partnership III *Clifton P. Prophet*, for Canadian Imperial Bank of Commerce

HEARD: April 12, 2012

NEWBOULD J.

[1] iMarketing Solutions Group Inc. ("IMSG") and a number of subsidiary corporations applied on April 12, 2002 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

[2] Prior to December 3, 2012, IMSG was a publicly traded company listed on the TSX Venture Exchange. On that date, IMSG voluntarily delisted its common shares from the TSX-V and began listing its common shares on the Canadian National Stock Exchange.

[3] IMSG is the direct or indirect parent company of twenty-two subsidiaries ("IMSG Group"). Seventeen of the subsidiaries along with IMSG comprise the Applicants in these proceedings.

[4] The applicants are one of the largest participants in the telemarketing and fundraising industry in North America. The applicants provide direct marketing solutions for not-for-profit organizations, political organizations and professional associations. The IMSG Group's core businesses include: (i) tele-fundraising and outreach; (ii) data development; (iii) direct mail fundraising and outreach; (iv) data management; (v) publishing; (vi) social media; (vii) secure caging (an industry term for the process or act of collecting donations, processing donor mail and depositing contributions to customer accounts); and (viii) marketing list rentals (the renting of donor lists to third parties in exchange for a fee).

[5] The IMSG Group's Canadian operations are located in the provinces of Ontario, British Columbia, Alberta, Manitoba, Quebec and New Brunswick. The IMSG Group's U.S. operations are located in the states of Wisconsin, Colorado, Pennsylvania, Missouri, Virginia, New Mexico and Florida. For the nine months ended September 30, 2012, the IMSG Group's Canadian operations accounted for approximately 57% of the applicants' gross margin while U.S. operations accounted for the remaining 43%. In 2013, the applicants'Canadian operations were expected to account for 53% of the total gross margin.

[6] As at April 5, 2013, the applicants employed approximately 1,143 employees (662 active employees and 481 on layoff) almost evenly divided between Canada and the U.S. The applicants' employees are not unionized and there are no pension plans in place.

[7] The applicants have a $2 million loan facility with CIBC made to The Responsive Marketing Group Inc. ("RMG"), which is one of the applicants. That loan has been fully advanced. It is secured against the assets of IRMG and guaranteed by other subsidiaries.

[8] On October 12, 2012, IMSG obtained bridge loan financing in the amount of $1.5 million. The bridge loan was provided by Shotgun Fund Limited Partnership III ("SF LP III") controlled by, among others, Michael Davis, a director and officer of IMSG. The purpose of the bridge loan was to address short-term liquidity issues and to improve IMSG's financial position. The net proceeds from

the bridge loan were used for general working capital and operational restructuring purposes.

[9] On December 4, 2012, IMSG completed a private placement offering of a secured convertible promissory note. The gross proceeds from the offering were $3.5 million and the sole subscriber was SF LP III. The convertible note has a maturity date of December 4, 2015. IMSG granted SF LP III a security interest in all of its assets. The amount owing under the convertible promissory note is approximately $3.8 million. The proceeds from the offering were used to repay the bridge loan and to fund the applicants' general working capital requirements.

[10] As at April 5, 2013, the most significant liabilities of the applicants, other than their indebtedness to CIBC, approximately $2.0 million, and SF LP III, approximately $3.8 million, are as follows:

	($millions)
Unpaid Statutory Withholdings	$0.2
Tax Authorities	$1.2
Trade Creditors	$4.3
Estimated Severance Obligations (as at April 5, 2013)	$0.9
Estimated Future Obligations Relating to Abandoned Facilities	$0.8
Rental Arrears	$0.4
	$7.8

Insolvency and Stay

[11] The evidentiary record establishes that the IMSG Group is facing an intense liquidity challenge such that it cannot pay all liabilities as they become due, which liabilities include ongoing operating costs, as well as legacy costs incurred as a result of previous operational restructuring initiatives already undertaken. These initiatives were implemented with a view to returning the business of the IMSG Group to profitability.

[12] The record also establishes that without an immediate stay of proceedings, the applicants' businesses cannot survive. The applicants are under increasing pressure from their creditors to pay outstanding accounts, including certain suppliers of goods and services that are critical to the ongoing operation of the applicants' businesses, and under constant threat from their landlords and critical suppliers who threaten to take enforcement actions to bar the applicants from their business premises and to discontinue the supply of goods and services necessary for the applicants to operate their businesses.

[13] While the IMSG Group has historically been profitable, generating positive net income of approximately $2.3 million and $232,000 as recently as the fiscal years ending December 31, 2009 and 2010, over the most recent twenty-four month period it has generally incurred significant losses and, at present, the applicants lack

sufficient liquidity to continue operating their businesses. For the three months ended September 30, 2012, the IMSG Group generated a loss of $3.3 million and negative EBITDA from continuing operations of $2.4 million. For the nine months ending September 30, 2012, the loss generated was $4.7 million and the negative EBITDA from continuing operations was $3.0 million. Although the IMSG Group has not finalized its audited financial statements for the year ending December 31, 2012, it expects to report continued material losses from ongoing operations as well as additional restructuring costs and losses from discontinued operations. For the first quarter of 2013, it expects that the IMSG Group will continue to show negative EBITDA and net losses, although the magnitude of such losses is expected to be materially lower than the quarterly results in 2012. It is expected that the IMSG Group will generate positive cash flow from ongoing operations shortly following the commencement of these proceedings.

[14] Over the past two years, the applicants have taken steps to address the challenges facing them by implementing a number of initiatives to lower operating costs through process efficiencies and higher productivity. They commenced the implementation of a restructuring plan that was intended to transform their business and called for significant changes to the applicants' corporate structure, operations and management to bring these together under a single operating model. The applicants' restructuring plan has taken longer than expected to implement and anticipated operating results have not been achieved, resulting in the applicants' costs being higher than expected and savings being delayed.

[15] I am satisfied from the record, including the report from the proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made. The applicants request that the stay apply as well to limited partnerships which form part of their business in light of the integrated nature of the business. Although the CCAA applies to corporations, there is authority that the stay may in appropriate circumstances be ordered to apply to limited partnership interests, particularly where the business interests of the applicant corporations are intertwined with the limited partnerships. See *Re Lehndorff General Partner Ltd.* reflex, (1993), 9 B.L.R. (2d) 275. Such is the case with the applicants, and the stay requested is ordered.

