Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE PROPOSAL OF DANIER LEATHER INC., a company incorporated pursuant to the laws of the Province of Ontario, with a head office in the City of Toronto, in the Province of Ontario

BRIEF OF AUTHORITIES OF DANIER LEATHER INC.
(Motion Returnable February 8, 2016)

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INDEX

PRIMARY SOURCES

20. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42 (S.C.C.)

21. *Re Stelco Inc.*, [2006] O.J. No. 275 (S.C.J. [Commercial List])

22. *Re Hollinger Inc.*, 2011 ONCA 579

SECONDARY SOURCES

23. Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1

TAB 1

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Receivers — Miscellaneous

Receiver was appointed over debtor company — Debtor was in development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate — Receiver brought motion for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in Receiver's First Report — Motion granted — Receiver lacked access to sufficient funding to support debtor's operations during lengthy sales process — Quick sales process was required — Marketing, bid solicitation and bidding procedures proposed by Receiver would result in fair, transparent and commercially efficacious process, and were approved — Stalking horse agreement was approved for purposes requested by Receiver — Receiver was granted priority over existing perfected security interests and statutory encumbrances — Debtor did not maintain any pension plans — Activities in Receiver's First Report were approved.

Table of Authorities

Cases considered by *D.M. Brown J.*:

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

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — followed

Graceway Canada Co., Re (2011), 2011 ONSC 6403, 2011 CarswellOnt 11687, 85 C.B.R. (5th) 252 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4262, 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 56 C.B.R. (5th) 74, 2009 CarswellOnt 4839 (Ont. S.C.J. [Commercial List]) — referred to

Parlay Entertainment Inc., Re (2011), 81 C.B.R. (5th) 58, 2011 ONSC 3492, 2011 CarswellOnt 5929 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4382, 2010 CarswellQue 9720 (C.S. Que.) — referred to

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

Statutes considered:

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

s. 243(6) — considered

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

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

MOTION by receiver for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in its First Report.

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

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. [1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, [2] *BIA* proposals, [3] and *CCAA* proceedings. [4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court

has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. [5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid. [6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding

procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court. [7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> . . .

> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation. [8]

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

Footnotes

1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.

3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.

4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (C.S. Que.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).

5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.

7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.

8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

End of Document

TAB 2

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

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

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

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

H.J. Wilton-Siegel J.

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

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

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Miscellaneous

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

Table of Authorities

Statutes considered:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Background

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

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court

has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

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

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

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

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

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

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

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

Administration Charge

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

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

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

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

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

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

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

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

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

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

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

The SISP

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

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

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

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

26 Lastly, the Proposal Trustee supports the proposed SISP.

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

Engagement Letter with the Financial Advisor

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

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

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

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

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

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

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

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

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

Extension of the Stay

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

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

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

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

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

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

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

End of Document

TAB 3

2011 ONSC 3230
Ontario Superior Court of Justice

Komtech Inc., Re

2011 CarswellOnt 6577, 2011 ONSC 3230, 106 O.R. (3d) 654, 205 A.C.W.S. (3d) 24, 81 C.B.R. (5th) 256

In the Matter of the Proposal of Komtech Inc. pursuant to the Law of the Province of Ontario, with a Head Office in the City of Kanata, in the Province of Ontario

Paul Kane J.

Heard: April 27, 2011
Judgment: July 8, 2011
Docket: 33-1469781

Counsel: Keith A. MacLaren for Komtech Inc.
John O'Toole, André Ducasse for Business Development Bank of Canada
Karen Perron for Hubbell Canada LP

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Where no proposal — Company became insolvent — Company issued notice of intent to make proposal under Bankruptcy and Insolvency Act — Company sought auction for sale of assets — Company brought motion for approval of sale — Motion granted — Trustee and primary lenders of company approved of sale process — Proposed process was likely to see higher price than forced sale of assets — Company made reasonable efforts in search of alternate financing, equity partnership or purchaser of business — Company cooperated with trustee to identify and engage prospective purchasers — Position of creditors would not improve if motion dismissed — Sale could still be authorized under s. 65.13 of Act despite fact that proposal had not been filed, as court had jurisdiction to do so.

Table of Authorities

Cases considered by *Paul Kane J.*:

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

Hypnotic Clubs Inc., Re (2010), 68 C.B.R. (5th) 267, 2010 CarswellOnt 3463, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — referred to

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

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

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

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

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

s. 65.13(3) [en. 2005, c. 47, s. 44] — considered

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

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

s. 81.4(4) [en. 2005, c. 47, s. 67] — referred to

s. 81.6(2) [en. 2005, c. 47, s. 67] — referred to

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

s. 36 — considered

Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, Act to establish the, S.C. 2005, c. 47
Generally — referred to

MOTION by company for approval of sale of assets.

***Paul Kane J.*:**

1 The applicant, Komtech Inc., ("Komtech") designs and manufactures plastic injection products at two facilities in Ontario and employs approximately 150 employees. Faced with serious financial difficulties, Komtech filed a Notice of Intention ("NOI") to make a proposal ("Proposal") under s. 50.4 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("*BIA*") on March 2, 2011. A. Farber & Partners Inc. was appointed Proposal Trustee ("Trustee").

2 This Court on March 31, 2011, granted an extension to file the Proposal until May 16, 2011.

3 On April 20, 2011, Komtech by motion sought approval of a bidding process ("Bid Process") for the auction of its assets and the preliminary approval of the Stalking Horse Asset Purchase Agreement, the ("APA") between itself as vendor and 2279591 Ontario Inc. as purchaser. Pursuant to the APA, most of the assets of the vendor including, accounts receivable, inventory equipment, assigned contracts, intellectual property, products and prepaid expenses, are to be sold subject to the Bid Process, for a purchase price of $2,800,000 ("the Purchase Price", or the "MBA").

4 All secured creditors of Komtech were served with this motion pursuant to s. 65.13(3) of the *BIA*. Section 65.13(3) of the Act does not require service on unsecured creditors.

5 The two primary secured lenders support this motion namely: the Business Development Bank of Canada ("BDB") and HSBC Canada ("HSBC"). Demand for payment by each of these secured lenders has been made of Komtech. Komtech has been unsuccessful in obtaining alternative credit facilities. Combined, these two secured lenders are presently owed approximately $6,000,000. The NOI dated February 26, 2011, lists approximately $3,600,000 additional debt owing to other creditors of Komtech in addition to BDB and HSBC.

6 The Purchase Price may be increased in an auction under the Bid Process. The Trustee recommends that the motion be granted and in support thereof, filed a Second Report dated April 19, 2011, and a supplement to the Second Report dated April 27, 2011. The Trustee expresses the opinion that the greatest chance of return to creditors of Komtech is proceeding with the APA coupled with an auction using the APA and the Purchase Price as the floor.

7 The Trustee in the Second Report confirms that the purchaser under the APA will carry on the business now being operated by Komtech and continue the employment of most of the 150 unionized and non-unionized employees of Komtech.

Evaluation of the APA and Bid Process

8 I have reviewed the asset realization value estimate of Komtech's assets, the analysis prepared by the Trustee as well as an independent manufacturing equipment evaluation dated April 8, 2011. This estimate of liquidation value strongly supports the recommendation of the Trustee that Komtech be authorized to execute the APA as it represents consideration materially in excess of the liquidation value likely obtainable on a forced sale of assets.

9 I am satisfied on the material filed that Komtech has made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business. I am further satisfied that Komtech has cooperated with the Trustee to identify and engage prospective purchasers of the company and its assets.

10 In the event this motion is granted, the Trustee has undertaken to conduct further marketing in the hope of obtaining higher bids from prospective purchasers above that contained in the APA. That potential may increase consideration and payment to secured and unsecured creditors.

11 It is my understanding that 2279591, as purchaser in the APA, is not a related party to Komtech.

12 The position of Komtech's secured and unsecured creditors will not improve if this motion is dismissed given the past unsuccessful attempts to sell the business and the estimate of the realizable value of the company's assets. The use of the Stalking Horse APA in the marketing and Bid Process represents the only remaining potential recovery for creditors beyond BDB and HSBC.

13 The Trustee in his reports has satisfied the requirements under s. 65.13(4). Alternative sources of financing were sought and are unavailable. A process was undertaken to identify and seek interest from potential purchasers under the direction of the Proposal Trustee. Negotiations took place with the knowledge of BDB and HSBC which led to the presentation for approval of the APA.

14 Involvement by the BDB since April 20, 2011 has increased the level of consideration payable under the APA by $100,000.

15 The APA represents continued employment to a large majority of the existing employees of Komtech. The APA represents a lower level of financial disruption to the existing customer base and suppliers of Komtech.

16 Given the realization value estimate, it appears that the consideration to be paid under the APA is reasonable and fair considering the book value, the market value and the estimate of liquidation value of such assets.

17 It is contemplated that a motion seeking a vesting order will be brought in the next several weeks. The Trustee has undertaken to provide all secured creditors and a representative group of the largest unsecured creditors with notice of that

motion. That motion will provide creditors with an opportunity to express concerns regarding this initial approval of the APA, the auction bid process and amounts.

18 There is also value to suppliers and the greater community if this business is continued by a purchaser under the APA or the Bid Process.

19 Subject to the issue stated below, the moving party has satisfied me as to the requisite elements under s. 65.13 of the *BIA*.

Remaining Issue

20 On the facts in this case, it is unlikely that Komtech will be able to present a Proposal for approval by its creditors. The issue is whether court approval of the sale of assets is available under s. 65.13 of the *BIA* when the debtor is unable to present a Proposal to its creditors.

21 Parliament enacted s. 65.13 of the *BIA* at the same time as enacting s. 36 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Both amendments were enacted in 2005.

22 The wording of s. 65.13 under the *BIA* and s. 36 under the *CCAA*, are remarkably similar.

23 Section 65.13(1) of the *BIA* prohibits the sale and disposition of assets outside the ordinary course of business in respect of an insolvent person which has filed an NOI under s. 50.4, unless authorized by the court to do so.

24 *Hypnotic Clubs Inc., Re* (2010), 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) involved an NOI by the debtor under the *BIA* and a motion for approval of a sale of assets to a related third party under s. 65.13. The trustee was this Proposal Trustee. The Court refused to approve that asset purchase agreement as it was not satisfied that good faith efforts had been made to sell the debtor's assets to unrelated parties. In coming to that conclusion, the court at paras. 36 and 37 states:

> **36** Given these circumstances, and taking into account the underlying policy of the *BIA* of letting creditors vote as they choose in respect of accepting or rejecting a proposal, in my view, the factor of required good faith efforts stipulated by s. 65.13(5)(a) has not been met.
>
> **37** It is obvious that a deemed assignment into bankruptcy by s. 50.1(8), consequential to no proposal having being made, will quite probably result in Ms. Telios and the other unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of Hypnotic's assets through the proposed Revised APA.

25 Under s. 65.13, the court's jurisdiction to authorize the sale of assets outside of the ordinary course of business is not expressed as limited to cases where the debtor is capable of presenting a Proposal to its creditors. The ability to present a Proposal is not one of the listed factors to be considered on a motion under s. 65.13(4). Parliament could have, but did not include language in s. 65.13 requiring the presentation of or the ability to present a Proposal and the vote thereon by creditors, as a condition to the exercise of the court's jurisdiction to authorize a sale of assets.

26 A comparable issue under the *CCAA* with wording remarkably similar to s. 65.13 of the *BIA* has concluded that the court has jurisdiction to authorize the sale of business assets absent a formal plan of compromising arrangement under s. 36 of the *CCAA*.

27 Section 36 of the *CCAA* reads as follows:

> **Restriction on disposition of business assets**
>
> **36.** (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder

approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (*a*) or (*b*).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

28 In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), the court found jurisdiction under the *CCAA* absent a plan of an arrangement which was described as "skeletal in nature". That court held that an important consideration, in addition to whether the business continues under the debtor stewardship or under a new equity structure, is whether the business can be continued as a going concern in the form of a sale by the debtor.

29 Following the amendments creating s. 36 of the *CCAA*, the Court in *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), determined that s. 36 of the *CCAA* expressly permits the sale of substantially all of the debtor's assets even in the absence of the presentation and vote upon a plan of arrangement.

30 Section 65.13 of the *BIA* and s. 36 of the *CCAA* were introduced in 2005 in "An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts" (Bill C-55).

31 There were two Senate Committee meetings. At one of those, the Honourable Jerry Pickard, Parliamentary Secretary to the Minister of Industry, stated:

> It is widely accepted that inadequate provisions exist for workers whose employers becomes bankrupt. Previous attempts to bring about better protection for workers have failed, as the Minister of Labour has pointed out. ...
>
> Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to create greater fairness and efficiency.
>
> To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.
>
> (Emphasis added)

32 The resulting Senate Committee Report discusses how a sale of assets, at times, is necessary to effect a successful restructuring, resulting in added protection for both creditors and employees.

33 Although different legislation, the similarity of language of s. 65.13 of the *BIA* and s. 36 of the *CCAA*, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding: (a) the filing of an NOI, or (b) an order under the *CCAA*, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors, is not a condition to this Court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the *BIA*.

Interim Charges

34 The Stalking Horse Bidders Charge as security for the breakup fee and expense reimbursement under the APA, the Director's and Officer's charge to indemnify against statutory liability and the administration charge related to the fees of the Proposal Trustee and the debtor as presented, are authorized under s. 64.1 and s. 64.2 of the *BIA*. They are appropriate priorities and charges in this case subject to ss. 14.06(7); 81.4(4); and 81.6(2) of the *BIA*.

35 For the above reasons, the relief sought in this motion is granted.

Motion granted.

End of Document

TAB 4

2009 CarswellOnt 8207
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

Heard: December 11, 2009
Judgment: December 11, 2009
Written reasons: December 18, 2009
Docket: 09-8482-00CL

Counsel: Jay Swartz, Jim Bunting for Applicants
G. Moffat for Monitor, Deloitte & Touche Inc.
Joseph Bellissimo for Roynat Capital Inc.
Peter J. Osborne for R.N. Singh, Purchaser
Edmond Lamek for Toronto-Dominion Bank
D. Dowdall for Noteholders
D. Ullmann for Procom Consultants Group Inc.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Applicants were protected under Companies' Creditors Arrangement Act — Applicants brought motion for extension of stay period, approval of bid process and approval of "Stalking Horse APA" — Motion granted — Motion was supported by special committee, advisors, key creditor groups and monitor — Opposition came from business competitor and party interested in possibly bidding on assets of applicants — Applicants established that sales transaction was warranted and that sale would benefit economic community — No creditor came forward to object sale of business — It was unnecessary for court to substitute its business judgment for that of applicants.

Table of Authorities

Cases considered by *Morawetz J.*:

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 36 — considered

MOTION by applicants for extension of stay and for approval of bid process and agreement.

***Morawetz J.*:**

1 At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

9 Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

10 The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

11 It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

12 Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

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

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

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

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

(d) Is there a better viable alternative?

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

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

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

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

18 In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

19 In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

20 With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

21 For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

22 For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

23 The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

24 Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

25 An order shall issue to give effect to the foregoing.

Motion granted.

TAB 5

2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
J. Carfagnini, J. Pasquariello for Monitor, Ernst & Young Inc.
M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect

to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Table of Authorities

Cases considered by *Morawetz J.*:

Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

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.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

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Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

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

PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to

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Statutes considered:

Bankruptcy Code, 11 U.S.C.
s. 363 — referred to

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

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

***Morawetz J.*:**

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, *Re PSINet*, *supra*, *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra*, *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar*

Financial Services Ltd. v. Hard-Rock Paving Co. (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging*, *supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited*, *supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited*, *supra*, at para. 3.

39 In *Re Stelco Inc.*, *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc*, *supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan

"will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):
>
> > The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]
>
> 25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...
>
> 26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation

to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

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

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

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

(d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going

concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

Motion granted.

End of Document

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bank of Montreal v. Peri Formwork Systems Inc. | 2012 BCCA 4, 2012 CarswellBC 10, [2012] B.C.W.L.D. 1799, [2012] B.C.W.L.D. 1800, 314 B.C.A.C. 240, 534 W.A.C. 240, 346 D.L.R. (4th) 495, 211 A.C.W.S. (3d) 780, 8 C.L.R. (4th) 79, 85 C.B.R. (5th) 80 | (B.C. C.A., Jan 6, 2012)

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not

Minister of Revenue) c. Rainville (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

TAB 7

2013 SCC 6
Supreme Court of Canada

Indalex Ltd., Re

2013 CarswellOnt 733, 2013 CarswellOnt 734, 2013 SCC 6, [2013] 1 S.C.R. 271, [2013] W.D.F.L. 1591, [2013] W.D.F.L. 1592, [2013] S.C.J. No. 6, 20 P.P.S.A.C. (3d) 1, 223 A.C.W.S. (3d) 1049, 2 C.C.P.B. (2nd) 1, 301 O.A.C. 1, 354 D.L.R. (4th) 581, 439 N.R. 235, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, J.E. 2013-185, D.T.E. 2013T-97

Sun Indalex Finance, LLC (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

United Steelworkers (Appellant) and Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services (Respondents) and Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association (Interveners)

McLachlin C.J.C., LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver JJ.