[16] It is to be noted that CIBC is subject to the stay. There is an issue, however, between the applicants and CIBC that needs to be addressed quickly and I understand that the parties are dealing with it. That has a do with whether the CIBC loan, once reduced by payments being made directly to CIBC by customers of one or more of the applicants, is to be increased to $2 million. I understand that the applicants do not intend to compromise the rights of CIBC, including its security and collateral position, as result the proceedings and that the parties are working towards a mutually acceptable arrangement to the effect that intention. In the circumstances CIBC has reserved its rights concerning the Initial Order, which it has not opposed based upon this understanding.

DIP financing

[17] The record indicates that the IMSG Group will require additional emergency funding in order to implement this restructuring. SF LP III has agreed to provide debtor in possession financing to the applicants up to the aggregate amount of $1.0 million, subject to the applicants obtaining an Initial Order in this proceeding on the terms requested granting the DIP Lender a charge over all of the property, assets and undertaking of the applicants in priority to all creditors except CIBC. The cash flow forecasts for the period April 15, 2013 to August 2, 2013 indicate that in the absence of the DIP financing, the applicants have insufficient cash to continue to operate and operations will cease immediately. This is the view of both the applicants and the proposed Monitor.

[18] After considering the factors set out in section 11.2 (4) of the CCAA, it appears that the DIP financing and charge appears reasonable and they are approved.

Administration Charge

[19] The applicants propose an Administration Charge of $300,000 to secure payment of the fees and expenses of the applicants' counsel, the Monitor and its counsel and the CRO and its counsel. The proposed Monitor is of the view that the proposed charge is reasonable. It appears to me relatively modest and is approved. This charge will rank after the CIBC security and before the other charges approved in the Initial Order, including the DIP charge.

Director's charge

[20] The applicants also propose a Directors' Charge of $1.3 million for any liabilities the directors and officers may incur after the commencement of these proceedings. The applicants estimate that the post-filing priority payables in respect of which the directors would have personal liability are approximately $1.3 million based on payroll, payroll remittances, vacation pay and sales taxes and determination or severance payments that may be owing. The proposed Monitor has reviewed the calculations and is of the view that the Directors' Charge is reasonable in relation to the quantum of the estimated potential liability. The Directors' Charge is approved.

Chief Restructuring Officer

[21] The applicants propose that Mr. Upkar Arora CA, ICD.D, co-founder and Managing Director of Illumina, be appointed ChiefRestructuring Officer. Illumina is an independent financial advisory firm that provides financial, operational and strategic advisory services to mid-sized businesses. IMSG retained Mr. Arora on September 24, 2012 as interim CFO upon the resignation of IMSG's previous CFO. It was expected that Mr. Arora's appointment would last for three months during which time he would, among other things, assist IMSG's board of directors in selecting a new CFO. Mr. Arora has remained in the position of interim CFO and, in that capacity, currently oversees the financial affairs of the applicants both in Canada and the U.S.

[22] Mr. Arora has intimate knowledge of the Applicants' operations, financial status and efforts that have been undertaken by the applicants to restructure their business. The applicants believe that Mr. Arora's knowledge and experience will be an asset to them and will be of great assistance to the proposed Monitor in guiding the applicants through thisrestructuring process. A fee of $75,000 per month has been agreed, plus asuccess fee on terms to be negotiated subject to court approval. The proposed Monitor believes that the monthly fee for Mr. Arora is reasonable and that absent his retention, professional fees would increase by at least the monthly fee payable to him. Mr. Arora is appointed as CRO and as an officer of the Court on the terms agreed between the applicants and Mr. Arora.

Cash management system

[23] The IMSG Group operates an extensive centralized cash management system integrated among the various entities and centrally managed from IMSG's head office in Toronto. Cash is transferred daily, as needed, among some 120 bank accounts of the operating entities at multiple financial institutions its uses in Canada and the U.S. as well as customer accounts controlled by the IMSG Group. The applicants wish to continue this method of financing the various businesses on a daily basis. The proposed Monitor believes that it is necessary that this existing cash management system be continued as doing so would avoid (i) delays in accounts receivable collections and accounts payable payments until new bank and credit card accounts were established; (ii) a distraction of management's limited resources and (iii) payroll payment disruptions. It would also reduce administrative costs and expenses. The proposed Monitor points out that the cash flow projections do not consider the impact of cash flow delays and such delays would result in a need for increased funding which is not presently available.

[24] The Initial Order will contain a provision that subject to the terms of the DIP facility, IMSG is authorized to make loans, advances or transfers of funds to any of the other IMSG Group entities in accordance with the cash management system and the DIP facility and the subsidiaries are authorized to repay funds previously advanced to them by IMSG from time to time in accordance with the cash management system and DIP facility. As well, there shall be an Inter-Company Charge on the property of IMSG Group.

Critical Suppliers and customers

[25] The applicants have identified certain critical suppliers who provide goods and services critical to the applicants' ongoing operations. As well there are customers who to whom remittances were not made as required. The applicants have proposed in the Initial Order authority to make payments to these customers and critical suppliers for pre-filing indebtedness in consultation with the Monitor as it is believed that without making such payments their businesses cannot survive. The monitor believes the payments are appropriate and necessary for a number of reasons, including the fact that customers regularly engage on a per-contract or per-service basis and would be expected to terminate or not renew their contracts if payment obligations to them were not honoured. The cash flow projections indicate that the applicants will have sufficient liquidity to make these payments over the next several weeks.

[26] The authorization to pay pre-filing amounts to critical suppliers is codified in section 11.4 of the CCAA. Pursuant to this section, the Court has the discretion to:

> (a) declare a person to be a critical supplier, if it is satisfied the person is a supplier of goods or services to the company and the goods or services are critical to the company's continued operations (s. 11.4(1));
>
> (b) make an order requiring the "critical supplier" to supply any goods or services specified by the Court to the company on any terms and conditions that are consistent with the supply relationship or the Court considers appropriate (s. 11.4(2)).

[27] The rationale for the enactment of section 11.4 is explained in the Industry Canada Clause by Clause Briefing Book as follows:

> Companies undergoing arestructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

[28] The critical suppliers have been identified in the affidavit material of the applicants.

[29] It is appropriate that the Initial Order contain a provision that the IMSG Group will be permitted to make such pre-filing payments owing to customers and to suppliers as determined by the IMSG Group in consultation with the Monitor to be necessary to permit them to proceed with the restructuring.

Chapter 15 proceedings

[30] IMSG Group intends to commence proceedings under Chapter 15 of the U.S. *Bankruptcy Code* pursuant to which they will seek to have these CCAA proceedings recognized as a foreign main proceeding and the Initial Order enforced in the US. IMSG will be named as the Foreign Representative in respect of the application. This would appear appropriate in light of the cross-border scope of the business, assets and operations of the applicants. The applicants are of the view that the center of main interests of the IMSG Group is in Ontario for a number of reasons set out in paragraph 21 of the affidavit of Mr. Langhorne. The proposed Monitor shares that view. They may well be correct, but it must be recognized that it is the function of the receiving court in the United States to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15. See *Re Cinram* (2012), 91 C.B.R. (5th) 46, per Morawetz J.

[31] The Initial Order signed on April 12, 2013 contains the provisions discussed in this endorsement.

Newbould J.

Released: April 15, 2013

CITATION: Re iMarketing Solutions Group, 2013 ONSC 2223
COURT FILE NO.: CV-13-10067-00CL

DATE: 20130415

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF iMARKETING SOLUTIONS GROUP INC. and the Companies referred to in Schedule "A"(the "Applicants")

REASONS FOR JUDGMENT

Newbould J.

Released: April 15, 2013

TAB 6

Royal Bank of Canada v. Cow Harbour Construction Ltd., 2011 ABQB 96 (CanLII)

Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2011 ABQB 96

Date: 20110301

Docket: 1003 11241, 1003 05560

Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendant's

And Between:

Docket: 1003 05560

BKCY

Action No: 24-115359

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

In the Matter of Companies' Creditors Arrangement Act, R.S.C. 1985, c. C -36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

Memorandum of Decision
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] On April 7, 2010, Cow Harbour Construction Ltd. ("Cow Harbour") appliedto this Court for, and was granted, an initial order (the "Initial Order")under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("*CCAA*"). Part of that Initial Order appointed Mr. Patrick Ross as Cow Harbour's chief restructuring advisor ("CRA").

[2] Mr. Ross applies to this Court for an order that he be paid for his role as CRA in accordance with the terms of an agreement with Cow Harbour (the"Agreement") dated April 6, 2010, and that this remuneration be secured against Cow Harbour's property or proceeds under an administrative charge granted under the Initial Order.

II. Facts

[3] Cow Harbour applied for the Initial Order under the *CCAA*, with the support of the Royal Bank of Canada ("RBC"), its primary secured creditor. One of RBC's conditions for its support was that Cow Harbour retain a CRA to oversee its restructuring. The hearing to consider Cow Harbour's application for the Initial Order took place over two days, April 6, 2010 and April 7, 2010.

[4] PriceWaterhouseCooper ("PWC") and Mr. Don MacLean, one of its Senior Vice -Presidents, were closely involved in the lead-up to this Court granting the Initial Order. PWC was also actively involved in the *CCAA* proceedings. It was also eventually appointed Cow Harbour's receiver, when Cow Harbour's creditors concluded that restructuring was not a viable option. PWC and Mr. MacLean continue to be involved in these proceedings. In fact, Mr. MacLean filed an affidavit in opposition to Mr. Ross's application.

[5] Mr. Ross is an independent affiliate partner of Lindsey Goldberg LLP, a private equity fund based in New York. He has extensive high-level business experience, including roles involving business turn-around consulting and acting as the president and chief executive officer of a number of companies in which he steered their economic recovery.

[6] Mr. MacLean provided the initial draft of the Agreement, in the form of a template engagement letter, to Cow Harbour's chief financial officer, Mr. Demetri Koumarelas. Mr. Koumarelas was instrumental in negotiating the terms of the Agreement with Mr. Ross. The draft form of the Agreement was tailored to meet the arrangement between Cow Harbour and Mr. Ross. Cow Harbour and Mr. Ross signed the Agreement on April 6, 2010.

[7] The following provisions of the Agreement are relevant to the application before this Court (Mr. Koumarelas changed some portions of the Agreement through handwritten insertions or changes, which are indicated by italics. Strikeouts represent strikeouts from the original document that PWC provided to Mr. Koumarelas):

> 3. Fees
>
> PR's [Patrick Ross] compensation for the service referred to above will be as follows:
>
> 4.1 WorkFee
>
> * A daily work fee of $2,000.00 payable weekly;
> * A completion fee of $500,000 (the "Completion Fee") payable at the completion of this mandate. *"Completion of this mandate" will be defined as 3 months from the date a plan of arrangement is sanctioned by the Court.*
>
> 4.2 SuccessFee

(a) Financing and sales approved by RBC:

* 1% of any additional or replacement financing raised *or sourced by PR*, with new or existing lenders (only for a new loan) payable from closing proceeds; or

* 1% of any proceeds from a sale of equity or assets *sourced by PR* (other than the sale-leaseback transactions entered into by CHC [Cow Harbour]), payable from closing proceeds; or

* 1% of any combination of financing and sale proceeds *sourced by PR*;

4.3 TerminationFees and success Fees Earned

(a) in the event that PR is terminated without cause prior to ~~CHC emerging from CCAA protection~~ *completion of this mandate*, PR will be paid the greater of i) Success Fees Earned as detailed above and defined below; or ii) a break fee in lieu of success fees calculated as $10,000.00 per week multiplied by the number of weeks worked, in addition to the weekly work fee.