Heard: June 5, 2012
Judgment: February 1, 2013
Docket: 34308

Proceedings: reversing *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.); reversing *Indalex Ltd., Re* (2010), 79 C.C.P.B. 301, 2010 ONSC 1114, 2010 CarswellOnt 893 (Ont. S.C.J. [Commercial List]); and reversing in part *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.); additional reasons to *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.)

Counsel: Benjamin Zarnett, Frederick L. Myers, Brian F. Empey, Peter Kolla, for Appellant, Sun Indalex Finance, LLC

ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. Does the Deemed Trust Supersede the DIP Charge?

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.), at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

TAB 8

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

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

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

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

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

H.A. Rady J.

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

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

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

In September 2015, debtors filed intention to make proposal — Debtors were indirect subsidiaries of HP Inc. — SE Ltd. was competitor of HP Inc., and it expressed interest in purchasing debtors' business as going concern — SE Ltd. offered to make DIP loan of up to $1 million to fund projected shortfall in cash flow — Debtors brought motion for orders consolidating their proposal proceeding, authorizing debtors to enter into an interim financing term sheet with SE Ltd. as DIP lender, approving DIP term sheet and granting SE Ltd. super priority charge to secure all of debtors' obligations to SE Ltd. under DIP term sheet, granting charge not to exceed $150,000 in favour of debtors' legal counsel to secure payment of their reasonable fees and disbursements, granting charge up to $2,000,000 in favour of debtors' directors and officers, approving process for sale and marketing of debtors' business and assets, approving agreement of purchase and sale between SE Ltd. and debtors and granting debtors extension of time to make proposal to their creditors — Motion granted — Consolidation of debtors' notice of intention proceedings was appropriate — It avoided multiplicity of proceedings, associated costs and need to file three sets of motion materials — Three debtors were closely aligned and shared accounting, administration, human resources and financial functions — Debtors' assets were to be marketed together and form single purchase and sale transaction — DIP term sheet was approved and super priority granted — Administration charge was granted — Involvement of professional advisors was critical to successful restructuring — Process was reasonably complex and their assistance was self evidently necessary to navigate to completion — Debtors had limited means to obtain that professional assistance — Directors' of officers' charge was warranted — It was only required in event that sale was not concluded and wind down of facility was required — Directors and officers whose participation in process was critical might not continue

their involvement if relief was not granted — Sale process and stalking horse agreement were approved — It permitted sale of debtors' business as going concern — Stalking horse bid established floor price for debtors' assets — Process seemed fair and transparent and there was no viable alternative — Proposal trustee supported process and agreement — Time to file proposal was extended so sale process could be carried out.

Table of Authorities

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

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

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

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

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

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

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

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

Statutes considered:

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

s. 13 — considered

s. 14 — considered

s. 15 — considered

s. 16 — considered

s. 17 — considered

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

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

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

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

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

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

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

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

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

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

s. 244(1) — considered

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

s. 36 — considered

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

MOTION by debtors for approval of proposal.

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

Introduction

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

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

(b) administratively consolidating the debtors' proposal proceeding;

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

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

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

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

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

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

Preliminary Matter

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

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

Background

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

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

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

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

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

9 The plant employs twelve part and full time employees.

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

11 Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario

Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

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

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

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

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

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

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

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

> i. the sale process will be commenced immediately following the date of the order approving it;
>
> ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;
>
> iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;
>
> iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;
>
> v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

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

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

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

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

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

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

(a) *Harvest Ontario Partners:*

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

(ii) BMO in respect of accounts.

(b) *Harvest Power Mustang Generation Ltd.*

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

(ii) BMO in respect of accounts; and

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

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

Analysis

a) the administrative consolidation

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

b) the DIP agreement and charge

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

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

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

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and

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

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

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

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

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > . . .
> >
> > Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
> >
> > [Emphasis in original]

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

c) administration charge

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

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

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

d) the D & O charge

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

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

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

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;

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

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

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

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

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169(Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?
>
> 14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.
>
> 16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

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

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

> 6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which

offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

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

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

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

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

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

f) Extension of time to file a proposal

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

42 For these reasons, the relief sought is granted.

Motion granted.

End of Document

TAB 9

Case Name:

Nortel Networks Corp. (Re)

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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, (Applicants)

[2009] O.J. No. 4293

56 C.B.R. (5th) 74

2009 CarswellOnt 4839

Docket: 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: August 4, 2009.
Judgment: August 4, 2009.

(30 paras.)

Bankruptcy and insolvency law -- Companies' Creditors' Arrangement Act (CCAA) matters -- Motion by Nortel Networks for approval of the Bidding Procedures relating to the Enterprise Solutions Business and for approval of the sale agreement between Nortel and Avaya Inc. as purchaser allowed -- Appropriate to approve sale agreement and Bidding Procedures at this time to ensure applicants could carry on business as going concern.

Motion by Nortel Networks for the approval of the Bidding Procedures relating to the Enterprise Solutions Business and for approval of the sale agreement between Nortel and its affiliates as seller

and Avaya Inc. as purchaser. The applicants also requested the approval of a Side Agreement among the sellers and the court appointed administrators. The transaction described in the Sale Agreement was very complex. The Enterprise Solutions business operated globally in approximately 121 countries. Bids were to be received by September 4, 2009 with the sellers to conduct an auction on September 11, 2009 followed by a motion to approve any transaction both before this court and the US Court.

HELD: Motion allowed. It was appropriate to approve the Sale Agreement. The Bidding Procedures were also approved and the Side Agreement should also be approved. The sales transaction was warranted at this time to ensure the applicants' business could be carried on as a going concern.

Counsel:

Mr. D. Tay, Mr. M. Kotrly, for Nortel Networks Corporation et al.

Mr. J.A. Carfagnini, Mr. C.G. Armstrong, for Monitor, Ernst and Young Incorporated.

Mr. J. Bunting, for Nortel Networks UK Limited (In Administration).

Mr. S.R. Orzy, for Noteholders.

Mr. S. Kukulowicz, for Canadian Lawyers, for Unsecured Creditors' Committee.

Ms T. Lie, for Superintendent of Financial Services of Ontario.

Mr. C. Thorburn, for Canadian Lawyers, for Matlin Patterson.

Mr. K. McElcheran, for Avaya Inc.

Ms F. Baloo, for CAW Canada Legal Department.

Mr. D. Yiokaris, for Former Employees.

Ms L. Pillon, for Enterprise Network Holdings Bv.

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1 G.B. MORAWETZ J.:-- This Hearing was conducted by way of video conference with a parallel motion being heard in the United States Bankruptcy Court with His Honor Judge Gross presiding over the Hearing in the U.S. Court.

2 This Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol which has previously been approved by both the U.S. Court and by this court.

3 Nortel brings this motion for the approval of the Bidding Procedures relating to the Enterprise Solutions Business. It also seeks approval of the Sale Agreement among Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL") and Nortel Networks Inc. ("NNI") and their affiliates as "Sellers" and Avaya Inc. as "Purchaser."

4 In addition, the Applicants also request the approval of a Side Agreement among the Sellers and the court appointed administrators, which Side Agreement is attached to the Eighteenth Report filed by Ernst and Young Inc., the Monitor.

5 Finally, the Applicants seek a Sealing Order to seal the Confidential Appendix to the Eighteenth Report pending further Order of this court.

6 The Bidding Procedures and Sale Agreement are described in the affidavit of Mr. George Riedel, Chief Strategy Officer of Nortel, sworn July 30, 2009 and they are also described in the Eighteenth Report of the Monitor.

7 Nine formal and informal objections were filed in the U.S. Proceedings. These objections have been resolved and in some cases minor modifications have been made to the Bidding Procedures.

8 I am satisfied that no further comment is required in this Endorsement with respect to the objections filed in the U.S. Proceedings.

9 The transaction described in the Sale Agreement is very complex. The Monitor has made specific reference to the transaction. The Enterprise Solutions business involved addresses the communications needs of large and small businesses across various industries by providing products and services that integrate voice, E-mail, conferencing, video and instant messaging. Competitors to the business include Cisco, Avaya, Alcatel-Lucent, Siemens Enterprise Communications, NEC and others.

10 This business operates globally in approximately 121 countries. The Monitor has indicated that the business has an installed base with over 75 million voice lines and 75 million data ports. The fiscal revenues in 2008 were $2.8 billion representing approximately 27% of Nortel's 2008 revenues.

11 With respect to the Canadian aspect, the fiscal 2008 revenues in Canada were $183 million representing approximately 26% of Nortel's 2008 Canadian revenue.

12 The base purchase price as set out in the Stalking Horse Agreement is $475 million. It also provides for a Break-Up-Fee of $14.25 million and an Expense Reimbursement cap of $9.5 million.

13 The materials indicate that Bids are to be received by September 4, 2009 with the Sellers to conduct an auction on September 11, 2009 followed by a motion to approve any transaction both before this court and the U.S. Court.

14 With respect to the evidence in support of the transaction, I refer to the conclusions of Mr. Riedel at paragraphs 38 to 40 of his affidavit where he states as follows:

> 38. "I believe that the Sale Agreement is the product of a vigorous, comprehensive and fair process. The proposed Auction Sale Process for the Enterprise Solutions Business, based on the Sale Agreement as a stalking horse bid, is the best way to preserve the business as a going concern and to maximize value and preserve as many jobs as possible for the Applicants' employees. I further believe that exploration of the sale of the other businesses as a going concern through this process will provide the greatest chances for further value and maximization and job preservation."
>
> 39. "Based on the Applicants' previous consideration of potential transactions involving the Enterprise Solutions Business and after re-canvassing the marketplace since the commencement of these proceedings, I believe that the proposed transaction with the Purchaser represents the highest and best proposal available for the Enterprise Solutions Business, subject to the receipt of a better bid through the auction process contemplated in this motion."
>
> 40. "The Sale Agreement also requires an expeditious sale process and provides the Purchaser the right to terminate the Sale Agreement if certain milestones in the sale process are not timely met. For these reasons, the expeditious sale of the Assets is critical to the maximization of the value of the Applicants' assets and, in turn, to a recovery for the Applicants' estates."

15 The Monitor has similarly provided extensive background to the transaction and reports its analysis and recommendations at paragraph 92 of the Eighteenth Report where it states as follows:

> 92. "The Monitor has reviewed Nortel's efforts to divest its Enterprise Solutions Business and is of the view that the Company is acting in good faith to maximize the value. The Monitor recommends approval of the Avaya Agreement as a "stalking horse" bid, approval of the Bidding Procedures as described and approval of the Side Agreement. In so doing, the Monitor considers the potential payment of the Break Fee and Expense Reimbursement to Avaya as reasonable in the circumstances."

16 The Bidding Procedures, as proposed, are not unlike the Bidding Procedures which have previously been approved in the sale of the CMDA Business and the LTE Business. The Bidding Procedures in respect of these businesses were approved by this court on June 29, 2009 with Reasons released on July 23, 2009, [2009] O.J. No. 3169, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List])].

17 Likewise, as with the previous transaction, I am satisfied that this court has the jurisdiction to authorize the Sale Agreement. (See Reasons from July 23, 2009.)

18 Turning now to a consideration of whether it is appropriate in this case to approve the sale process.

19 The factors to consider on a sales process under the CCAA, in the absence of a plan, has been previously considered in these proceedings, and again, I refer to the Nortel Reasons of July 23, 2009 at paragraph 49. Those factors are as follows:

1) Is a sales transaction warranted at this time?
2) Will the sale benefit the whole "economic community?"
3) Do any of the debtor's creditors have a bona fide reason to object to a sale of the business?
4) Is there a better viable alternative?

20 In this case the details of the transaction and the sales process, as described In Mr. Riedel's affidavit and in the Monitor's Eighteenth Report, establish, in my view, that it is appropriate to approve the Sale Agreement. The factors, as set out and previously accepted in the Reasons of July 23, are equally applicable in this transaction.

21 I also note that there were no objections with respect to the sale process.

22 I also note that the sale is subject to further court approval, and, again, the court will expect that the Applicants will make reference to the Soundair principles at such time.

23 As it was previously noted in the Reasons of July 23, the Applicants are part of a complicated corporate group, they carry on an active international business, and I accept that an important fact to consider in the CCAA process is whether the case can be made to continue the business as a going concern.

24 I am satisfied, having considered the factors referenced above, as well as the facts summarized in the affidavit of Mr. Riedel, and in the Eighteenth Report, that the Applicants have met the test and I am therefore satisfied that this motion should be granted.

25 Accordingly I approve the Bidding Procedures as described in Mr. Riedel's affidavit and in the Eighteenth Report which procedures have also been approved this morning by Judge Gross in the U.S. Court.

26 I am also satisfied that the Sale Agreement and Side Agreement should be approved.

27 Further, that the Sale Agreement be accepted for purposes of conducting the Stalking Horse Bid in accordance with the Bidding Procedures including, without limitation the Break Up Fee, and the Expense Reimbursement.

28 Further, I have also been satisfied that Appendix B to the Eighteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the

stakeholders, and accordingly, I Order that this document be sealed pending further Order of the court.

29 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the Sale Approval motion. This process is consistent with the practice of this court.

30 This concludes my Endorsement in respect of the Bidding Procedures and the Sale Agreement.

cp/s/qllxr/qljxr/qlaxr/qlaxw

TAB 10

Case Name:

W.C. Wood Corp. Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a proposed plan of compromise or arrangement of W.C. Wood Corporation Ltd., W.C. Wood Holdings Inc. and W.C. Wood Corporation Inc., Applicants

[2009] O.J. No. 4808

61 C.B.R. (5th) 69

2009 CarswellOnt 7113

182 A.C.W.S. (3d) 258

Court File No. CV-09-8194-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: November 5, 2009.
Judgment: November 9, 2009.

(19 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Directions -- Motion by Monitor for directions allowed -- Companies under protection had sought to sell business as a going concern -- Consent compromise order provided for two tier liquidation process -- Pending offer to purchase ongoing business existed, with liquidation of assets to follow if transaction did not close -- Monitor sought directions in respect of inclusion of competitor that sought access to premises to conduct due diligence on assets -- Companies expressed concern that site visit would prejudice pending bid for business -- Court approved Monitor's proposal of granting competitor access in event that pending offer did not complete.

Statutes, Regulations and Rules Cited:

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

Counsel:

D. Rob English and Sam Babe, for the Monitor.

Kevin McElcheran, for the applicants.

Elizabeth Pillon, for One Rock Capital Partners, LLC.

Clifton P. Prophet, for Electrolux North America.

Evan Cobb, for CIT Business Credit Canada Inc.

Aaron Rousseau, for Whirlpool Corporation.

ENDORSEMENT

1 **F.J.C. NEWBOULD J.**:-- The Monitor, BDO Dunwoody Ltd., moves for advice and directions with respect to the inclusion of Electrolux North America ("Electrolux") in a liquidation sales process being conducted pursuant to my order of October 26, 2009. The issue that has arisen is whether Electrolux should be permitted access to the applicants' premises prior to November 13, 2009, on which date One Rock Capital Partners, LLC ("One Rock") must decide whether to firm up its Asset Purchase Agreement ("APA").

2 The order of October 26, 2009 was a compromise order made on consent as a result of an application brought by the lenders of the applicants to have a receiver of the applicants appointed and to have the assets of the applicants sold in a liquidation process. There had been marketing efforts for some time before that which had led to an offer from One Rock to buy the business of the applicants on a going concern basis. The lenders were not happy with the One Rock offer, including the fact that it did not provide for a deposit, contained many conditions and was subject to financing which the lenders thought would unlikely materialize. After negotiations, the consent order was made which provided for a two-track process.

3 In substance, the consent order authorized the applicants to sign the APA with One Rock so long as the APA was firm, with all conditions satisfied or waived, and the deposit received by the monitor by November 13, 2009. The order also directs the Monitor to solicit liquidation proposals, subject to confidentiality considerations, by November 13, 2009 and directs the parties to attend at

Court on November 16, 2009. At that time, if One Rock is ready to close by November 27, 2009 without condition, and if the APA provides for payment in full of the first priority DIP lenders, the APA is to be approved. If the conditions are not met, the Monitor is to be appointed a receiver and proceed to a liquidation sale proposal. The order further provides that if a liquidation proposal is accepted because it offers greater value than the One Rock purchase price, One Rock is entitled to a break fee of 4 percent of its purchase price so long as One Rock was ready and able to close.

4 Prior to the order of October 26, 2009, the applicants had engaged in a process to attempt to sell the business on a going concern basis. During that going sales concern process, the Monitor was contacted by counsel to Electrolux, which is the leading North American manufacturer of freezers and a competitor to the applicants, who together were the only North American manufacturer of freezers. The Monitor was told, amongst other things, that if the going concern sales process did not succeed, Electrolux would be interested in participating in a liquidation sale of the assets and that Electrolux had a particular interest in the intellectual property of the applicants.