In the event of a termination by either party, the Success Fees Earned will be calculated as follows: i) the full amount of the success fee referred to in 4.2(a) if an agreement is entered into during or after termination, for a transaction contemplated in 4.2 (a) with a party who had reviewed information regarding CHC and declared that they had an interest, prior to termination, identified in writing by PR, and only if an agreement is entered into within three months of termination and transaction closes within six months of executing an agreement, plus ii) any other success fees earned during the period prior to our termination which remain unpaid (the"Success Fees Earned)

[8] The Initial Order:

(a) required Cow Harbourto hire Mr. Ross as the CRA (Initial Order para.11);

(b) directed Cow Harbour to pay the CRA in accordance with the Agreement (Initial Order para. 31); and

(c) included the CRA's fees and disbursements in the definition of an "Administrative Charge" (Initial Order para. 34), which was given a priority as described more fully in the Initial Order paras. 58 and 60.

[9] At the hearing on April 7, 2010, Ms. Kelly Bourassa, counsel for one of Cow Harbour's creditors, raised the question and contested the appointment of a CRA. Ms. Bourassa argued that it was inappropriate for this Court to appoint a CRA, when the terms of his engagement and, in particular, the contingent fees payable to him, were unknown. This Court invited Mr. McCabe, Cow Harbour's counsel, to advise it of the Agreement's terms. Mr. McCabe consulted with Mr. Ross and then advised this Court that the terms of the Agreement were as follows:

> The CRA is in the courtroom, he advises me that it's $2,000 per day, that's for working days. And he has negotiated a $500,000 success fee. I would point out that the success fee kicksin only if it is a success, it can't - - - it cannot, I submit, Sir, come out of the pocket of the creditors, and it cannot be something that can be detrimentally affected by the charge. (Transcript of Proceedings, April 7, 2010, p. 43, ll. 20-34)

[10] Mr. Ross's evidence, in cross-examination on his affidavit, is that he told Mr. McCabe during a break in the April 7, 2010 proceedings, that his fees under the Agreement were:

- a $2,000 a day fee;
- a $190 day allowance for living expenses;
- a completion fee of $500,000 if Cow Harbour had a plan of arrangement approved by the Court; and
- a 1% success fee on any new financing or equity sale.

(Cross-examination on Affidavit of Mr. Ross, October 28, 2010, p. 21, ll. 1-8)

(the completion fee and successfee are referred to in these reasons as the "Completion Fee" and "Success Fee," respectively).

[11] Ms. Bourassa further objected to the Success Fee and to the securing of the CRA's remuneration under the Administrative Charge. Mr. McCabe responded by saying that the *CCAA* process would be sidetracked by delaying Mr. Ross's appointment and that Mr. Ross was needed to add value to Cow Harbour immediately. This Court indicated that it was premature to discuss a contingentSuccess Fee (Transcript of Proceedings, April 7, 2010, p. 43, ll. 39-41; p. 44, ll. 1-37). Further submissions were made on April 7, 2010, but none in reference to the CRA, and this Court granted the Initial Order under the terms that Cow Harbour sought. These terms included the appointment of Mr. Ross according to the terms of the Agreement and a provision that his fees and disbursements would

be secured by the Administrative Charge. The Initial Order was entered on April 9, 2010.

[12] The Agreement was the subject of portions of the following further hearings:

(a) On April 28, 2010, Cow Harbour sought an extension of the Initial Order's stay of proceedings. Before this hearing, the court-appointed monitor under the Initial Order, Deloitte & Touche Inc. (the "Monitor"), filed its third report, which provided, among other things, information about the terms of the CRA's retainer, indicating that if Cow Harbour's restructuring were successful, the CRA would receive "considerable" contingent compensation, but if not, the CRA would be restricted to his daily work fee. The Agreement was not put before this Court.

(b) At the May 28, 2010 hearing, there was a shift from Cow Harbour's attempt to restructure by refinancing or finding equity, to the CRA's application to hire Ernst & Young Corporate Finance (Canada) Inc. ("E & Y") to sell Cow Harbour or its assets. During this hearing, this Court was advised that the information it was given as to the terms of the Agreement was inaccurate. The Monitor's seventh report raised the issue of whether the CRA would be entitledto a 1% Success Fee on an asset sale. Some of the creditors argued that this Court could not approve the 1% Success Fee, because Mr. McCabe had not fully disclosed the terms of the Agreement to this Court before it granted the Initial Order.

(c) The May 28, 2010 hearing was continued on June 1, 2010, when this Court approved the hiring of E & Y to fulfill a sales mandate that the CRA outlined in his first report, including soliciting purchasers and finding sources within 30 days (the "May 28 Order"). The CRA's counsel advised this Court that E & Y's fees would be paid out of the Completion Fee or the Success Fee, if Mr. Ross received them, or from Cow Harbour if he did not.

[13] Pursuant to the May 28 Order, E & Y compiled a list of prospective buyers, including Aecon Group Inc. ("Aecon"), and sent out teasers to them. Aecon did not respond, so Mr. Ross contacted Mr. Scott Balfour, Aecon's president, asking that Aecon consider this opportunity. In June, Aecon submitted a bid to purchase Cow Harbour's assets for $165 million ("First Aecon Offer").

[14] At the July 6, 2010 hearing, the CRA sought this Court's approval of the First Aecon Offer, which the CRA had accepted. Certain creditors strenuously objected to this Court approving the First Aecon Offer, because the offer did not provide for an allocation of purchase price proceeds among the creditors. This Court did not approve the First Aecon Offer.

[15] As a result of submissions by certain of Cow Harbour's secured creditors, this Court suspended Mr. Ross from his role as CRA and appointed PWC as a

"transaction facilitator," assuming the CRA's duties in connection with any further dealing with prospective purchasers, including Aecon, and negotiations with Cow Harbours's creditors. PWC worked with the prospective purchasers and the creditors to secure an offer to purchase Cow Harbour's assets that was acceptable to the creditors. Aecon submitted a further offer (the "Second Aecon Offer"), which contained a purchase price of $180 million and an allocation of purchase price among the creditors.

[16] On August 25, 2010, this Court approved the Second Aecon Offer.

III. Issues

[17] RBC and PWC oppose Mr. Ross's application, arguing that because this Court received misinformation about the terms of the Agreement, the Success Feeis not payable, and even if it is payable, it cannot be secured by the Administration Charge. Further, they argue that the Completion Fee is not payable under the clear language of the Agreement.