5 Pursuant to the October 26, 2009 order, the Monitor has solicited liquidation proposals. Electrolux requested, and was provided by the Monitor, with copies of the information package and asset listings that have been provided to other potential bidders of the assets after signing a confidentiality agreement. Electrolux has requested access to the applicants' premises to conduct a due diligence on the assets that would be sold under a liquidation scenario, but to date has not been given access in light of concerns raised by a number of interested parties. The concerns relate to a perceived competitive advantage to Electrolux over the business of the applicants being sold to One Rock because of what Electrolux could learn on an inspection of the premises, with a resultant loss of the One Rock purchase under the APA.

6 Mr. Angi, the president and chief executive officer of the applicants, has sworn in his affidavit dated November 4, 2009 as follows:

> 5. Electrolux is the only other freezer manufacturer with manufacturing facilities in North America.
> 6. The One Rock APA is the last remaining chance available to the Company to sell its business as a going concern. If that transaction is not closed, the Company's business will be liquidated.
> 8. As a competitor, Electrolux would benefit from the liquidation of W.C. Wood. In fact, it would be difficult for Electrolux to buy the Company's business as a going concern because of *Competition Act* restrictions.
> 10. A site visit by Electrolux could scuttle the current going concern agreement with One Rock for the following reasons:
>
> (a) One Rock has clearly stated they will not consummate the sale if Electrolux is allowed in the plants;

(b) A site visit by Electrolux will inevitably compromise "trade secrets" relative to the plants and manufacturing processes of the Company, valuable Intellectual Property assets that are critical to the going concern sale;

(c) It is not only the Company's trade secrets that are at risk but also licensed intellectual property belonging to Whirlpool and the continuing relationship with Whirlpool is a key condition of the One Rock APA;

(d) Electrolux does not need to visit the plants to submit a liquidation bid as it has the pertinent information and can provide a preliminary bid that can be updated with a visit if the One Rock APA conditions are not met by Nov. 13th.

7 Mr. Lee, the secretary of One Rock, has sworn in his affidavit of November 4, 2009 as follows:

5. One Rock has serious concerns that access to the Premises by Electrolux would prejudice the ongoing value of their own bid. Many of the reasons for our concerns were previously outlined in the Angi Affidavit. In addition, an on-site visit would prejudice the One Rock bid, as this would permit Electrolux the opportunity to gain highly sensitive information, allowing it to potentially reverse engineer certain product costs based on its view of the Applicants' internal operations, which would in turn prejudice One Rock should they be the ultimate purchaser, competing in the market with Electrolux.
6. It is worth noting that Electrolux has more capacity than it requires and it is well known in the industry that Electrolux has recently closed plants and laid off employees in the US as a result of overcapacity in their operations, therefore, it likely has no good faith interest in the equipment or other assets of the Applicants. I believe that any offer by Electrolux would only be in respect of the Applicants' trademark and other intellectual property. Electrolux could easily obtain this information from a public search, without access to the Applicants' confidential information or access to its premises.
7. Should Electrolux be permitted access to the Premises, One Rock believes that the potential prejudice to their bid, and the value of any ongoing sale will have been adversely affected and as such they will be forced to withdraw from the APA and step away from purchasing the Applicants' assets. This would be an unfortunate consequence, and one we wish to avoid.

8 Mr. Spina, a product line manager of Electrolux, has sworn in his affidavit of November 5, 2009 in response to the application brought by the Monitor that after the October 26, 2009 order was made, Electrolux requested physical access to the premises of the applicants to examine the equipment of the applicants "with a view to formulating a bid for some or all of the equipment and intellectual property of the applicants." He also stated:

> [Electrolux] remains interested and engaged in the process of purchasing the equipment and intellectual property of the Applicants, after, and subject to, being afforded a reasonable opportunity to undertake meaningful due diligence on such assets.

9 The competitive concerns expressed to the Monitor by the applicants and others and referred to in the Ninth Report of the Monitor, including the concerns raised in the affidavit of Mr. Angi of the applicants and Mr. Lee of One Rock, were not addressed by Mr. Spina in his affidavit.

10 Because of the concerns that One Rock will not proceed with the APA if Electrolux is given access to the premises of the applicants, the Monitor has proposed a process as follows:

a) Electrolux will not be permitted access prior to noon on November 13, 2009, or thereafter if One Rock waives its conditions at that time;
b) If One Rock fails to waive its conditions by 12:00 noon on November 13, 2009, access will be granted to Electrolux commencing no later than November 16, 2009;
c) If the One Rock APA is terminated, the date for delivery of a liquidation proposal from Electrolux to the Monitor should be extended from November 16, 2009 to 12:00 noon on November 23, 2009 and other bidders who are required to submit their bids by November 13, 2009 shall be notified accordingly, such that any liquidation proposal that may be accepted by the Monitor by November 16, 2009 shall be subject to the Monitor's review of any subsequent Electrolux offer.

11 The Monitor points out that one potential prejudice to this recommendation is that if Electrolux made a liquidation offer higher than the One Rock APA value, that offer could have been accepted and a break fee paid to the applicants creating additional recovery for other creditors. The Monitor points out that this potential prejudice is only theoretical as no indications of value have been received. The Monitor further states, however, that there are obvious benefits to a going concern sale, especially with regard to the interests of employee stakeholders. The Monitor concludes that his recommendation represents his best business judgment.

12 Electrolux is opposed to the Monitor's proposal. It wishes to have access on a timely basis prior to November 13, 2009, the date when One Rock must decide whether or not to firm up its purchase under the APA, in order to be in a position to make an offer for one or more of the assets of the applicants, if it decides to do so, by November 13, 2009. It takes the position that the integrity of the liquidation sale process must be protected, which requires that Electrolux be given the same access to the premises as other potential bidders in the liquidation sale process. In that way, Electrolux might be in a position to make a sufficiently high offer greater than the One Rock APA value to cause the Monitor to terminate the One Rock APA in favour of the Electrolux offer and pay One Rock its 4 percent break fee.

13 In my view, the proposal of the Monitor should be accepted. It is not a perfect world and the CCAA process is certainly no different. I have reached this conclusion for a number of reasons.

14 I cannot say on the basis of the record before me that the competitive concerns of One Rock are not valid. While it is contended by Electrolux that the position of One Rock is just a self-serving position in order to preserve its contract, no evidence has been offered on behalf of Electrolux contradicting those concerns. Electrolux has filed no affidavit material stating that it would not gain a competitive advantage against the business of the applicants by having access to the applicants' premises and internal operations. The order of October 26, 2009, which directed the Monitor to solicit liquidation proposals, stated that it was subject to confidentiality considerations. The concern raised by One Rock objectively can be reasonably viewed as being such a confidentiality concern.

15 The One Rock bid was the only going concern bid received and it was ultimately accepted pursuant to the October 26, 2009 order. The Monitor's confidential liquidation analysis provided to the court on October 26, 2009 compared the estimated realizations in the event of a sale to One Rock to the estimated realizations of a liquidation. This analysis indicated that the proceeds from the sale on a going concern basis to One Rock would exceed the estimated realizations of a liquidation. The prospects of Electrolux bidding a higher value than the One Rock APA value for one or more of the assets on a liquidation basis are unknown, but certainly one cannot say on this record that the prospects are sufficiently good to cause the One Rock APA to be lost.

16 There is some doubt on the basis of the record before me that Electrolux requires access to the premises in order to make a bid for what it is interested in. Electrolux's counsel told the Monitor that Electrolux was particularly interested in the intellectual property, which is consistent with the evidence of Mr. Lee of One Rock that Electrolux has overcapacity and has been closing some plants and laying off employees and that it is the intellectual property which he believes Electrolux is interested in. Presumably access to the premises of the applicants would not be needed for information regarding trade marks or other intellectual property, which would be available from a public search.

17 The One Rock purchase on a going concern basis, apart from its likely advantageous price, would also be advantageous to the stakeholders of the applicants, including its employees, suppliers and customers. Whirlpool is a supplier and customer of the applicants. It also licenses intellectual property to the applicants and is a DIP lender. Counsel for Whirlpool stated that although Whirlpool would stand to gain if a higher offer from a liquidation sale materialized, Whirlpool nevertheless supports the Monitor's position. Whirlpool does not expect Electrolux to make an offer in excess of or close to the going concern value to be paid by One Rock and sees a benefit to a continuing relationship with One Rock as a supplier and customer.

18 CIT Business Credit Canada Inc., the agent for the secured lenders to the applicants, was the party that previously moved to have a receiver appointed and scuttle the One Rock offer. It too supports the position of the Monitor. This perhaps is understandable as the One Rock APA is

anticipated to pay the lenders debt in full, which might not be the case in a liquidation scenario that would also undoubtedly take some considerable period of time. That uncertainty as to the amount that might be received on a liquidation, and the length of time that would be involved in obtaining it, is good reason not to cause the One Rock APA to be lost if it can be avoided.

19 In the circumstances, the proposal of the Monitor is accepted and the stay under the Initial Order is extended until November 30, 2009. The draft order submitted by the Monitor appears reasonable.

F.J.C. NEWBOULD J.

TAB 11

2014 ONSC 947
Ontario Superior Court of Justice

MPH Graphics Inc., Re

2014 CarswellOnt 18942, 2014 ONSC 947, 23 C.B.R. (6th) 224, 250 A.C.W.S. (3d) 384

In the Matter of the Proposal of MPH Graphics Inc., a Company Incorporated Pursuant to the Laws of the Province of Ontario, with a Head Office in the City of Markham, in the Province of Ontario, Applicant

Morawetz R.S.J.

Heard: January 3, 2014; January 6, 2014
Judgment: January 6, 2014
Docket: 31-1823671

Counsel: Jeffrey C. Carhart, for MPH Graphics Inc.
C. Linthwaite, for Proposal Trustee, Ira Smith & Associates Inc.
R. Church, for Unifor Local 519-G
S. Mitra, for Royal Bank of Canada
S. Graff, for Thistle (Purchaser)

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Reasonable terms

Debtor company submitted proposal — Parties negotiated terms of stalking horse agreement — Court raised concern that break fees and overbid requirements in stalking horse agreement were excessive — Parties reduced break fees and overbid requirements — Revised structure was more reasonable — Fact that stalking horse proposal was revised only after court raised issue underscored necessity for independent party to conduct detailed review of proposed stalking horse arrangements before they are presented to court for approval — Stalking horse process and charges approved.

Table of Authorities

Statutes considered:

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

RULING regarding terms of stalking horse agreement in corporate proposal.

Morawetz R.S.J.:

1 As a result of concerns raised by the court, the parties, over the weekend, reached an agreement on revised terms for the Stalking Horse Agreement.

2 As originally presented, on a transaction price of $1.765 million, the break fee was $150,000 with an overbid requirement of $250,000 with each subsequent overbid [requirement] being $250,000.

3 I expressed the view that these requirements would jeopardize the ability of a competing bidder to make a bid. In short, I found these amounts to be excessive.

4 The revised structure is more reasonable. The break fee has been reduced to $100,000 and the overbid has been reduced to $100,000 with subsequent overbids now being set at $5,000. These are amounts are, according to the Proposal Trustee, reasonable in the circumstances.

5 It is somewhat surprising that the stalking horse proposal was revised only after I raised the issue. It underscores the necessity for an independent party to conduct a detailed review of proposed stalking horse arrangements before they are presented to court for approval.

6 In this case, it appears that the detailed review conducted by the Proposal Trustee took place after the initial court hearing.

7 It is essential, in my view, to ensure that a detailed review takes place so as to ensure that the position of all parties can be considered.

8 In the absence of an independent party reviewing the transaction, the position of the debtor is put forward, as well as the position of the purchaser and, in this case, the Union. All were in favour of the original transaction. What was lacking was an advocate for the unsecured creditors. This deficiency has now been addressed in the Second Supplementary Report to the First Report of the Proposal Trustee.

9 The Stalking Horse Process is approved. The D&O Charge and the Administration Charge are both approved. In making this determination, I have taken into account that secured creditors are on notice of the request. I have also considered the BIA requirements. The Stalking Horse Charge is also approved.

10 Counsel to the Proposal Trustee requested that the Proposal Trustee's Record be sealed. The contents of the Record consist of the Liquidation Analysis and the value of a lease. This information is commercially sensitive and its disclosure could be harmful to stakeholders. Having considered the *Sierra Club* principles, I am persuaded that the Record can be and is sealed pending closing.

11 The debtor also requests an extension to March 10, 2014 to file the proposal. The extension is granted.

12 All parties are aware that certain employees are covered by a collective agreement. For greater clarification, in approving the Stalking Horse Transaction, no determination has been made of any issues that may be raised with respect to the status of the Purchaser as a successor employer.

13 Orders have been signed to give effect to the foregoing.

Order accordingly.

End of Document

TAB 12

2011 ONSC 3492
Ontario Superior Court of Justice

Parlay Entertainment Inc., Re

2011 CarswellOnt 5929, 2011 ONSC 3492, 81 C.B.R. (5th) 58

In the Matter of the Notice of Intention to Make a Proposal of Parlay Entertainment Inc., Insolvent Person (Applicant)

Morawetz J.

Heard: June 3, 2011
Oral reasons: June 3, 2011
Written reasons: June 4, 2011
Docket: 32-1494254

Counsel: J. Fogarty for Applicant
C. Prophet for M. Projects

Subject: Insolvency; Corporate and Commercial; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Insolvent company (applicant) filed notice of intention to make proposal under Bankruptcy and Insolvency Act (BIA) — Applicant and Proposal Trustee opined that sales process incorporating "stalking horse" bid was appropriate — Applicant brought motion for extension of time to file proposal and for ancillary relief relating to proposed sales process — Motion granted — Test under s. 50.4(9) of BIA was satisfied — Extension granted — Proposal Trustee's report established that applicant was working towards sale of assets — There were no Personal Property Security Act registrations such that proceeds of sale less expenses should be available to creditors — Applicant had been acting in good faith and with due diligence and would likely be able to make viable proposal from proceeds of sale — Proposal Trustee reported that no creditor would be materially prejudiced if extension was granted.

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

Insolvent company (applicant) filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Unsuccessful attempts to sell or restructure had been made — Applicant and Proposal Trustee opined that sales process incorporating "stalking horse" bid was appropriate — Applicant brought motion for extension of time to file proposal and for ancillary relief relating to proposed sales process — Motion granted — Transaction and sales process should be approved — Proposal Trustee opined that process and bidding procedures were reasonable in circumstances and there was no reasonable alternative to recommended proposal — Time for implementing solution was running out — Reservations expressed relating to indirect benefits flowing to stalking horse bidder in form of break fee, expense reimbursement and overbid requirements were addressed to certain degree by concession made by stalking horse bidder to reduce overbid provision by 50 percent from $75,000 to $37,500.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

MOTION by applicant for extension of time to file proposal, and for ancillary relief.

Morawetz J.:

1 On June 3, 2011, I heard the above motion. I endorsed the record as follows:

> Motion granted based on a reduction in the minimum overbid amount to $37,500. Stay extended to July 18, 2011. Reasons to follows on June 6, 2011.

2 These are the reasons relating to the June 3, 2011 endorsement.

3 The motion was not opposed.

4 The Applicant requests an extension of time to file the proposal.

5 The evidence in support is the Proposal Trustee's report. The report established that the Applicant is working towards a sale of assets. There are no PPSA registrations such that proceeds of sale less expenses should be available to creditors. I am satisfied that the Applicant has acted and is acting in good faith and with due diligence and that it will likely be able to make a viable proposal from the proceeds of sale. The Proposal Trustee reports that no creditor will be materially prejudiced if the extension is granted.

6 The test under s. 50.4(9) has, in my view, been satisfied. The extension to July 18, 2011 is granted.

7 The parties should note that any further extension requests should be supported by an affidavit of a representative of the Applicant or a satisfactory explanation as to why an affidavit is not being filed.

8 With respect to the relief relating to the proposed sales process, the report of the Proposal Trustee was reviewed by counsel in great detail. Mr. Davidson of BDO Canada also provided additional commentary.

9 The Report establishes that:

> a. Parlay has been attempting for some time to restructure. There have been attempts to sell, which have proved unsuccessful;
>
> b. Revenues have declined in a significant amount;
>
> c. Losses of $2.5 million were incurred in 2010; and
>
> d. Management is of the view that present revenue levels do not represent a sustainable business model.

10 The Applicant and the Proposal Trustee are now of the view that a sales process, incorporating a stalking horse bid is appropriate.

11 The Proposal Trustee's views to support this type of process are summarized in the memo of law submitted by the Applicant. The memo also sets out the considerations that have been taken into account in other stalking horse sales.

12 This particular stalking horse asset purchase agreement includes a $50,000 break fee, a $50,000 expense reimbursement provision and a $75,000 minimum overbid provision on a sales price of approximately $2.1 million. It also provides that the purchaser, who is also the DIP lender, can credit bid to the limit of the DIP Facility.

13 The Proposal Trustee is of the view that the process is reasonable and recommends that it be approved.

14 The Proposal Trustee has indicated that it will file a Supplementary Report which confirms, among other things, that it is of the view that the Bidding Procedures are reasonable in the circumstances and that there is no reasonable alternative to the recommended proposal.

15 I have also been persuaded that the time for implementing a solution is running out. The proposed transaction was referenced as being a life line. Concern was expressed with respect to the ongoing employment of Parlay's work force. I accept the legitimacy of these concerns. In the circumstances, I am satisfied that the transaction and sales process should be approved, notwithstanding reservations that I expressed relating to the indirect benefits flowing to M Projects — the Stalking Horse Bidder - in the form of the break fee, expense reimbursement and overbid requirements, when considered in totality. My reservations were addressed, to a degree, by the concession made by M Projects to reduce the overbid provision by 50% from $75,000 to $37,500.

16 The Proposal Trustee is of the view that the break-up fee and reimbursement fee and overbid provision are reasonable. In view of the aforementioned concession of M Projects, I am satisfied that the transaction and sales process, in the circumstances of this case, should be approved.

17 The Applicant also requested approval of a D & O Charge. At this point, it is uncertain if the existing D & O Policy can be extended.

18 I am satisfied that the D & O Charge should be granted, as requested, subject to the proviso that if the D & O Policy can be extended on satisfactory terms, the Proposal Trustee should report this development to the court and make appropriate recommendations as to whether the D & O Charge should be vacated.

19 The ancillary relief requested is, in my view, appropriate in the circumstances.

20 The motion is granted and an order shall issue to give effect to the foregoing.

Motion granted.

End of Document

TAB 13

2012 ONSC 2063
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 4117, 2012 ONSC 2063, 213 A.C.W.S. (3d) 831

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 Sino-Forest Corporation, Applicant

Morawetz J.

Heard: March 30, 2012
Judgment: April 2, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Applicant
E.A. Sellers, for Sino Forest Corporation Board of Directors
Derrick Tay, Jennifer Stam, for Proposed Monitor, FTI Consulting Canada Inc.
R. J. Chadwick, B. O'Neill, C. Descours, for Ad Hoc Noteholders
M. Starnino, for Counsel in the Ontario Class Action
P. Griffin, for Ernst & Young
Jim Grout, Hugh Craig, for Ontario Securities Commission
Scott Bomhof, for Credit Suisse, TD and the Underwriter Defendants in the Canadian Class Action

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Application for initial order and sale process order under Companies' Creditors Arrangement Act (Can.) — Applicant was publicly-listed major integrated forest plantation operator and forest production company with assets predominantly in PRC — Published report stated that applicant was near total fraud and Ponzi scheme — Investigations launched by securities commissions in both Ontario and Hong Kong — Applicant had not been able to release 2011 Q3 results — Applicant cautioned that its historic financial statements and related audit reports should not be relied upon — Application granted — Administration Charge and Director's Charge in requested amount appropriate and necessary — Continued participation of directors desirable.

Table of Authorities

Cases considered by *Morawetz J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 45 B.L.R. (4th) 201, 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (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

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

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

s. 2(1) "debtor company" — referred to

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

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

***Morawetz J.*:**

Overview

1 The Applicant, Sino-Forest Corporation ("SFC"), moves for an Initial Order and Sale Process Order under the *Companies' Creditors Arrangement Act* ("CCAA").

2 The factual basis for the application is set out in the affidavit of Mr. W. Judson Martin, sworn March 30, 2012. Additional detail has been provided in a pre-filing report provided by the proposed monitor, FTI Consulting Canada Inc. ("FTI").

3 Counsel to SFC advise that, after extensive arm's-length negotiations, SFC has entered into a Support Agreement with a substantial number of its Noteholders, which requires SFC to pursue a CCAA plan as well as a Sale Process.

4 Counsel to SFC advises that the restructuring transactions contemplated by this proceeding are intended to:

(a) separate Sino-Forest's business operations from the problems facing SFC outside the People's Republic of China ("PRC") by transferring the intermediate holding companies that own the "business" and SFC's inter-company claims against its subsidiaries to a newly formed company owned primarily by the Noteholders in compromise of their claims;

(b) effect a Sale Process to determine whether anyone will purchase SFC's business operations for an amount of consideration acceptable to SFC and its Noteholders, with potential excess being made available to Junior Constituents;

(c) create a structure that will enable litigation claims to be pursued for the benefit of SFC's stakeholders; and

(d) allow Junior Constituents some "upside" in the form of a profit participation if Sino-Forest's business operations acquired by the Noteholders are monetized at a profit within seven years from Plan implementation.

5 The relief sought by SFC in this application includes:

(i) a stay of proceedings against SFC, its current or former directors or officers, any of SFC's property, and in respect of certain of SFC's subsidiaries with respect to the note indentures issued by SFC;

(ii) the granting of a Directors' Charge and Administration Charge on certain of SFC's property;

(iii) the approval of the engagement letter of SFC's financial advisor, Houlihan Lokey;

(iv) the relieving of SFC of any obligation to call and hold an annual meeting of shareholders until further order of this court; and

(v) the approval of sales process procedures.

Facts

6 SFC was formed under the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B-16, and in 2002 filed articles of continuance under the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 ("CBCA").

7 Since 1995, SFC has been a publicly-listed company on the TSX. SFC's registered office is in Mississauga, Ontario, and its principal executive office is in Hong Kong.

8 A total of 137 entities make up the Sino-Forest Companies: 67 PRC incorporated entities (with 12 branch companies), 58 BVI incorporated entities, 7 Hong Kong incorporated entities, 2 Canadian entities and 3 entities incorporated in other jurisdictions.

9 SFC currently has three employees. Collectively, the Sino-Forest Companies employ a total of approximately 3,553 employees, with approximately 3,460 located in the PRC and approximately 90 located in Hong Kong.

10 Sino-Forest is a publicly-listed major integrated forest plantation operator and forest productions company, with assets predominantly in the PRC. Its principal businesses include the sale of standing timber and wood logs, the ownership and management of forest plantation trees, and the complementary manufacturing of downstream engineered-wood products.

11 Substantially all of Sino-Forest's sales are generated in the PRC.

12 On June 2, 2011, Muddy Waters LLC published a report (the "MW Report") which, according to submissions made by SFC, alleged, among other things, that SFC is a "near total fraud" and a "ponzi scheme".

13 On the same day that the MW Report was released, the board of directors of SFC appointed an independent committee to investigate the allegations set out in the MW Report.

14 In addition, investigations have been launched by the Ontario Securities Commission ("OSC"), the Hong Kong Securities and Futures Commissions ("HKSFC") and the Royal Canadian Mounted Police ("RCMP").

15 On August 26, 2011, the OSC issued a cease trade order with respect to the securities of SFC and with respect to certain senior management personnel. With the consent of SFC, the cease trade order was extended by subsequent orders of the OSC.

16 SFC and certain of its officers, directors and employees, along with SFC's current and former auditors, technical consultants and various underwriters involved in prior equity and debt offerings, have been named as defendants in eight class action lawsuits in Canada. Additionally, a class action was commenced against SFC and other defendants in the State of New York.

17 The affidavit of Mr. Martin also points out that circumstances are such that SFC has not been able to release Q3 2011 results and these circumstances could also impact SFC's historical financial statements and its ability to obtain an audit for its 2011 fiscal year. On January 10, 2012, SFC cautioned that its historic financial statements and related audit reports should not be relied upon.

18 SFC has issued four series of notes (two senior notes and two convertible notes), with a combined principal amount of approximately $1.8 billion, which remain outstanding and mature at various times between 2013 and 2017. The notes are supported by various guarantees from subsidiaries of SFC, and some are also supported by share pledges from certain of SFC's subsidiaries.

19 Mr. Martin has acknowledged that SFC's failure to file the Q3 results constitutes a default under the note indentures.

20 On January 12, 2012, SFC announced that holders of a majority in principal amount of SFC's senior notes due 2014 and its senior notes due 2017 agreed to waive the default arising from SFC's failure to release the Q3 results on a timely basis.

21 The waiver agreements expire on the earlier of April 30, 2012 and any earlier termination of the waiver agreements in accordance with their terms. In addition, should SFC fail to file its audited financial statements for its fiscal year ended December 31, 2011 by March 30, 2012, the indenture trustees would be in a position to accelerate and enforce the approximately $1.8 billion in notes.

22 The audited financial statements for the fiscal year that ended on December 31, 2011 have not yet been filed.

23 Mr. Martin also deposes that, although the allegations in the MW Report have not been substantiated, the allegations have had a catastrophic negative impact on Sino-Forest's business activities and there has been a material decline in the market value of SFC's common shares and notes. Further, credit ratings were lowered and ultimately withdrawn.

24 Mr. Martin contends that the various investigations and class action lawsuits have required, and will continue to require, that significant resources be expended by directors, officers and employees of Sino-Forest. This has also affected Sino-Forest's ability to conduct its operations in the normal course of business and the business has effectively been frozen and ground to a halt. In addition, SFC has been unable to secure or renew certain existing onshore banking facilities and has been unable to obtain offshore letters of credit to facilitate its trading business. Further, relationships with the PRC government, local government, and suppliers have become strained, making it increasingly difficult to conduct any business operations.

25 As noted above, following arm's-length negotiations between SFC and the Ad Hoc Noteholders, the parties entered into a Support Agreement which provides that SFC will pursue a CCAA plan on the terms set out in the Support Agreement in order to implement the agreed upon restructuring transaction.

Application of the CCAA

26 SFC is a corporation continued under the CBCA and is a "company" as defined in the CCAA.

27 SFC also takes the position that it is a "debtor company" within the meaning of the CCAA. A "debtor company" includes a company that is insolvent.

28 The issued and outstanding convertible and senior notes of SFC total approximately $1.8 billion. The waiver agreements with respect to SFC's defaults under the senior notes expire on April 30, 2012. Mr. Martin contends that, but for the Support Agreement, which requires SFC to pursue a CCAA plan, the indenture trustees under the notes would be entitled to accelerate and enforce the rights of the Noteholders as soon as April 30, 2012. As such, SFC contends that it is insolvent as it is "reasonably

expected to run out of liquidity within a reasonable proximity of time" and would be unable to meet its obligations as they come due or continue as a going concern. See *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) at para. 26; leave to appeal to C.A. refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.); and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at paras. 12 and 32.

29 For the purposes of this application, I accept that SFC is a "debtor company" within the meaning of the CCAA and is insolvent; and, as a CBCA company that is insolvent with debts in excess of $5 million, SFC meets the statutory requirements for relief under the CCAA.

30 The required financial information, including cash-flow information, has been filed.

31 I am satisfied that it is appropriate to grant SFC relief under the CCAA and to provide for a stay of proceedings. FTI Consulting Canada, Inc., having filed its Consent to act, is appointed Monitor.

The Administration Charge

32 SFC has also requested an Administration Charge. Section 11.52 of the CCAA provides the court with the jurisdiction to grant an Administration Charge in respect of the fees and expenses of FTI and other professionals.

33 I am satisfied that, in the circumstances of this case, an Administration Charge in the requested amount is appropriate. In making this determination I have taken into account the complexity of the business, the proposed role of the beneficiaries of the charge, 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 position of FTI.

34 In this case, FTI supports the Administration Charge. Further, it is noted that the Administration Charge does not seek a super priority charge ranking ahead of the secured creditors.

The Directors' Charge

35 SFC also requests a Directors' Charge. Section 11.51 of the CCAA provides the court with the jurisdiction to grant a charge in favour of any director to indemnify the director against obligations and liabilities that they may incur as a director of the company after commencement of the CCAA proceedings.

36 Having reviewed the record, I am satisfied that the Directors' Charge in the requested amount is appropriate and necessary. In making this determination, I have taken into account that the continued participation of directors is desirable and, in this particular case, absent the Directors' Charge, the directors have indicated they will not continue in their participation in the restructuring of SFC. I am also satisfied that the insurance policies currently in place contain exclusions and limitations of coverage which could leave SFC's directors without coverage in certain circumstances.

37 In addition, the Directors' Charge is intended to rank behind the Administration Charge. Further, FTI supports the Directors' Charge and the Directors' Charge does not seek a super priority charge ranking ahead of secured creditors.

38 Based on the above, I am satisfied that the Directors' Charge is fair and reasonable in the circumstances.

The Sale Process

39 SFC has also requested approval for the Sale Process.

40 The CCAA is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent company. It has been held that a sale by a debtor, which preserves its businesses as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the CCAA in the absence of a plan. See *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) at paras. 47-48.

41 The following questions may be considered when determining whether to authorize a sale under the CCAA in the absence of a plan (See *Nortel Networks Corp., Re, supra* at para. 49):

(i) Is the sale transaction warranted at this time?

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

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

(iv) Is there a better alternative?

42 Counsel submits that as a result of the uncertainty surrounding SFC, it is impossible to know what an interested third party might be willing to pay for the underlying business operations of SFC once they are separated from the problems facing SFC outside the PRC. Counsel further contends that it is only by running the Sale Process that SFC and the court can determine whether there is an interested party that would be willing to purchase SFC's business operations for an amount of consideration that is acceptable to SFC and its Noteholders while also making excess funds available to Junior Constituents.

43 Based on a review of the record, the comments of FTI, and the support levels being provided by the Ad Hoc Noteholders Committee, I am satisfied that the aforementioned factors, when considered in the circumstances of this case, justify the approval of the Sale Process at this point in time.

Ancillary Relief

44 I am also of the view that it is impractical for SFC to call and hold its annual general meeting at this time and, therefore, I am of the view that it is appropriate to grant an order relieving SFC of this obligation.

45 SFC seeks to have FTI authorized, as a formal representative of SFC, to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including as "foreign main proceedings" in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Counsel contends that such an order is necessary to facilitate the restructuring as, among other things, SFC faces class action lawsuits in New York, the notes are governed by New York law, the indenture trustees are located in New York and certain of the SFC subsidiaries may face proceedings in foreign jurisdictions in respect of certain notes issued by SFC. In my view, this relief is appropriate and is granted.

46 SFC also requests an order approving:

(i) the Financial Advisor Agreement; and

(ii) Houlihan Lokey's retention by SFC under the terms of the agreement.

47 Both SFC and FTI believe that the quantum and nature of the remuneration provided for in the Financial Advisor Agreement is fair and reasonable and that an order approving the Financial Advisor Agreement is appropriate and essential to a successful restructuring of SFC. This request has the support of parties appearing today and, in my view, is appropriate in the circumstances and is therefore granted.

Disposition

48 Accordingly, the relief requested by SFC is granted and orders shall issue substantially in the form of the Initial Order and the Sale Process Order included the Application Record.

Miscellaneous

49 SFC has confirmed that it is bound by the Support Agreement and intends to comply with it.

50 The come-back hearing is scheduled for Friday, April 13, 2012. The orders granted today contain a come-back clause. The orders were made on extremely short notice and for all practical purposes are to be treated as being made *ex parte*.

51 The scheduling of future hearings in this matter shall be coordinated through counsel to the Monitor and the Commercial List Office.

52 Finally, it would be helpful if counsel could also file materials on a USB key in addition to a paper record.

End of Document

TAB 14

2012 CarswellMan 827
Manitoba Court of Queen's Bench

Arctic Glacier Income Fund, Re

2012 CarswellMan 827

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Arctic Glacier Income Fund, Arctic Glacier Inc. and Arctic Glacier International Inc. and the Additional Applicants Listed on Schedule "A" Hereto, (collectively, the "Applicants")

Spivak J.

Heard: February 22, 2012
Judgment: February 22, 2012
Docket: Winnipeg Centre CI 12-01-76323

Counsel: Counsel — not provided

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Applicants, debtor companies and income trust, brought application for protection of Companies' Creditors Arrangement Act — Application granted — Initial order issued — Applicants to remain in possession of assets, carry on business, and continue using central cash management system — Key employee retention plan and sales and investor solicitation process were approved — Chief process supervisor was appointed — Stay of proceedings against applicants was ordered — Monitor was appointed — DIP financing was approved — Various charges were approved and priority of charges was determined.

Table of Authorities

Statutes considered:

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

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33
Generally — referred to

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

Generally — referred to

s. 2 "secured creditor" — considered

s. 11.03(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.1 [en. 1997, c. 12, s. 124] — considered

s. 11.1(4) [en. 1997, c. 12, s. 124] — considered

s. 23(1)(a) — referred to

s. 32 — considered

s. 32(5) — considered

Contaminated Sites Remediation Act, S.M. 1996, c. 40
Generally — referred to

Dangerous Goods Handling and Transportation Act, R.S.M. 1987, c. D12
Generally — referred to

Environment Act, S.M. 1987-88, c. 26
Generally — referred to

Public Health Act, R.S.M. 1987, c. P210
Generally — referred to

Water Resources Conservation Act, S.M. 2000, c. W72
Generally — referred to

Workplace Safety and Health Act, R.S.M. 1987, c. W210
Generally — referred to

APPLICATION by debtor companies and income trust for protection of *Companies' Creditors Arrangement Act*.