[18] Thus, the issues before this Court are:

1. Is Mr. Ross entitledto the Completion Fee?

2. Is Mr. Ross entitled to the 1% Success Fee?

3. If Mr. Ross is entitled to the Success Fee, is it secured by the Administration Charge?

4. Are E & Y's fees are payable from the Completion Fee or the Success Fee, or must Cow Harbour pay them?

IV. Analysis

1. Is Mr. Ross entitled to the Completion Fee?

a. *Mr. Ross's submissions*

[19] Mr. Ross submits that these issues are questions of interpretation of a contract and not a question of redrawing or revising the Agreement. He argues that his substantial performance of the terms of the Agreement is sufficient for payment of the Completion Fee, citing ***Herron v. Hunting Chase Inc.***,2003 ABCA 219 (CanLII), 2003 ABCA 219, 330 A.R. 53 at paras. 19-23. Conceding that this Court has not sanctioned a plan of arrangement, he argues that, in any event, the *CCAA*'s policy objectives have been accomplished by an equivalent means, the sale of Cow Harbour's assets.

[20] Mr. Ross cites the following from Janis P. Sarra, *Rescue! TheCompanies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at p. 9:

> The CCAA has a broad remedial purpose, permitting compromises or arrangements to be made between an insolvent company and its creditors. The courts have held that the CCAA allows the debtor company to avoid bankruptcy, to continue operating, and to find a business strategy that enables it to meet the demands of creditors. The CCAA is to be given a large and liberal interpretation so as best to meet its policy objectives.

[21] Dr. Sarra goes on to explain that those objectives include:

> (a) avoiding where possible, the devastating social and economic consequences of the cessation of business operations;
>
> (b) allowing a transition period for debtors in which they can adjust to difficult marketsin unsettled times and emerge competitive and innovative, and
>
> (c) balancing the costs of the process with the benefits of potential success and the protection of many interests.

[22] The Supreme Court of Canada in ***Century Services Inc. v. Canada (Attorney General),*** 2010 SCC 60 (CanLII), 2010 SCC 60, recently discussed the purpose of the *CCAA*:

> 15 As I will discuss at greater length below, the purpose of the *CCAA* – Canada's first reorganization statute – is to permit the debtor to continue to carry on business and, where possible, **avoid the social and economic costs of liquidating its assets**. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
>
> [Emphasis added]

[23] This Court, in its October 5, 2010 decision, noted:

> 4 It became clear that Cow Harbour was not going to be able to restructure its affairs through a refinancing, compromise or an equity restructuring. Rather, this matter evolved into a liquidation. This Court approved a process that would permit Cow Harbourto restructure by way of a sale of its assets ... The intent behind this process was to effect a sale of Cow Harbour as a going concern.

[24] Mr. Ross argues that the result of the *CCAA* proceedings was a sale to Aecon of a substantial portion of Cow Harbour's assets and business, and that Aecon continues to operate the business as a going concern. He argues that although this was accomplished through a receivership, this was merely a mechanism that

expedited the *CCAA*'s intended outcome. He notes that virtually all of Cow Harbour's employees have continued employment, Syncrude Canada Ltd. (Cow Harbour's primary customer) will have its contract with Cow Harbour completed, and Cow Harbour's business continues as a viable business with additional capital resources and management strength from Aecon.

[25] Mr. Ross concludes that he has substantially performed his obligation to obtain Court sanction of a plan of arrangement and therefore, he has earned the Completion Fee.

b. *PWC's submissions*

[26] PWC argues that Mr. Ross has not earned the Completion Fee according to the Agreement's plain wording, since the Completion Fee was only payable "at the completion of [the CRA's] mandate." The Agreement expressly defined this term as "3 months from the date a plan of arrangement is sanctioned by the Court." Noting that this Court has not sanctioned any plan of arrangement, and that in fact there was no "plan of arrangement" since restructuring was not accomplished, PWC concludes that the CRA has not earned the Completion Fee.

c. *RBC's submissions*

[27] RBC supports PWC's submissions and its written submissions were limitedto the question of the Success Fee.

d. *Conclusion*

[28] This Court has some sympathy for Mr. Ross's functional analysis. However, the Agreement expressly defined the conditions under which he would earn the Completion Fee:

> A completion fee of $500,000 (the"Completion Fee") payable at the completion of this mandate. *"Completion of this mandate" will be defined as 3 months from the date a plan of arrangement is sanctioned by the Court.*

[29] The handwritten addition of this clause makes it clear that the Completion Fee would be payable 3 months after this Court approves a plan of arrangement. This Court agrees with the CRA that this is a question of interpreting the terms of the contract. The Supreme Court of Canada in ***Eli Lilly & Co. v. Novopharm Ltd.; Eli Lilly & Co. v. Apotex Inc.,*** 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129 said:

> 54 ... The contractual intent of the parties is to be determined **by reference to the words they used in drafting the document**, possibly read in light of the surrounding circumstances which were prevalent at the time ...
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of

Lord Atkinson in ***Lampson v. City of Quebec*** (1920), 54 D.L.R. 344 (P.C.), at p. 350:

> . . . the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself ... [I]f the meaning of the deed, **reading its words in their ordinary sense, be plain and unambiguous** it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses. . . ."
> [Emphasis added]

[30] The plain language of the Agreement sets out a specific condition that must be met before the CRA is entitled to be paid the Completion Fee. That specific condition has not been met.