***Spivak J.*:**

1 THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*") was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

2 ON READING the affidavit of Keith McMahon sworn February 21, 2012 and the Exhibits thereto (the *"McMahon Affidavit"*), and on being advised that CPPIB Credit Investments Inc., or any successor thereto (the *"Agent"*), as the Administrative Agent on behalf of the secured lenders to the Applicants (the *"Secured Lenders"*) consents to the relief requested in this Application, and on being advised that notice of this Application was given to Coliseum Capital Management LLC (New York) and Talamod Asset Management, LLC, in their capacity as registered holders of units of Arctic Glacier Income Fund, and on hearing the submissions of counsel for the Applicants, Alvarez & Marsal Canada Inc. and counsel for the Secured Lenders, no one appearing for any other party although duly served as appears from the affidavit of service, and on reading the consent of Alvarez & Marsal Canada Inc. to act as the Monitor.

Service

3 1. THIS COURT ORDERS that the time for service of the Notice of Application and the supporting materials is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

Application

4 2. THIS COURT ORDERS AND DECLARES that the Applicant Arctic Glacier Income Fund *("AGIF")* is an income trust to which the CCAA applies and the Applicants Arctic Glacier Inc. ("AGI") and Arctic Glacier International Inc. *("AGII")* and those entities listed on Schedule "A" (the *"Additional Applicants")*, are debtor companies to which the CCAA applies (the Applicants (which term includes the Additional Applicants) and Glacier Valley Ice Company, L.P. *("Glacier LP")* are collectively referred to herein as the *"Arctic Glacier Parties")*.

Plan of Arrangement

5 3. THIS COURT ORDERS that the Arctic Glacier Parties shall have the authority to file and may, subject to further order of this Court, file with this Court one or more plans of compromise or arrangement (hereinafter referred to collectively as the *"Plan")*.

Possession of Property and Operations

6 4. THIS COURT ORDERS that the Arctic Glacier Parties shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the *"Property")*. Subject to further Order of this Court, each of the Arctic Glacier Parties shall continue to carry on business in a manner consistent with the preservation of their respective businesses (the *"Business")* and Property. The Arctic Glacier Parties are hereby authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively *"Assistants")* currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

7 5. THIS COURT ORDERS that the Arctic Glacier Parties shall be entitled to continue to utilize the central cash management system currently in place as described in the McMahon Affidavit or replace it with another substantially similar central cash management system (the *"Cash Management System")* and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Arctic Glacier Parties of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Arctic Glacier Parties, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

8 6. THIS COURT ORDERS that, subject to the terms of and availability under the Commitment Letter and the Definitive Documents (each as defined herein), the Arctic Glacier Parties shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future fees and expenses of members of the board of trustees and any wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Arctic Glacier Parties, trustees of AGIF, or directors and officers of the Arctic Glacier Parties in respect of these proceedings, at their standard rates and charges.

9 7. THIS COURT ORDERS that, except as otherwise provided to the contrary herein and subject to the terms of and availability under the Commitment Letter and the Definitive Documents, the Arctic Glacier Parties shall be entitled but not required to pay all reasonable expenses incurred by the Arctic Glacier Parties in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including existing directors and officers insurance in respect of the Arctic Glacier Parties' trustees, directors and officers, any reasonable renewals or substitutions thereof and run off coverage in respect thereto), maintenance and security services;

(b) payment for goods or services actually supplied to an Arctic Glacier Party prior to the date of this Order with the consent of the Monitor; and

(c) payment for goods or services actually supplied to an Arctic Glacier Party following the date of this Order.

10 8. THIS COURT ORDERS that the Arctic Glacier Parties shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, *"Sales Taxes")* required to be remitted by an Arctic Glacier Party in connection with the sale of goods and services by the Arctic Glacier Parties, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada, or of any Province thereof or any political subdivision thereof or any other taxation authority (including taxation authorities in the United States) in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Arctic Glacier Parties.

11 9. THIS COURT ORDERS that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Arctic Glacier Parties shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Arctic Glacier Party and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears) or in accordance with the relevant lease, in the discretion of the Arctic Glacier Party. On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

12 10. THIS COURT ORDERS that, except as specifically permitted herein or required by the Commitment Letter or Definitive Documents, each of the Arctic Glacier Parties is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by such Arctic Glacier Party to any of its creditors as of this date, except in respect of interest, costs and expenses payable under the First Lien Debt (as defined in the McMahon Affidavit) and the TD Obligations (as defined in the McMahon Affidavit); (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

Restructuring

13 11. THIS COURT ORDERS that each of the Arctic Glacier Parties shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Commitment Letter or Definitive Documents, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2 million in the aggregate, and complete any transactions provided for in the Commitment Letter or Definitive Documents, including the sale of the land and building located in Huntington, NY, permitted by the terms of the Commitment Letter or Definitive Documents, without reference to the foregoing dollar limits;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the applicable employer and such employee or, failing such agreement, to deal with the consequences thereof in accordance with applicable law;

(c) in accordance with paragraphs 12 and 13, vacate, abandon or quit any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days' notice in writing to the relevant landlord on such terms as may be agreed upon between the relevant Arctic Glacier Party and such landlord or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise;

(d) repudiate such of its arrangements or agreements of any nature whatsoever, whether oral or written, as the Arctic Glacier Parties deem appropriate on such terms as may be agreed upon between the relevant Arctic Glacier Party and such counter-parties or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise; and

(e) in accordance with the SISP (as hereinafter defined), pursue all avenues of (i) refinancing and recapitalization and (ii) all purchase offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or recapitalization or any sale (except as permitted by subparagraph (a) of this section),

all of the foregoing to permit the Arctic Glacier Parties to proceed with an orderly restructuring of the Business (the *"Restructuring").*

14 12. THIS COURT ORDERS that an Arctic Glacier Party shall provide each of the relevant landlords with notice of the Arctic Glacier Party's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes an Arctic Glacier Party's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Arctic Glacier Party, or by further Order of this Court upon application by the Arctic Glacier Party on at least two (2) days notice to such landlord and any such secured creditors. If an Arctic Glacier Party disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Arctic Glacier Party's claim to the fixtures in dispute.

15 13. THIS COURT ORDERS that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Arctic Glacier Parties and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Arctic Glacier Parties in respect of such lease or leased premises and such landlord shall be entitled to notify the Arctic Glacier Parties of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

Inter-Company Balances Charge

16 14. THIS COURT ORDERS that, subject to the terms of the Commitment Letter and the Definitive Documents:

(a) (i) AGI and AGIF (collectively *"Arctic Canada")* are authorized to make loans, advances or transfers of funds to AGII, the Additional Applicants and Glacier LP (collectively *"Arctic U.S.")* from time to time in accordance with the Cash Management System; and (ii) Arctic U.S. is hereby authorized to repay funds previously advanced to Arctic U.S. by Arctic Canada from time to time in accordance with the Cash Management System; and,

(b) (i) Arctic U.S. is hereby authorized to make loans, advances or transfers of funds to Arctic Canada from time to time in accordance with the Cash Management System; and (ii) Arctic Canada is hereby authorized to repay funds previously advanced to Arctic Canada by Arctic U.S. from time to time in accordance with the Cash Management System.

17 15. THIS COURT ORDERS that Arctic Canada shall be entitled to the benefits of, and is hereby granted, a charge (the *"Canada Inter-Company Charge")* on the Property of Arctic U.S. in an amount equal to but not exceeding the aggregate amounts actually outstanding at any given time based on advances made by Arctic Canada to Arctic U.S. pursuant to the authorization granted under sub-paragraph 14(a) herein from and after the date of this Order.

18 16. THIS COURT ORDERS that Arctic U.S. shall be entitled to the benefits of, and is hereby granted, a charge (the *"U.S. Inter-Company Charge")* on the Property of Arctic Canada in an amount equal to but not exceeding the aggregate amounts actually outstanding at any given time based on advances made by Arctic U.S. to Arctic Canada pursuant to the authorization granted under sub-paragraph 14(b) herein from and after the date of this Order. The Canada Inter-Company Charge and the U.S. Inter-Company Charge are referred to herein collectively as the *"Inter-Company Balances Charge"*. The Inter-Company Balances Charge shall have the priority set out in paragraph 57 hereof.

Key Employee Retention Plan

19 17. THIS COURT ORDERS that the Key Employee Retention Plan, approved by the members of the board of trustees of AGIF on February 16, 2012 (the *"KERP")*, as attached as a confidential exhibit to the McMahon Affidavit, between AGI and certain key employees listed therein (the *"Key Employees")* be and is hereby approved and given full force and effect in accordance with its terms, and AGI is hereby directed to make the payments provided for thereunder, when due.

20 18. THIS COURT ORDERS the Key Employees shall be entitled to the benefit of and are hereby granted a charge (the *"KERP Charge")* on the Property, as security for all amounts now or hereafter owing to the Key Employees pursuant to the KERP to a total amount of C$2,600,000. The KERP Charge shall have the priority set out in paragraph 57 hereof.

Marketing of Investment Opportunity

21 19. THIS COURT ORDERS AND DIRECTS the Arctic Glacier Parties to immediately commence a Sale and Investor Solicitation Process attached hereto as Schedule "B" to this Order (the *"SISP")* for the purpose of offering the opportunity for potential investors to purchase or invest in the business and operations of the Arctic Glacier Parties as a going concern or to sponsor a Plan.

22 20. THIS COURT ORDERS that the SISP is hereby approved and the Arctic Glacier Parties, the Monitor, the Financial Advisor and the CPS (both as defined below) are hereby authorized and directed to perform each of their obligations thereunder.

23 21. THIS COURT ORDERS that the engagement of TD Securities Inc. as financial advisor to the Arctic Glacier Parties (the *"Financial Advisor")* pursuant to an engagement letter dated September 16, 2010 between the Financial Advisor and AGIF, as amended and extended (collectively the *"Engagement Letter")* attached as Confidential Exhibit 2 to the McMahon Affidavit, is hereby approved. AGIF is authorized, *nunc pro tunc*, to enter into the Engagement Letter and is directed to carry out and perform its obligations thereunder (including payment of amounts due to be paid pursuant to the terms of the Engagement Letter) and the Engagement Letter shall be binding upon AGIF.

24 22. THIS COURT ORDERS that all claims of the Financial Advisor pursuant to the Engagement Letter are not claims that may be compromised pursuant to the Plan, and shall be treated as unaffected in any Plan, any proposal under the *Bankruptcy and Insolvency Act* (the *"BIA")* or any other restructuring and no such Plan, proposal or restructuring shall be approved that does not provide for the payment of all amounts due to the Financial Advisor pursuant to the terms of the Engagement Letter.

25 23. THIS COURT ORDERS that a charge (the *"Financial Advisor Charge")* is hereby granted to the Financial Advisor in the maximum amount of US$2,000,000 over the Property, which charge shall be security for all amounts due to be paid to the Financial Advisor pursuant to the terms of the Engagement Letter, but shall not secure any indemnity or any fees or expenses incurred by the Financial Advisor in connection with any right of indemnity included in the Engagement Letter. The Financial Advisor Charge shall have the priority set out in paragraph 57 hereof.

26 24. THIS COURT ORDERS that the Financial Advisor, its affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of either its engagement by the Arctic Glacier Parties as Financial Advisor or any matter referred to in the Engagement Letter except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Financial Advisor in performing its obligations under the Engagement Letter.

Appointment of Chief Process Supervisor

27 25. THIS COURT ORDERS that 7088418 Canada Inc. o/a Grandview Advisors is hereby appointed as the Chief Process Supervisor (the "CPS") of the Arctic Glacier Parties pursuant to the terms of the CPS Engagement Letter (as defined below). The CPS is responsible for overseeing and directing the SISP for the benefit of all parties affected by these proceedings, reporting to the Court concerning the SISP and otherwise performing the functions set out in the CPS Engagement Letter. The CPS shall not be or be deemed to be a trustee, director, officer or employee of any of the Arctic Glacier Parties and shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder and under the CPS Engagement Letter, be deemed to have taken possession or control of the Property, or any part thereof, or managed the Business.

28 26. THIS COURT ORDERS that the terms of the CPS' engagement shall be those set out in the engagement letter between the CPS and AGI attached to the McMahon Affidavit as Exhibit "A" (the *"CPS* Engagement Letter") and the CPS Engagement Letter shall be binding upon AGI. The CPS Engagement Letter shall not be amended without prior approval of this Court.

29 27. THIS COURT ORDERS that the CPS is hereby authorized to file periodic reports concerning the SISP, shall make recommendations to the Arctic Glacier Parties as it may consider appropriate and work together with the Arctic Glacier Parties, the Financial Advisor and the Monitor to facilitate the SISP. Subject to paragraph 43(d) hereof, the Agent may consult with the CPS. The CPS may apply to the Court for directions as it considers appropriate in the conduct of its duties hereunder. The CPS is hereby authorized to retain counsel.

30 28. THIS COURT ORDERS that the fees, expenses and any other amount payable to the CPS under and pursuant to the CPS Engagement Letter are secured by the Administration Charge (as defined below) and that any claims of the CPS under the CPS Engagement Letter are not claims that may be compromised pursuant to the Plan, and shall be treated as unaffected in any Plan, any proposal under the BIA or any other restructuring and no such Plan, proposal or restructuring shall be approved that does not provide for the payment of all amounts due to the Chief Process Supervisor pursuant to the terms of the CPS Engagement Letter.

31 29. THIS COURT ORDERS that the CPS shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of either its appointment as CPS or any matter referred to in the CPS Engagement Letter except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the CPS in performing its obligations under the CPS Engagement Letter or this Order. In particular, the CPS shall incur no liability, whether statutory or otherwise, as a trustee, director or officer of the Arctic Glacier Parties.

No Proceedings Against the Arctic Glacier Parties or the Property

32 30. THIS COURT ORDERS that until and including March 23, 2012, or such later date as this Court may order (the "*Stay Period*"), no proceeding or enforcement process in any court or tribunal (each, a *"Proceeding")* shall be commenced or continued against or in respect of any of the Arctic Glacier Parties or the Monitor, or affecting the Business or the Property, except with the written consent of the Arctic Glacier Parties and the Monitor, or with leave of this Court, and any and all such Proceedings currently under way against or in respect of the Arctic Glacier Parties or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

No Exercise of Rights or Remedies

33 31. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being *"Persons"* and each being a *"Person")* against or in respect of the Arctic Glacier Parties or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Arctic Glacier Parties and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Arctic Glacier Parties to carry on any business which they are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

No Interference With Rights

34 32. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Arctic Glacier Parties, except with the written consent of the Arctic Glacier Parties and the Monitor, or leave of this Court.

Continuation of Services

35 33. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Arctic Glacier Parties or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Arctic Glacier Parties, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Arctic Glacier Parties, and that each of the Arctic Glacier Parties shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Arctic Glacier Parties in accordance with normal payment practices of the Arctic Glacier Parties or such other practices as may be agreed upon by the supplier or service provider and each of the Arctic Glacier Parties and the Monitor, or as may be ordered by this Court.

Critical Suppliers

36 34. THIS COURT ORDERS AND DECLARES that each of the entities listed in Schedule "C" hereto is a critical supplier to AGI as contemplated by Section 11.4 of the CCAA (each, a *"Critical Supplier").*

37 35. THIS COURT ORDERS that each Critical Supplier shall continue to supply AGI with goods and/or services on terms and conditions that are consistent with existing arrangements and past practices. No Critical Supplier may require the payment of a deposit or the posting of any security in connection with the supply of goods and/or services to AGI after the date of this Order.

38 36. THIS COURT ORDERS that each Critical Supplier shall be entitled to the benefit of and is hereby granted a charge (together, the *"Critical Supplier Charge")* on the Property of AGI in an amount equal to the value of the goods and services

supplied by such Critical Supplier and received by AGI after the date of this Order less all amounts paid to such Critical Supplier in respect of such goods and services. The Critical Supplier Charge shall have the priority set out in paragraph 57 hereof.

Non-Derogation of Rights

39 37. THIS COURT ORDERS that, subject to paragraphs 34 to 36 above relating to Critical Suppliers, no Person other than a Critical Supplier shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person other than a Critical Supplier be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Arctic Glacier Parties. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

Proceedings Against Directors and Officers

40 38. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future trustees, directors or officers of the Arctic Glacier Parties with respect to any claim against such trustees, directors or officers that arose before the date hereof and that relates to any obligations of the Arctic Glacier Parties whereby such trustees, directors or officers are alleged under any law to be liable in their capacity as trustees, directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Arctic Glacier Parties, if one is filed, is sanctioned by this Court or is refused by the creditors of the Arctic Glacier Parties or this Court.