[31] Mr. Ross raised the question of whether substantial performance of the condition would be sufficient performance. In ***Herron***, the Alberta Court of Appeal discussed the issue of substantial performance as follows:

> 19 In earlier days, contractual performance was an all or nothing proposition that could result in one party receiving a substantial windfall. For example, when a contractor carried out his obligations under the contract, but some of his work was defective, the principle of dependency absolved the other party from his obligation to pay anything, even though that party received something of value.To mitigate these harsh consequences, courts developed the notion of "substantial performance". Under the current law, when a contract has been substantially though not perfectly completed, the guilty party is entitledto payment under the contract, less the cost of making good the deficiencies, unless the contract provides otherwise ...
>
> 21 The principles of dependency and substantial performance most often apply in situations in which there is a straight-forward contract for goods or services. [G.H.L. Fridman in *The Law of Contract in Canada*, (4th ed.) (Scarborough: Carswell, 1999)] at 570 suggests that "a party is not relieved from payment for what has actually been done, unless: (1) he has obtained no benefit at all; (2) the work done is totally different from the work contracted to be done; or (3) the contractor abandoned the work before completion."
> [Footnotes omitted]

[32] The structure of the Agreement does not lend itself to an application of the notion of substantial performance. Either the condition is satisfied or it is not. Mr. Ross did not perform the condition required for him to receive the Completion Fee, and Cow Harbour did not receive the benefits for which it contracted. As well, Mr. Ross was paid a daily work fee for the work he did perform, and therefore was not faced with the "all or nothing" proposition described by the courts. Because Cow

Harbour has not been restructured and is,in fact, now bankrupt, the work Mr. Ross performed is totally different from the work Cow Harbour contracted him to do, which was to result in Cow Harbour's survival through a restructuring.

[33] In this Court's view, the doctrine of substantial performance is not relevant to the Completion Fee. Furthermore, from Cow Harbour's perspective, the CRA did not complete, or even substantially complete, what he had contracted to do.

[34] The Completion Fee was inserted for Cow Harbour's benefit. Had Mr. Ross completed the mandate, he would earn the Completion Fee. Mr. McCabe quite rightly stated that the Completion Fee would "not come out of the pockets of the creditors" and would only kick in if Mr. Ross completed his mandate. In this case, there was no completion; the condition for payment was not met. A plan of arrangement was never presented to this Court and, accordingly, this Court never sanctioned a plan of arrangement. Mr. Ross did not complete his mandatein accordance with the terms of the Agreement. Therefore, he has not earned the Completion Fee.

2. Is Mr. Ross entitled to the 1% Success Fee?

a. *Mr. Ross's submissions*

[35] Mr. Ross argues that Aecon bought Cow Harbour's assets and that RBC approved the sale. Thus, the requirements of the Success Fee contingency have been met. In particular, he notes that Mr. Koumarelas inserted the words"sourced by PR" and that if the language is ambiguous, it should be interpreted*contra proferentem.* Mr. Ross argues, however, that the words are not ambiguous. Although "sourced" does not have a dictionary definition, its meaning can easily be deduced. He argues that "sourced" is merely a conversion of the noun "source" to a verb. He provides some definitions of "source"including:

> A person who ... is the chief or prime cause of a specified condition, *The New Shorter Oxford English Dictionary*, 1993, *s.v.* "source";
>
> The originator or primary agent of an act, circumstances or result ... , *Black's Law Dictionary*, 9th ed., *s.v.* "source");
>
> "source" as a verb: obtain from a particular source; find out where something can be obtained, *Oxford Dictionary Online* (April 2010).

[36] Based on these definitions, Mr. Ross argues that "sourced by PR" may have two meanings:

(a) he was the originator of or prime cause of or the person who obtained the sale of Cow Harbour's assets to Aecon; or

(b) he was the person who supplied information as to or found out where to obtain Aecon as the purchaser of Cow Harbour's assets.

He further submits that even if all he did was suggest Aecon's name as a potential buyer, this would be sufficient for him to meet the prerequisites for earning the Success Fee.

[37] Mr. Ross argues that he did much more than this, however. He called Scott Balfour, Aecon's president, after Aecon did not respond to the teaser, urging Mr. Balfour to consider the business opportunity that Cow Harbour offered. As a result of this, and further discussions, Aecon submitted a proposal and later, a binding offer. Mr. Balfour, in his October 5, 2010 affidavit, stated that, "Aecon began to pursue the purchase of the business of Cow Harbour as a direct result of communications by Patrick Ross."

b. *PWC's submissions*

[38] PWC argues that Mr. Ross is not entitled to the Success Fee for three reasons:

1. the Agreement states that the Success Fee is payable for "financing and sales approved by RBC" and RBC did not approve the First Aecon Offer that Mr. Ross presented;

2. theSuccess Fee described to this Court in the initial application was only in respect of new financing or equity sale, but not an asset sale, therefore only a new financing or equity sale would qualify; and

3. Aecon was contacted by the joint efforts of Mr. Ross, E & Y and the Monitor. Therefore, the sale of Cow Harbour's assets were not "sourced by" Mr. Ross.

c. *RBC's submissions*

[39] RBC argues that under the Agreement, the Success Fee would not be payable to Mr. Ross unless RBC approved the financing or sale, and RBC did not approve the First Aecon Offer. It argues that the First Aecon Offer, which was the sale proposal that Mr. Ross sourced, was the $165 million offer that included conditions for the preparation of a plan of arrangement, approval of the plan of arrangement, a court order sanctioning and approving the plan of arrangement, and the requirement that the court order not be appealable. Further, the First Aecon Offer did not provide for the allocation of the proceeds among creditors and did not provide any basis on which a creditor could calculate the sale price of the assets over which it held security.

[40] By contrast, the Second Aecon Offer did not require a plan of arrangement or a non-appealable court order, was $15 million greater than the First Aecon Order, and was presented in conjunction with collateral agreements providing for the allocation of the sale proceeds among most secured creditors.

[41] Not only did RBC not approve the First Aecon Offer, it applied to this Court for the appointment of a receiver, an application heard on the same date as the date Mr. Ross applied for the order approving the First Aecon Offer. This Court refused Mr. Ross's application and appointed PWC as the receiver of Cow Harbour. PWC then entered into negotiations with Aecon and most of Cow Harbour's creditors and was able to secure an offer that was acceptable to RBC and most of the creditors.

[42] RBC further argues that just because this Court approved an offer that Aecon made does not mean that Mr. Ross earned the Success Fee. It is the sale that RBC had to approve, not merely the identity of the offeror.

d. ***Conclusion***

i. *What does "sourced by PR" mean?*

[43] RBC and PWC (collectively, the "Respondents") view the Agreement para. 4.2 narrowly by suggesting that since RBC did not approve the First Aecon Offer, the contingency for the payment was not met.

[44] Neither of the Respondents dealt specifically during argument with what was meant by the term "sourced by" Mr. Ross. PWC suggests that the Second Aecon Offer was not "sourced by" Mr. Ross, but was the result of joint efforts of PWC, E & Y and Mr. Ross. This argument does not take the Respondents far. There is no doubt, on the facts, that Mr. Ross was responsible for bringing Aecon to the table, despite its initial lack of interest in the sale. On a plain reading of the clause, Mr. Ross earned the Success Fee if he was a source of the sale. There is nothing to indicate that it would only be payable if he was the sole source of the sale. In fact, it is arguable that had Mr. Ross sourced some financing and some portion of a sale, he would have been entitledto 1% of whatever he had sourced, even if further aspects of the sale or financing were sourced by someone else.

[45] PWC provided the template for the Agreement and Mr. Koumarelas of Cow Harbour "filled in the blanks." If this Court is incorrect in its interpretation of the Agreement, to the extent that the Agreement is vague, any vagueness would favour Mr. Ross.

[46] Mr. Ross found and acquired a source to buy Cow Harbour's assets."Source" even its more traditional definitions, refers to the origin, or primary originator, of an act, circumstance, or result. Even if the Monitor, E& Y, and PWC were part of a joint effort to suggest potential buyers and eventually negotiated the Second Aecon Offer, Aecon had expressed no interestin making an offer until it was actively pursued by Mr. Ross. Aecon was"sourced by" Mr. Ross.

ii. *Did RBC approve the sale "sourced by" Mr. Ross*

[47] RBC approved the Second Aecon Offer, and not the First Aecon Offer. For the reasons given above, this Court finds that the Second Aecon Offer was"sourced by" Mr. Ross. Had the Agreement said that RBC must approve a sale"negotiated

by" or "finalized by" Mr. Ross, there might be some merit to distinguishing between the First Aecon Offer and the Second Aecon Offer. However, the Agreement refers only to "sourced by" and this Court finds that Mr. Ross sourced the sale of Cow Harbour's assets to Aecon, even if there were additional players involved in identifying the potential buyer and negotiating the eventual sale.

[48] From a public policy perspective, it would be highly offensive to allow parties to retain an individual to accomplish a task and then once the task is partially performed, allow the parties to prevent the individual from fully performing its task and yet be able to take the fruits of the individual's efforts without the agreed-upon, or some, remuneration. Such an approach would send a chill through the commercial world and, in particular, the insolvency world. This Court should not countenance such an approach.

iii. What is the effect of the Court's lack of accurate knowledge of the actual terms of the Agreement?

[49] PWC argues that the Agreement was not before this Court when it granted the Initial Order, and that this Court granted the Initial Order based on misinformation. It further argues that the only terms of the Agreement that this Court can enforce are those that this Court approved. Because Mr. Ross did not clarify the terms of the Agreement at the hearing, he is not entitled to the Success Fee. He is only entitled to what was known by the Court at the time of the hearing and therefore contemplated by the Initial Order.

[50] This Court does not accept this argument for several reasons. First, the Initial Order expressly refers to the Agreement and orders that the CRA be paid according to the Agreement's terms. This Court was aware that a portion of Mr. Ross's remuneration was contingent, but said that it was premature to address the details of Mr. Ross's remuneration. As importantly, RBC had made it clear at the hearing that resulted in the Initial Order, that its cooperation in Cow Harbour's *CCAA* proceedings was dependent on the appointment of a CRA. RBC was working closely with PWC throughout Cow Harbour's *CCAA* proceedings and PWC provided the template for the Agreement. Because of the short time frame within which this Court had to make a determination concerning its granting of the Initial Order, and RBC's position concerning the appointment of a CRA, this Court had to appoint the CRA and leave the discussion of its remuneration to a later date or not appoint a CRA and thereby lose RBC's support for the proceedings. It chose the former and the discussion concerning the CRA's remuneration did not commence in earnest until after this Court approved the Second Aecon Offer.

[51] Second, it appears that the Respondents are conducting a collateral attack on the Initial Order. The Initial Order was entered and the Respondents did not appeal it. Thus, the Initial Order stands on its terms. As the Alberta Court of Appeal noted in ***Alberta (Child, Youth and Family Enhancement, Director) v. B.M.***, 2009 ABCA 258 (CanLII), 2009 ABCA 258, 460 A.R. 188:

10 It is usually impossibleto open up, reconsider, or vary a decision after the formal judgment has been signed and entered. In that case, the judge simply has no jurisdiction to do so.

[52] The relevant portions of the Initial Order read:

11 The Applicant is directed to immediately hire Patrick Ross as the ChiefRestructuring Advisor (the "Advisor").

31 ... The Advisor shall be paid in accordance with the agreement between the Applicant and the Advisor as part of the costs of these proceedings...

[53] Third, this Court granted the Order Amending the Initial Order on July 6, 2010 (entered on July 8, 2010). The amending order does not amend the Initial Order's terms dealing with the CRA's remuneration. By July 2010, all parties to these proceedings knew the terms of the Agreement, having discussed them at the May 28, 2010 / June 1, 2010 application, and the actual Agreement became part of the record on June 4, 2010.

iv. What is the Quantum of the Success Fee?

[54] For the foregoing reasons, Mr. Ross is entitled to a Success Fee. The issue then becomes the quantum of the Success Fee. It is clear from these proceedings that other parties exerted efforts to obtain the Second Aecon Offer. Certainly E & Y was partially involved, as well as PWC in its role as transaction facilitator.

[55] From Cow Harbour's perspective, these proceedings were not a "success." However, from the perspective of most of the other creditors, it was. Mr. Ross did not accomplish what he was originally retained to accomplish, but the parties ended up with a *CCAA*-like result, which included satisfying some of the *CCAA*'s broader policy objectives. We can speculate that this might have occurred in any event, had Mr. Ross not pursued Aecon as a potential purchaser. But that is not what is before this Court. What is before it is a purchase of the assets of Cow Harbour and a continuation of its business by a corporation, Aecon, that Mr. Ross sourced and pursued.