Directors' and Officers' Indemnification and Charge

41 39. THIS COURT ORDERS that the Arctic Glacier Parties shall indemnity their trustees, directors and officers against obligations and liabilities that they may incur as trustees, directors or officers of the Arctic Glacier Parties after the commencement of the within proceedings, except to the extent that, with respect to any trustee, officer or director, the obligation or liability was incurred as a result of the trustee's, the director's or the officer's gross negligence or wilful misconduct.

42 40. THIS COURT ORDERS that the trustees, directors and officers of the Arctic Glacier Parties shall be entitled to the benefit of and are hereby granted a charge (the *"Directors' Charge")* on the Property, which charge shall not exceed an aggregate amount of US$2,700,000, as security for the indemnity provided in paragraph 39 of this Order. The Directors' Charge shall have the priority set out in paragraphs 57 herein.

43 41. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the trustees, directors and officers of the Arctic Glacier Parties shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 39 of this Order.

Appointment of Monitor

44 42. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Business and financial affairs of the Arctic Glacier Parties with the powers and obligations set out in the CCAA or set forth herein and that the Arctic Glacier Parties and their unit holders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Arctic Glacier Parties pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

45 43. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Arctic Glacier Parties' receipts and disbursements;

(b) perform its obligations under the SISP;

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the SISP and such other matters as may be relevant to the proceedings herein;

(d) assist the Arctic Glacier Parties, to the extent required by the Arctic Glacier Parties, in their dissemination to the Agent and its counsel of financial and other information, which may be used in these proceedings, including reporting on the basis specified in the Commitment Letter or Definitive Documents (each as defined below), and consult with the Agent as the Monitor deems advisable (subject to the restrictions set out herein), and for greater certainty, the Monitor, the Financial Advisor, the CPS and the Arctic Glacier Parties shall not provide information to the Agent or the DIP Lenders concerning the SISP except in accordance with the SISP;

(e) assist the Arctic Glacier Parties in the preparation of Cash Flow Projections (as defined below);

(f) assist the CPS in the performance of its duties as set out in this Order and the CPS Engagement Letter;

(g) advise the Arctic Glacier Parties in their preparation of the Arctic Glacier Parties' cash flow statements and reporting required by the Agent, which information shall be reviewed with the Monitor and delivered to the Agent and its counsel as specified in the Commitment Letter or Definitive Documents (each as defined herein);

(h) advise the Arctic Glacier Parties in the development of the Plan and any amendments to the Plan;

(i) assist the Arctic Glacier Parties, to the extent required by the Arctic Glacier Parties, with the holding and administering of creditors' meetings and other required stakeholder meetings, if any, for voting on the Plan;

(j) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Arctic Glacier Parties, to the extent that is necessary to adequately assess the business and financial affairs of the Arctic Glacier Parties or to perform its duties arising under this Order;

(k) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(l) perform such other duties as are required by this Order or by this Court from time to time.

46 44. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

47 45. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, *"Possession"*) of any of the Property or any property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act, The Environment Act* (Manitoba), *The Water Resources Conservation Act* (Manitoba), *The Contaminated Sites Remediation Act* (Manitoba), *The Dangerous Goods Handling and Transportation Act* (Manitoba), *The Public Health Act* (Manitoba) or *The Workplace Safety and Health Act* (Manitoba), regulations thereunder or any other similar, municipal, federal, provincial or state law of any jurisdiction where the Arctic Glacier Parties carry on business or have assets (the *"Environmental Legislation"*), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property or any other property within the meaning of any Environmental Legislation, unless it is actually in possession.

48 46. THIS COURT ORDERS that the Monitor shall provide any creditor of the Arctic Glacier Parties with information provided by the Arctic Glacier Parties in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Arctic Glacier Parties is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Arctic Glacier Parties may agree.

49 47. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

50 48. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Agent, counsel to the trustees of AGIF, counsel to The Toronto-Dominion Bank ("TD"), counsel to the directors and officers of the Arctic Glacier Parties, and counsel to the Arctic Glacier Parties shall be paid their reasonable fees and disbursements, in each case at their standard rates or at the rates and charges agreed by the Arctic Glacier Parties, by the Arctic Glacier Parties as part of the costs of these proceedings. The Arctic Glacier Parties are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Agent and counsel for the Arctic Glacier Parties on a weekly or a bi-weekly basis and, in addition, the Arctic Glacier Parties are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Arctic Glacier Parties, retainers in the amounts of $125,000, $125,000 and $350,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time. The Arctic Glacier Parties are hereby authorized and directed to pay the accounts of counsel for TD on a bi-weekly basis from the TD LC Security (as defined in the McMahon Affidavit).

51 49. THIS COURT ORDERS that at the request of the Arctic Glacier Parties, the Agent, any other party in interest or this Court, the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of this Court, but nothing herein shall fetter this Court's discretion to refer such matters to a Master of this Honourable Court.

52 50. THIS COURT ORDERS that the Monitor, counsel to the Monitor, the CPS, counsel to the trustees of AGIF, counsel to the directors and officers of the Arctic Glacier Parties, and counsel to the Arctic Glacier Parties shall be entitled to the benefit of and are hereby granted a charge (the *"Administration Charge")* on the Property, which charge shall not exceed an aggregate amount of US$2,000,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraph 57 hereof. The beneficiaries of the Administration Charge, at the request of the Monitor, shall be required to provide the Monitor with bi-weekly updates regarding the unpaid amounts owing to them that are secured by the Administration Charge.

DIP Financing

53 51. THIS COURT ORDERS that the Arctic Glacier Parties are hereby authorized and empowered to obtain and borrow under a credit facility (the *"DIP Loan")* from the Secured Lenders (the Secured Lenders in their capacity as lenders under the credit facility hereby authorized are called the *"DIP Lenders")* in order to finance the Arctic Glacier Parties' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed a combined total of C$26,000,000 and US$24,000,000 unless permitted by further Order of this Court.

54 52. THIS COURT ORDERS that such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Arctic Glacier Parties and the Agent dated as of February 21, 2012 (the *"Commitment Letter")*, filed.

55 53. THIS COURT ORDERS that the Arctic Glacier Parties are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the *"Definitive Documents")*, as are contemplated by the Commitment Letter or as may be reasonably required by the Agent pursuant to the terms thereof, and the Arctic Glacier Parties are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Agent under and pursuant to the Commitment Letter and the Definitive Documents for the benefit of the DIP Lenders as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

56 54. THIS COURT ORDERS that the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the *"DIP Lenders' Charge")* on the Property, which DIP Lenders' Charge shall not secure an obligation that exists before this Order is made. The DIP Lenders' Charge shall have the priority set out in paragraphs 57 hereof.

57 55. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the Agent may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Commitment Letter, the Definitive Documents or the DIP Lenders' Charge, the Agent, upon 4 days' notice to the Arctic Glacier Parties and the Monitor, may exercise any and all of its rights and remedies against the Arctic Glacier Parties or the Property under or pursuant to the Commitment Letter, Definitive Documents and the DIP Lenders' Charge, including without limitation, to cease making advances to the Arctic Glacier Parties and set off and/or consolidate any amounts owing by the Agent to the Arctic Glacier Parties against the obligations of the Arctic Glacier Parties to the Agent under the Commitment Letter, the Definitive Documents, the Credit Agreements (as defined herein) or the DIP Lenders' Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Arctic Glacier Parties and for the appointment of a trustee in bankruptcy of the Arctic Glacier Parties; and

(c) the foregoing rights and remedies of the Agent shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Arctic Glacier Parties or the Property.

58 56. THIS COURT ORDERS AND DECLARES that the claims of the DIP Lenders in relation to the DIP Loan are not claims that may be compromised pursuant to the Plan, and shall be treated as unaffected in any Plan, any proposal under the BIA or any other restructuring and no such Plan, proposal or restructuring shall be approved that does not provide for the payment of all amounts due to the DIP Lenders pursuant to the terms of the Commitment Letter and the Definitive Documents.

Validity and Priority of Charges Created by This Order

59 57. THIS COURT ORDERS that the priorities of the Administration Charge, Financial Advisor Charge, Directors' Charge, DIP Lenders' Charge, KERP Charge, Critical Supplier Charge, and Inter-Company Balances Charge (collectively, the *"Charges")*, as among them, shall be as follows:

First - The Administration Charge (to the maximum amount of US$2,000,000) and the Financial Advisor Charge (to the maximum amount of an additional US$2,000,000) on *apart passu* basis;

Second - The Directors' Charge (to the maximum amount of US$2,700,000);

Third - The Critical Supplier Charge (to the maximum amount of C$1,000,000, only as against the assets of AGI)

Fourth - The DIP Lenders' Charge (to the maximum amount of C$28,600,000 plus US$26,400,000);

Fifth - The KERP Charge (to the maximum amount of C$2,600,000) and the Critical Supplier Charge (for any amounts above C$1,000,000) on a *pari passu* basis (with the Critical Supplier Charge as against the assets of AGI only); and,

Sixth - The Inter-Company Balances Charge.

60 58. THIS COURT ORDERS that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

61 59. THIS COURT ORDERS that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, *"Encumbrances"*) in favour of any Person, notwithstanding the order of perfection or attachment, except for (i) any validly perfected purchase money security interest in favour of a secured creditor, (ii) 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 amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA, including source deductions from wages, employer health tax, workers compensation, vacation pay and banked overtime for employees, or (iii) the TD LC Security, as defined in the McMahon Affidavit.

62 60. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Arctic Glacier Parties shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Arctic Glacier Parties also obtain the prior written consent of the Monitor, the Agent and the Chargees (as defined below) or further Order of this Court.

63 61. THIS COURT ORDERS that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the *"Chargees"*) shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an *"Agreement"*) which binds the Arctic Glacier Parties, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Commitment Letter or the Definitive Documents shall create or be deemed to constitute a breach by any Arctic Glacier Party of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Arctic Glacier Parties entering into the Commitment Letter, the creation of the Charges or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Arctic Glacier Parties pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

64 62. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Arctic Glacier Parties' interest in such real property.

Documents to Be Sealed

65 63. THIS COURT ORDERS that the KERP, the Financial Advisor Engagement and the DIP Fee Letter, which are attached as Confidential Exhibits 1, 2 and 3, respectively, to the McMahon Affidavit, shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

Service and Notice

66 64. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Globe and Mail, the Winnipeg Free Press and The Wall Street Journal (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against any Arctic Glacier Party of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

67 65. THIS COURT ORDERS that the Arctic Glacier Parties and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or electronic transmission to the Arctic Glacier Parties' creditors or other interested parties at their respective addresses as last shown on the records of the Arctic Glacier Parties and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

68 66. THIS COURT ORDERS that counsel for the Arctic Glacier Parties shall prepare and keep current a service list *("Service List")* containing the name and contact information (which may include the address, telephone number and facsimile number or email address) for service to: the Arctic Glacier Parties; the Monitor; and each creditor or other interested Person who has sent a request, in writing, to counsel for the Arctic Glacier Parties to be added to the Service List. The Service List shall indicate whether each Person on the Service List has elected to be served by email or facsimile, and failing such election the Service List shall indicate service by email. The Service List shall be posted on the website of the Monitor at the address indicated in paragraph 67 herein. For greater certainty, creditors and other interested Persons who have received notice in accordance with paragraph 64(b) of this Order and/or have been served in accordance with paragraph 65 of this Order, and who do not send a request, in writing, to counsel for the Arctic Glacier Parties to be added to the Service List, shall not be required to be further served in these proceedings.

69 67. THIS COURT ORDERS that the Arctic Glacier Parties, the Monitor, and any party on the Service List may serve any court materials in these proceedings by facsimile or by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at *www.alvarezandmarsal.com/arcticglacier*. Service shall be deemed valid and sufficient if sent in this manner.

General

70 68. THIS COURT ORDERS that any of the Arctic Glacier Parties or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

71 69. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Arctic Glacier Parties, the Business or the Property.

72 70. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Arctic Glacier Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Arctic Glacier Parties and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Arctic Glacier Parties and the Monitor and their respective agents in carrying out the terms of this Order.

73 71. THIS COURT ORDERS that each of the Arctic Glacier Parties and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this

Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

74 72. THIS COURT ORDERS that the Monitor is hereby directed, as a foreign representative of the Arctic Glacier Parties, to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§101-1330, as amended.

75 73. THIS COURT ORDERS that any interested party (including the Arctic Glacier Parties and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

76 74. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Central Standard/ Daylight Time on the date of this Order.

Schedule "A" — Additional Applicants

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

Diamond Newport Corporation

Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Schedule "B" — Sale and Investor Solicitation Process

Schedule "[•]"

Arctic Glaciur Sale and Investor Solicitation Process

Introduction

On February •, 2012, Arctic Glacier Income Fund ("AGIF") and its subsidiaries listed on Appendix "A" hereto (sometimes referred to collectively as the "Applicants") obtained an initial order (the "Initial Order") under the *Companies' Creditors Arrangement Act* ("CCAA") from the Manitoba Court of Queen's Bench (the "Court"). As part of the Initial Order, the Court approved the Sale and Investor Solicitation Process set forth herein (the "SISP"). The purpose of the SISP is to seek Sale Proposals and Investment Proposals from Qualified Bidders and to implement one or a combination of them in respect of the Property and the Business.

This SISP describes, among other things: (a) the Property available for sale and the opportunity for an investment in the Business/ Arctic, (b) the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Property and the Business, (c) the manner in which bidders and bids become Qualified Bidders and Qualified Bids, respectively, (d) the evaluation of bids received, (e) the ultimate selection of a Successful Bidder, and (f) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.

Capitalized terms used in this SISP and not otherwise defined have the meanings given to them in paragraph 1 below.

Defined Terms

1. The following capitalized terms have the following meanings when used in this SISP:

(a) "Arctic" means AGIF and all of its subsidiaries.

(b) "Business" means the business of Arctic.

(c) "Business Day" means a day (other than Saturday or Sunday) on which banks are generally open for business in Toronto, Ontario and Winnipeg, Manitoba.

(d) "Claims and Interests" is defined in paragraph 6.

(e) "Confidential Information Memorandum" is defined in paragraph 3.

(f) "Credit Bid" shall mean any offer submitted by the Lenders in the form of a Sale Proposal or Investment Proposal, pursuant to which the consideration offered includes an exchange for, and in full and final satisfaction of, all or a portion (as

determined by the Lenders, in their discretion) of their secured claims including their secured claims pursuant to the first and second lien credit facilities of Arctic and any other financing provided by the Lenders including debtor-in-possession financing. For the avoidance of doubt, the Lenders may submit a Credit Bid, offering as consideration an exchange of all or a portion of the Lender Claims for an ownership interest in the Business and may participate as a bidder in any auction authorized by any court.

(g) "CPS" is defined in paragraph 2.

(h) "Deposit" is defined in paragraph 22.

(i) "Final Bid" is defined in paragraph 21.

(j) "Financial Advisor" means TD Securities Inc.

(k) "Form of Investment Agreement" means the form of equity investment agreement to be developed by Arctic in consultation with the Monitor and the Financial Advisor and provided to Qualified Bidders that submitted a Qualified LOI for an Investment Proposal and have not been eliminated in accordance with paragraph 10, which agreement shall provide for the direct payment of net proceeds to the Lenders on account of the Lender Claims on completion of the transaction contemplated thereby.

(l) "Form of Purchase Agreement" means the form of purchase and sale agreement to be developed by Arctic in consultation with the Monitor and the Financial Advisor and provided to Qualified Bidders that submitted a Qualified LOI for a Sale Proposal and have not been eliminated in accordance with paragraph 10, which agreement shall provide for the direct payment of net proceeds to the Lenders on account of the Lender Claims on completion of the transaction contemplated thereby.

(m) "Investment Proposal" is defined in paragraph 14.

(n) "Lender Claims" means the aggregate amount owing to the agent and the Lenders arising from or related to the first and second lien credit facilities of Arctic and any other financing provided by the Lenders (including debtor-in-possession financing), which shall include to the maximum extent permissible under applicable documentation and law, without limitation, all accrued and unpaid principal, interest, default interest, premiums and reasonable fees, costs, charges and expenses all as may be due and payable under the aforementioned credit facilities and/or other financing and any ancillary documents (which shall include the reasonable fees of any and all legal and financial advisors to the Lenders, including, without limitation, Torys LLP and Milbank, Tweed, Hadley & McCloy LLP).

(o) "Lenders" mean CPPIB Credit Investments Inc., West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P., West Face Long Term Opportunities Global Master L.P., and all of foregoing parties' assignees in respect of Lender Claims.

(p) "LOI" is defined in paragraph 11.

(q) "Monitor" means Alvarez & Marsal Canada Inc.

(r) "NDA" means a non-disclosure agreement in form and substance satisfactory to the Monitor, the CPS, the Financial Advisor, and the Applicants, which will inure to the benefit of any purchaser of the Property or any investor in the Business or Arctic.