[56] One-percent of an amount in the hundreds of millions of dollars is a large sum. The size of the Success Fee does not, however, determine whether Mr. Ross is entitled to it. The calculation of the amount was not challenged in earnest until later in the proceedings, once it became clear that Mr. Ross might be entitled to something nearing that large sum.

[57] Mr. Ross presented the First Aecon Offer of $165 million. That is the starting point for the calculation of the Success Fee. From that, we must take off an amount of effort, monetarily and otherwise, that others expended which resulted in the Second Aecon Offer. In other words, Mr. Ross is entitled to aSuccess Fee based on the terms of the Agreement and *quantum meruit.* Had this Court given Mr. Ross, with the support of the creditors, the opportunityto finalize the transaction with

Aecon, and had he finalized the transaction, he would have been entitled to the full Success Fee regardless of its amount. Quantum does not determine entitlement; the practical result of the application of the Agreement's terms determines entitlement.

[58] Using this formula, the parties are directed to attempt to negotiate Mr. Ross's Success Fee. If they are unable to negotiate an amount satisfactory to them, the may come back before this Court to argue this matter.

3. If Mr. Ross is entitled to the Success Fee, is it secured by the Administration Charge?

[59] Initial Order para. 34 describes the Administration Charge as follows:

> 34 The Applicant's Counsel, the Monitor, counsel to the Monitor, and the Advisor, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $2,000,000.00 as security for their professional fees and disbursements incurred of the Monitor, such counsel and the Advisor, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set outin paragraphs 58 and 60 hereof.

a. *Mr. Ross's Submissions*

[60] Mr. Ross argues that a broad and liberal interpretation of the Initial Order para. 34 indicates that the Success Fee is covered by the Administration Charge. He notes that Mossip J. of the Ontario Superior Court of Justice in ***Royal Bank of Canada v. 1542563 Ontario Inc.***, [2006] O.J. No. 3811 at para. 4, 152 A.C.W.S. (3d) 150 (Ont. Sup. Ct. Just.) said that courts should take this type of approach when interpreting court orders. He concluded:

> 4 In other words, a defendant cannot hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and of the administration of justice ...

b. *PWC's Submissions*

[61] PWC argues, for many of the same reasons it argued against payment of the Success Fee, that the Success Fee is not secured by the Administration Charge. It submits that because the Court was misinformed, securing the Success Fee under the Administration Charge would be contrary to the intent of the Initial Order. It notes that Cow Harbour has not been restructured, there was no plan of arrangement and the Success Fee will come out of monies that would otherwise be payable to the creditors.

[62] PWC further argues that the Administration Charge could not possibly secure the Success Fee under the Initial Order because at the time of the Initial Order the Court knew nothing about the terms of the Agreement. Moreover, PWC argues, to find that the Success Fee is secured under the Administration Charge would require the Court to find that:

(a) theSuccess Fee is owing, even though the only offer brought forward by Mr. Ross was unacceptable to RBC and the other creditors;

(b) theSuccess Fee ought to be calculated on the basis of the Second Aecon Offer, even though the Second Aecon Offer was the result of PWC's efforts, and Mr. Ross played no role "whatsoever" in this;

(c) theSuccess Fee is owing even though Cow Harbour was not successfully restructured, and all of Cow Harbour's assets have been, or will be, liquidated and it is no longer carrying on business; and

(d) the Court inadvertently secured the Success Fee under the Administration Charge without knowing anything about the Success Fee when it granted the Initial Order.

c. *Conclusion*

[63] The only question is whether the contingent fees, in particular theSuccess Fee, are part of the Administration Charge. As this Court has also already determined, the Agreement provided that the Success Fee was contingent on approval by RBC of a sale "sourced by" Mr. Ross. Thus, Mr. Ross was involvedin the Second Aecon Offer.

[64] PWC suggests that securing the Success Fee under the Administration Charge is contrary to the intent of the Initial Order. With respect, the ordinary meaning of the words used in the Initial Order are clear; the CRA (Advisor) is entitled to have its fees and disbursements secured by the Administration Charge. Even if there is some vagueness in the meaning of those words, ***1542563 Ontario*** indicates that a broad and liberal interpretation should be applied to achieve the Court's objectives. This Court finds that the purpose of an Administration Charge is to ensure the efficacy of the *CCAA* process by assuring professionals that they will be paid. Otherwise, those professionals will be reluctant to accept assignments or contracts with corporations in financial difficulty. A broad and liberal interpretation of the Initial Order is that the fees and disbursements payableto Mr. Ross and secured by the Administration Charge are those contained in the Agreement, including the Success Fee.

[65] The Success Fee to which Mr. Ross is entitled is secured by the Administration Charge.

4. Are E & Y's fees payable from the Completion Fee, the Success Fee, or must Cow Harbour pay them?

[66] E & Y's fees are payable from the Success Fee under the terms of this Court's order of June 1, 2010, which provided:

> 2. The engagement of Ernst & Young pursuant to the terms set out in the First Report of the Chief Restructuring Advisor ("the Advisor") and the engagement letter of Ernst & Young dated May 26, 2010 is hereby approved as provided therein.

[67] The First Report of the CRA provided at para. 8:

> (iii) The CRA offered to cover the cost of E & Y from his "success fee" if such was earned and paidto the CRA. The "success fee" is described in paragraph 8 of the Monitor's Third Report. If no fee is earned and paid to the CRA, the cost associated with E& Y would be borne by the Company.

[68] Thus, E & Y's fees are payable by Mr. Ross from the Success Fee, as finally negotiated.

V. Conclusion

[69] Mr. Ross's application for payment of the Completion Fee is denied, while his application for payment of the Success Fee is granted. The Success Fee to which Mr. Ross is entitled will be negotiated among the parties or determined by this Court. The Success Fee will be secured by the Administration Charge. E & Y's fees will be payable by Mr. Ross from the Success Fee.

Heard on the 11th day of January, 2010.
Dated at the City of Edmonton, Alberta this 1st day of March, 2011.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

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Macleod Dixon LLP

Daniel Carroll, Q.C. for Patrick Felix Ross
Field LLP

Ray Rutman for RBC
Fraser Milner Casgrain LLP

Court File No. CV14-10401-00CL

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced in Toronto

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