(s) "Outside Date" means July 31, 2012, or such later date as may be agreed to by the Applicants, the Financial Advisor, the CPS, the Monitor and the Lenders.

(t) "Phase 1" is defined in paragraph 11.

(u) "Phase 1 Bid Deadline" is defined in paragraph 13.

(v) "Phase 2" is defined in paragraph 18.

(w) "Phase 2 Bid Deadline" is defined in paragraph 22.

(x) "Potential Bidder" is defined in paragraph 8.

(y) "Property" means all of property, assets and undertakings of Arctic or the relevant entities within Arctic (which may include, in the case of any such entity, the shares in the capital of any other entities within Arctic), as applicable in the context of any bid.

(z) "Qualified Bid" means: (i) a Credit Bid; or (ii) a third party offer or combination of third party offers, in the form of a Sale Proposal(s) or an Investment Proposal(s) or including elements of both, the aggregate purchase price or funds to be invested are in an amount sufficient to pay the Lender Claims in full in cash and which, in any case, meets the requirements of paragraph 22.

(aa) "Qualified Bidder" is defined in paragraph 9. For the avoidance of doubt, the Lenders are, collectively, a Qualified Bidder to make a Credit Bid.

(bb) "Qualified LOI" is defined in paragraph 14.

(cc) "Sale Proposal" is defined in paragraph 14.

(dd) "Selected Qualified Bid" is defined in paragraph 30.

(ee) "Special Committee" means a committee established by the Trustees of AGIF to supervise, among other things, the implementation of the SISP.

(ff) "Successful Bid" is defined in paragraph 30.

(gg) "Successful Bidder" is defined in paragraph 30.

Supervision of the SISP

2. The Monitor will supervise, in all respects, the SISP and any attendant sales or investments and, in particular, will supervise the Financial Advisor's performance under its engagement by Arctic in connection therewith. Arctic is required to assist and support the efforts of the Monitor, the Financial Advisor and the Chief Process Supervisor ("CPS") as provided for herein. In the event that there is disagreement or clarification required as to the interpretation or application of this SISP or the responsibilities of the Monitor, the Financial Advisor, the CPS or Arctic hereunder, the Court will have jurisdiction to hear such matter and provide advice and directions, upon application of the Monitor or Arctic. For the avoidance of doubt, with respect to the Monitor's role in regards to the SISP, the terms of the Initial Order concerning the Monitor's rights and duties in this CCAA proceeding shall govern.

Sale and Investment Opportunity

3. A confidential information memorandum (the "Confidential Information Memorandum") describing the opportunity to acquire all or a portion of the Property or invest in the Business/Arctic will be made available by the Financial Advisor to Qualified Bidders. One or more Qualified Bids for less than substantially all of the Property will not be precluded from consideration, either alone or in combination as a Qualified Bid, Final Bid or a Successful Bid.

4. A bid may, at the option of the Qualified Bidder, involve, among other things, one or more of the following: a restructuring, recapitalization or other form of reorganization of the business and affairs of Arctic as a going concern; a sale of the Property

to the Qualified Bidder or to a newly formed acquisition entity; or a plan of compromise or arrangement pursuant to the CCAA or any corporate or other applicable legislation.

"As Is, Where Is"

5. The sale of the Property or investment in the Business/Arctic will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, Arctic or any of their respective agents or estates, except to the extent set forth in the definitive sale or investment agreement executed with a Successful Bidder.

Free Of Any And All Claims And Interests

6. In the event of a sale of all or a portion of the Property, all of the rights, title and interests of Arctic in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "Claims and Interests") pursuant to such court orders as may be desirable, except to the extent otherwise set forth in the definitive sale or investment agreement executed with a Successful Bidder.

Publication Notice

7. As soon as reasonably practicable after the granting of the Initial Order, but in any event no more than five (5) Business Days after the issuance of the Initial Order, the Monitor will cause a notice of the SISP (and such other relevant information which the Monitor, in consultation with the Financial Advisor and Arctic, considers appropriate) to be published in The Wall Street Journal (National Edition), The New York Times (New York City Edition) and The Globe and Mail (National Edition). On the same date, the Applicants will issue a press release setting out the notice and such other information, in form and substance satisfactory to the Monitor in consultation with the Financial Advisor and the Applicants, with Canada Newswire designating dissemination in Canada and major financial centres in the United States.

Participation Requirements

8. In order to participate in the SISP, each person (a "Potential Bidder") must deliver to the Financial Advisor at the address specified in Schedule "A" hereto (including by email or fax transmission):

(a) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the principals of the Potential Bidder;

(b) to the extent that a Potential Bidder has already signed an NDA, the parties thereto may execute an addendum (in form an substance satisfactory to the Monitor, CPS, the Financial Advisor and the Applicants) providing that the Company shall be entitled to enforce the terms of such NDA; and

(c) an executed NDA which shall include provisions whereby the Potential Bidder agrees to accept and be bound by the provisions contained herein.

9. A Potential Bidder that has executed an NDA, and has delivered the documents and information described above, and that the Monitor, in its reasonable business judgement, in consultation with the Financial Advisor, the CPS and the Applicants, determines is likely, based on the availability of financing, experience and other considerations, to be able to consummate a Sale Proposal or an Investment Proposal on or before the Outside Date will be deemed a "Qualified Bidder," and will be promptly notified of such determination by the Financial Advisor. For the avoidance of doubt, the Lenders collectively are a Qualified Bidder.

10. At anytime during Phase 1 or Phase 2, the Monitor may, in its reasonable business judgment and after consultation with the Financial Advisor, the CPS and Arctic, recommend to the Special Committee that a Qualified Bidder (other than the Lenders) be eliminated from the SISP. If the Special Committee accepts the Monitor's recommendation, such bidder will be eliminated from the SISP and will no longer be a "Qualified Bidder" for the purposes of this SISP. If the Special Committee does not accept the Monitor's recommendation, the Monitor will seek advice and directions of the Court.

SISP - Phase 1

Phase 1 Initial Timing

11. For a period of 35 days following the date of the Initial Order ("Phase 1"), the Financial Advisor (with the assistance of Arctic and the CPS, and under the supervision of the Monitor and in accordance with this SISP) will solicit non-binding indications of interest in the form of non-binding letters of intent ("LOIs") from prospective strategic or financial parties to acquire the Property or to invest in the Business/Arctic.

Due Diligence

12. The Financial Advisor will provide each Qualified Bidder with a copy of the Confidential Information Memorandum and access to an electronic data room of due diligence information. The Monitor, the Financial Advisor, the CPS and Arctic make no representation or warranty as to (i) the information contained in the Confidential Information Memorandum or (he electronic data rooms, (ii) provided through the due diligence process in Phase 1 or Phase 2 or (iii) otherwise made available, except to the extent expressly contemplated in any definitive sale or investment agreement with a Successful Bidder executed and delivered by Arctic.

Non-Binding Letters of Intent from Qualified Bidders

13. A Qualified Bidder that wishes to pursue a Sale Proposal or Investment Proposal (other than a Credit Bid) must deliver a LOI to the Financial Advisor at the address specified in Schedule "A" hereto (including by email or fax transmission), so as to be received by it not later than 5:00 PM (Central Time) on or before 35 days following the date of the Initial Order, unless such day is not a Business day, in which case, on the next Business Day] (the "Phase 1 Bid Deadline").

14. A LOI so submitted will be considered a qualified LOI (a "Qualified LOI") only if:

(a) the LOI is submitted on or before the Phase 1 Bid Deadline by a Qualified Bidder;

(b) it contains an indication of whether the Qualified Bidder is offering to:

(i) acquire all, substantially all or a portion of the Property (a "Sale Proposal"), or

(ii) make an investment in, or refinance the Business/Arctic (an "Investment Proposal");

(c) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price range in Canadian dollars (and U.S. dollar equivalent), including details of any liabilities to be assumed by the Qualified Bidder;

(ii) the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;

(iii) specific indication of the sources of capital for the Potential Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit-quality support or enhancement that will allow the Monitor, the Financial Advisor, the CPS and the Applicants and each of their respective advisors to make a reasonable business or professional judgment as to the Potential Bidder's financial or other capabilities to consummate the transaction;

(iv) the structure and financing of the transaction (including, but not limited to, the sources of financing of the purchase price, preliminary evidence of the availability of such financing, steps necessary and associated timing to obtain such financing and any related contingencies, as applicable);

(v) any anticipated corporate, unit holder, shareholder, internal or regulatory approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;

(vi) specific statements concerning the treatment of employees and plans for the ongoing involvement and roles of Arctic employees;

(vii) additional due diligence required to be conducted during Phase 2, if any;

(viii) all conditions to closing that the Qualified Bidder may wish to impose; and

(ix) any other terms or conditions of the Sale Proposal which the Qualified Bidder believes are material to the transaction;

(d) in the case of an Investment Proposal, it identifies the following:

(i) a detailed description of the structure of the transaction including, the direct or indirect investment target (whether AGIF or another entity within Arctic);

(ii) the aggregate amount of the equity and debt investment to be made in the Business/Arctic in Canadian dollars (and U.S. dollar equivalent) (including the sources of such capital, preliminary evidence of the availability of such capital and steps necessary and associated timing to obtain the capital and any related contingencies, as applicable);

(iii) the underlying assumptions regarding the pro forma capital structure (including the form and amount of anticipated equity and/or debt levels, debt service fees, interest or dividend rates, amortization, voting rights or other protective provisions (as applicable), redemption, prepayment or repayment attributes and any other material attributes of the investment);

(iv) equity, if any, to be allocated to the secured and unsecured creditors of Arctic;

(v) specific indication of the sources of capital for the Potential Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit-quality support or enhancement that will allow the Monitor, the Financial Advisor, the CPS and the Applicants and each of their respective advisors to make a reasonable business or professional judgment as to the Potential Bidder's financial or other capabilities to consummate the transaction

(vi) the structure and financing of the transaction, including a sources and uses analysis;

(vii) any anticipated corporate, unitholder, shareholder, internal or regulatory approvals required to close the transaction, the anticipated time frame and any anticipated impediments for obtaining such approvals;

(viii) specific statements concerning the treatment of employees and plans for the ongoing involvement and roles of Arctic employees;

(ix) additional due diligence required to be conducted during Phase 2, if any;

(x) all conditions to closing that the Qualified Bidder may wish to impose; and

(xi) any other terms or conditions of the Investment Proposal which the Qualified Bidder believes are material to the transaction;

(e) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by the Monitor, in consultation with the Financial Advisor, the CPS and Arctic; and

(f) the purchase price or funds to be invested, as assessed pursuant to paragraph 17 hereof, are in an amount that can reasonably be expected to be sufficient to pay the Lender Claims in full and in cash on completion of the transaction contemplated by the LOI.

15. The Monitor, in consultation with the Financial Advisor, the CPS and Arctic, may waive compliance with any one or more of the requirements specified above, except the requirement contained in paragraph 14(f) of this SISP, and deem such non-compliant bids to be a Qualified LOI. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Assessment of Qualified LOIs and Continuation or Termination of SISP

16. Within 5 Business Days following the Phase 1 Bid Deadline, or such later date as may be determined by the Monitor, in consultation with the Financial Advisor, the CPS and the Lenders, the Monitor will, in consultation with the Financial Advisor, the CPS and the Applicants, assess the Qualified LOIs received during Phase 1, if any, and will determine whether there is a reasonable prospect of obtaining a Qualified Bid. For the purpose of such consultations and evaluations, the Financial Advisor and/or the Monitor may request clarification of the terms of Qualified LOIs.

17. In assessing the Qualified LOIs, the Monitor, following consultation with the Financial Advisor, the CPS and the Applicants, will consider, among other things, the following:

(a) the form and amount of consideration being offered;

(b) the demonstrated financial capability of the Qualified Bidder to consummate the proposed transaction;

(c) the conditions to closing of the proposed transaction; and

(d) the estimated time required to complete the proposed transaction and whether, in the Monitor's reasonable business judgment, it is reasonably likely to close on or before the Outside Date.

18. If a Qualified LOI is received and the Monitor, in consultation with the Financial Advisor, the CPS and Arctic, determines there is a reasonable prospect of obtaining a Qualified Bid (other than a Credit Bid), the Monitor will recommend to the Special Committee that the SISP shall continue for a further 45 days in accordance with these SISP Procedures ("Phase 2"). If the Special Committee accepts the Monitor's recommendation, the SISP shall continue for a further 45 days. If the Special Committee does not accept the Monitor's recommendation, the Monitor will seek advice and directions of the Court. At any time during Phase 2, the Monitor, in consultation with the Financial Advisor, the CPS and the Applicants may extend Phase 2 by an additional 15 days (provided that in no event shall Phase 2 be longer than 60 days total).

19. If the Monitor, after consultation with the Financial Advisor, the CPS and Arctic, determines that (a) no Qualified LOI has been received, (b) there is no reasonable prospect of a Qualified LOI resulting in a Qualified Bid and the SISP moving to Phase 2, and (c) the Lenders have not yet elected to make a Credit Bid by the Phase 1 Bid Deadline, the Financial Advisor shall provide copies of the LOIs received by the Phase 1 Bid Deadline to the Lenders. Within 5 Business Days after such receipt by the Lenders of such LOIs, the Lenders may, in their sole and absolute discretion, (a) designate one or more LOIs as a Qualified LOI and/or (b) elect to make a Credit Bid. If no Qualified LOI is received or designated by the Lenders, and the Lenders elect not to make a Credit Bid, any of the Lenders, the Monitor, or Arctic may apply to the Court for further advice and directions regarding the continuation or termination of the SISP.

20. If: (a) one or more Qualified LOIs is received; and (b) the Monitor, in its reasonable business judgment, in consultation with the Financial Advisor, the CPS and the Applicants, determines that another Qualified Bidder's LOI has a reasonable prospect of becoming a Qualified Bid, the Monitor may designate such LOI as a Qualified LOI.

Phase 2

Due Diligence

21. During Phase 2, each Qualified Bidder with a Qualified LOI that is not eliminated from the SISP, and at the request of such Qualified Bidder, the legal and financial advisor(s) and/or lenders of such Qualified Bidder, provided that, in each case, such advisor or lender: (a) is reasonably acceptable to the Financial Advisor; and (b) has executed or is bound by an NDA, will be granted further access to such due diligence materials and information relating to the Property and the Business as the Financial Advisor, in its reasonable business judgment, in consultation with the Monitor, the CPS and the Applicants, determines, including, as appropriate, information or materials reasonably requested by Qualified Bidders, on-site presentation by senior management of Arctic, facility tours and access to further information in the electronic data room.

Final Bids from Qualified Bidders

22. A Qualified Bidder that is not eliminated from the SISP and that wishes to pursue a Sale Proposal or Investment Proposal, including a Credit Bid in the case of the Lenders, must deliver a final binding proposal (the "Final Bid"):

(a) in the case of a Sale Proposal, a duly authorized and executed purchase agreement based on the Form of Purchase Agreement and accompanied by a mark-up of the Form of Purchase Agreement showing amendments and modifications made thereto, together with all exhibits and schedules thereto, and such ancillary agreements as may be required by the bidder with all exhibits and schedules thereto;

(b) in the case of an Investment Proposal, a duly authorized and executed investment agreement based on the Form of Investment Agreement and accompanied by a mark-up of the Form of Investment Agreement showing amendments and modifications made thereto, together with all exhibits and schedules thereto, and such ancillary agreements as may be required by the bidder with all exhibits and schedules thereto,

to the Financial Advisor at the address specified in Schedule "A" hereto (including by email or fax transmission) so as to be received by it not later than 5:00 pm (Central Time) on the date which is 45 days following the commencement of Phase 2, or such other date as determined by the Monitor, in consultation with the Financial Advisor, the CPS and the Applicants (provided that Phase 2 shall not be more than 60 days) unless in each case, such day is not a Business Day, in which case, on the next Business Day (the "Phase 2 Bid Deadline").

23. If the Lenders choose to submit a Credit Bid involving aggregate consideration in excess of the Lender Claims (other than in the form of assumed liabilities), such Credit Bid will only be a Qualified Bid if received on or prior to the Phase 2 Bid Deadline.

Qualified Bids

24. A Final Bid will be considered a Qualified Bid only if (a) it is submitted by a Qualified Bidder who submitted a Qualified LOI on or before the Phase 1 Bid Deadline or it is a Credit Bid, and (b) the Final Bid (for the avoidance of doubt, including a Credit Bid) complies with, among other things, the following requirements:

(a) it includes a letter stating that the bidder's offer is irrevocable until the earlier of (a) the approval by a court of competent jurisdiction of a Successful Bid and (b) 45 days following the Phase 2 Bid Deadline, provided that if such bidder is selected as the Successful Bidder, its offer will remain irrevocable until the closing of the transaction with such Successful Bidder;

(b) it includes (if not a Credit Bid) written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Monitor, in consultation with the Financial Advisor, the CPS and Arctic, to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by its Final Bid;

(c) in respect of a Sale Proposal, the Property to be included and in the case of a Investment Proposal, any Property to be divested or disclaimed prior to closing;

(d) it includes full details of the proposed number of employees of the Applicants who will become employees of the bidder (in the case of a Sale Proposal) or shall remain as employees of the Applicants (in the case of an Investment Proposal) and, in each case, provisions setting out the terms and conditions of employment for continuing employees;

(e) details of any liabilities to be assumed by the Qualified Bidder;

(f) it is not conditional upon, among other things:

(i) the outcome of unperformed due diligence by the Qualified Bidder; or

(ii) obtaining financing;

(g) it fully discloses the identity of each entity that will be sponsoring or participating in the bid, and the complete terms of such participation;

(h) it outlines any anticipated regulatory and other approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;

(i) it identifies with particularity the contracts and leases the bidder wishes to assume and reject, contains full details of the bidder's proposal for the treatment of related cure costs (and provides adequate assurance of future performance thereunder); and it identifies with particularity any executory contract or unexpired lease the assumption and assignment of which is a condition to closing;

(j) it provides a timeline to closing with critical milestones;

(k) it includes evidence, in form and substance reasonably satisfactory to the Monitor and the Applicants, of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid;

(l) except in the case of a Credit Bid, it is accompanied by a refundable deposit (the "Deposit") in the form of a wire transfer (to a bank account specified by the Monitor), or such other form acceptable to the Monitor, payable to the order of the Monitor, in trust, in an amount equal to $10 million, to be held and dealt with in accordance with the terms of this SISP;

(m) it contains other information reasonably requested by the Financial Advisor, in consultation with the Monitor, the CPS and Arctic;

(n) except in the case of a Credit Bid (unless otherwise specified herein), it is received by the Phase 2 Bid Deadline;

(o) except in the case of a Credit Bid, the purchase price or funds to be invested will be in an amount sufficient to pay the Lender Claims, as calculated on the closing of the transaction contemplated by the Final Bid, in full and in cash, and shall provide that no such closing shall occur unless such payment in full of the Lender Claims is made concurrently;

(p) the Monitor determines that in its reasonable business judgment that it is likely that the Qualified Bidder will be able to consummate a Sale Proposal or Investment Proposal on or before the Outside Date in a manner that complies with all requirements of the SISP, including, without limitation, payment in full of the Lender Claims;

(q) in the case of a Sale Proposal it includes the following:

(i) an acknowledgement and representation that the bidder: (a) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its bid; and (b) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be

acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, except as expressly stated in the purchase and sale agreement; and

(r) in the case of an Investment Proposal, it includes an acknowledgement and representation that the bidder: (a) has relied solely upon its own independent review, investigation and/or inspection of any documents in making its bid; and (b) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the business of the Applicants or the completeness of any information provided in connection therewith, except as expressly stated in the Investment Agreement;

25. The Monitor, in consultation with the Financial Advisor, the CPS and Arctic, may waive compliance with any one or more of the requirements specified herein, except the requirements contained in paragraphs 23(o) and 23(p) of this SISP, which may not be waived, and deem such non-compliant bids to be Qualified Bids.

Evaluation and Selection of Successful Bid

26. The Monitor, in consultation with the Financial Advisor, the CPS and Arctic, will review each Qualified Bid as set forth herein.

27. Evaluation criteria with respect to a Sale Proposal may include, but are not limited to items such as: (a) the purchase price and net value (including assumed liabilities and other obligations to be performed by the bidder); (b) the firm, irrevocable commitment for financing the transaction; (c) the claims likely to be created by such bid in relation to other bids; (d) the counterparties to the transaction; (e) the terms of transaction documents; (f) other factors affecting the speed, certainty and value of the transaction (including any regulatory approvals required to close the transaction; (g) planned treatment of stakeholders; (h) the assets included or excluded from the bid; (i) proposed treatment of the employees; (j) any transition services required from Applicants post-closing and any related restructuring costs; and (k) the likelihood and timing of consummating the transaction.

28. Evaluation criteria with respect to an Investment Proposal may include, but are not limited to items such as: (a) the amount of equity and debt investment and the proposed sources and uses of such capital; (b) the firm, irrevocable commitment for financing the transaction; (c) the debt to equity structure post-closing; (d) the counterparties to the transaction; (e) the terms of the transaction documents; (f) other factors affecting the speed, certainty and value of the transaction (including any regulatory approvals required to close the transaction); (g) planned treatment of stakeholders; and (h) the likelihood and timing of consummating the transaction.

29. If one or more Qualified Bids is received, the Monitor, exercising its reasonable business judgment and following consultation with the Financial Advisor, the CPS and Arctic, will recommend to the Special Committee that the most favourable Qualified Bid be selected and that the Financial Advisor, the Monitor, Arctic and their advisors shall negotiate and settle the terms of a definitive agreement in respect of that Qualified Bid, all of which will be conditional upon Court approval. If the Special Committee does not accept such recommendation, the Monitor will seek advice and directions from the Court.

30. Once a definitive agreement has been negotiated and settled in respect of the Qualified Bid as selected by the Special Committee in accordance with the provisions hereof (the "Selected Qualified Bid"), the Select Qualified Bid will be the "Successful Bid" hereunder and the person(s) who made the Selected Qualified Bid will be the "Successful Bidder" hereunder.

31. If the Monitor, after consultation with the Financial Advisor, the CPS and Arctic, determines that no Qualified Bid has been received at the end of Phase 2 and the Lenders have not made a Credit Bid, the Financial Advisor shall provide copies of the Final Bids received by the Phase 2 Deadline, if any, to the Lenders. Within 5 Business Days after such receipt by the Lenders of the Final Bids, the Lenders may, in their sole and absolute discretion, (a) designate one or more Final Bids as Qualified Bids and/or (b) submit a Credit Bid. If any such designated Final Bid becomes a Selected Qualified Bid and becomes subject to a definitive agreement as contemplated by paragraph 30 hereof, the Lenders will not thereafter be entitled to submit a Credit Bid under this SISP unless such Selected Qualified Bid does not proceed, is terminated or fails to be completed in accordance with the terms and conditions of this SISP. If no Qualified Bid is received or designated by the Lenders, and the Lenders decide

not to submit a Credit Bid, any of the Lenders, the Monitor or Arctic may apply to the Court for further advice and directions regarding the continuation or termination of the SISP.

32. If the Monitor, after consultation with the Financial Advisor, the CPS and Arctic, determines at any point during Phase 2 that there is no reasonable prospect of obtaining a Credit Bid or of a Qualified LOI resulting in a Qualified Bid, Arctic or the Monitor will advise the Court and seek advice and directions of the Court with respect to continuation or termination of the SISP.

Approval Motion for Successful Bid

33. The Applicants will apply to the Court (the "Approval Motion") for an order approving the Successful Bid and authorizing Arctic to enter into any and all necessary agreements with respect to the Successful Bid and to undertake such other actions as may be necessary or appropriate to give effect to the Successful Bid.

34. The Approval Motion will be held on a date to be scheduled by the Court upon application by the Applicants. The Approval Motion may be adjourned or rescheduled by the Applicants or the Monitor without further notice by an announcement of the adjourned date at the Approval Motion.

35. All Qualified Bids (other than the Successful Bid) will be deemed rejected on the date of approval of the Sueeessful Bid by the Court.

Other Terms

No Derogation

36. Nothing in this SISP, or in any decision the Lenders may make regarding whether or not to submit a Credit Bid, shall affect the Lenders' rights to exercise contractual or legal remedies, or to enter into, and seek court approval for, any transaction with or relating to Arctic or its property, subject to the applicable stay provisions of the Initial Order.

Deposits

37. All Deposits will be retained by the Monitor and invested in an interest bearing trust account. If there is a Successful Bid, the Deposit (plus accrued interest) paid by the Successful Bidder whose bid is approved at the Approval Motion will be applied to the purchase price to be paid or investment amount to be made by the Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits (plus applicable interest) of Qualified Bidders not selected as the Successful Bidder will be returned to such bidders within 5 Business Days of the date upon which the Successful Bid is approved by the Court. If there is no Successful Bid, subject to the following paragraph, all Deposits (plus applicable interest) will be returned to the bidders within 5 Business Days of the date upon which the SISP is terminated in accordance with these procedures.

38. If a Successful Bidder breaches its obligations under the terms of the SISP, its Deposit shall be forfeited as liquidated damages and not as a penalty.

Approvals

39. For the avoidance of doubt, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA or any other statute or as otherwise required at law in order to implement a Successful Bid.

No Amendment

40. There will be no amendments to this SISP without the consent of the Monitor, the Financial Advisor, Arctic and the Lenders or, in the absence of consent, the approval of the Court.

41. This SISP does not, and will not be interpreted to, create any contractual or other legal relationship between Arctic and any Qualified Bidder, other than as specifically set forth in a definitive agreement that may be signed with Arctic. At any

time during the SISP, the Monitor may, following consultation with the Financial Advisor, the CPS and the Applicants, upon reasonable prior notice to the Lenders, apply to the Court for advice and directions with respect to the discharge of its power and duties hereunder.

Schedule "A" — Address for Notices and Deliveries

To the Monitor:

Alvarez & Marsal Canada Inc.

Attn: [Richard Morawetz and Adam Zalev]

Direct Dial: 416-847-5151/416-847-5154

Facsimile:

Email: rmorawetz@alvarezandmarsal.com/azalev@alvarezandmarsal.com

To the Financial Advisor:

TD Securities Inc.

66 Wellington Street West

9th Floor

Toronto, ON M5K 1A2

Attn: Art Chipman, Managing Director

Direct Dial: 416.308.3099

Facsimile: 416.308.0182

E-mail: art.chipman@tdsecurities.com

Attn: Atif Zia, Vice President and Director

Direct Dial: 416.307.9921

Facsimile: 416.308.0182

E-mail: atif.zia@tdsecurities.com

To the Applicants:

625 Henry Avenue,

Winnipeg, MB R3A 0V1

Attn: Keith McMahon, President and Chief Executive Officer

Arctic Glacier Inc.

Direct Dial: 204-772-2473

Facsimile: 204-783-9857

E-mail: kmcmahon@arcticglacier.com

Schedule "C" — Critical Suppliers

Canadian Critical Supplier List Feb 2012

Vendor Name	Vendor Type
Distributor/Co-Packer	
Black's Ice Co Inc	Distributor/Co-Packer
Boite a Glace	Distributor/ Co-Packer
Christian Dugas	Distributor/ Co-Packer
Glace Laurentide	Distributor/ Co-Packer
Lake Ontario Ice	Distributor/Co-Packer
Lecoupe Ice	Distributor/ Co-Packer
North Star ice	Distributor/Co-Packer
Richard Boutin Inc	Distributor/ Co-Packer
Sylvain Lane Distribution	Distributor/ Co-Packer
Transport ML	Distributor/ Co-Packer
Valere D'Anjou Inc	Distributor/ Co-Packer
Utility Suppliers	
Hydro-Quebec	Utility
PAP BC Hydro	Utility
PAP Chatham-Kent Utility Services	Utility
PAP Cogeco	Utility
PAP Direct Energy	Utility
PAP Enbridge	Utility
PAP Enersource	Utility
PAP Enmax	Utility
PAP Epcor	Utility
PAP Fortis BC	Utility
PAP Horizon Utilities	Utility
PAP Hydro One	Utility
PAP Hydro Quebec	Utility
PAP MB Hydro	Utility
PAP Nexen	Utility
PAP Primus	Utility
PAP TeraGo Networks Inc.	Utility
PAP TransAlta Energy Marketing	Utility
PAP UnionGas	Utility
TransAlta Energy Marketing	Utility
Fuel suppliers	
4 Refuel Canada LP	Fuel
Centex Petroleum	Fuel
Husky Oil Marketing Company	Fuel
Iberic Oil Co Ltd	Fuel
Imperial Oil	Fuel
PAP Federated Co-operatives	Fuel
PAP GazMetro	Fuel
PAP Husky Oil Marketing Company	Fuel
PAP Petro Canada	Fuel
PAP Shell Canada	Fuel
Pioneer Energy LP	Fuel
United Farmers of Alberta -Calgary	Fuel
Waddick Fuels	Fuel
Vehicle Rental and Transport	
Altruck Idealease - Lease	Vehicle & Transport
Caneda Transport Inc	Vehicle & Transport

CH Robinson Worldwide Inc- Toronto	Vehicle & Transport
Checker Flag Leasing Inc	Vehicle & Transport
Chill Chain Logistic	Vehicle & Transport
CTS Lease & Rental - Regina	Vehicle & Transport
CTS Lease & Rental - Winnipeg	Vehicle & Transport
Excellence Peterbilt Inc	Vehicle & Transport
Great West Truck Lease & Rentals Ltd	Vehicle & Transport
Harold North Trucking Ltd	Vehicle & Transport
Humberview Chevrolet	Vehicle & Transport
Inland Paclease	Vehicle fit Transport
JDS Enterprizes Ltd	Vehicle & Transport
Kenworth Ontario PacLease	Vehicle & Transport
Little Rock Farm	Vehicle S Transport
M Kostiuk Express Ltd	Vehicle & Transport
Maxim Rentals & Leasing	Vehicle & Transport
Mid-West Collision Division	Vehicle & Transport
Muirkirk Freight Services	Vehicle & Transport
Paccar Leasing Company Ltd	Vehicle & Transport
PAP Altruck Idealease	Vehicle & Transport
PAP CTS Lease	Vehicle & Transport
PAP Excellence Peterbilt Inc	Vehicle & Transport
PAP Inland Paclease	Vehicle & Transport
PAP Maxim Rentals	Vehicle & Transport
PAP MCAP Leasing Ltd	Vehicle & Transport
PAP Western Toronto Idealese	Vehicle S Transport
Penske Truck Leasing	Vehicle S Transport
R & B Distribution	Vehicle S Transport
Randy Smith	Vehicle & Transport
Ryder Truck Rental Canada Ltd	Vehicle S Transport
S & S Forwarding Ltd	Vehicle S Transport
Tandet NationaLease Ltd	Vehicle S Transport
Target Transport Ltd	Vehicle & Transport
Trans-Go Logistique Inc.	Vehicle & Transport
Vezina Assurances Inc	Vehicle & Transport
Western Toronto Idealease	Vehicle & Transport
Western Toronto International Trucks Inc	Vehicle & Transport
Inventory and Ice Storage Suppliers (including packaging)	
2740-5364 Quebec Inc	Inventory
BlizzArt Sculpture Enr	Inventory
Bois De Foyer IGL Inc	Inventory
Canadian Gold Beverages Inc	Inventory
Canadian Paper & Packaging Co Inc	Inventory
Chep Equipment Pooling Systems	Inventory
Emballages Clef Inc	Inventory
Entrepot Frigorifique international Inc	Inventory
Hood Packaging Corporation	Inventory
Millard Refrigerated Services	inventory
Millennium Flexible Packaging	Inventory
Mr Iceman Ltd	Inventory
Norampac	Inventory
NorCan Flexible Packaging Inc	Inventory
Praxair Distribution	Inventory
Trenton Cold Storage Inc	Inventory
Versacold Group Services ULC	Inventory
Versacold Logistics Canada Inc	Inventory
Professional Services (including staffing agencies and service providers)	
CSM Driver Services Inc	Professional
CXA Recruiting	Professional

Discover Staffing Solutions Inc	Professional
Endeavour Personnel Ltd EPL	Professional
Entreprise MR 2000 Inc	Professional.
J J Keller and Associates Inc	Professional
Pivotal Integrated HR Solutions	Professional
Promax	Professional
Randstad	Professional
Staff Right	Professional
Staffing Guys Inc. The	Professional
Equipment Providers	
6108947 Manitoba Ltd	Equipment
Advanced Refrigeration HVAC Inc	Equipment
Alain Refrigeration Enr	Equipment
Arrow Specialites	Equipment
Atlantis Refrigeration Inc	Equipment
Corporate Express - Mississauga ON	Equipment
Descartes Systems Group Inc	Equipment
Entreprise J P Enr	Equipment
Excell Electrical Corporation	Equipment
Fixair Inc	Equipment
High Line Corporation	Equipment
Highjump Software Canada Inc	Equipment
Intercall	Equipment
Intermec Technologies Canada Ltd	Equipment
Johnsen Machine Company Ltd	Equipment
Leer Limited Partnership	Equipment
Master Group LP, The	Equipment
Microage - Winnipeg	Equipment
Microsoft Licensing GP	Equipment
Modern Ice	Equipment
OnX Enterprise Solutions Ltd	Equipment
PAP CIT Financial	Equipment
PAP CitiCorp Vendor Finance Ltd	Equipment
PAP Milne Office Systems	Equipment
PAP National Leasing	Equipment
PAP Standard Leasing	Equipment
Paperless Business Systems	Equipment
Polar Industries Ltd	Equipment
Prophet Business Group Ltd	Equipment
Quest Software Canada	Equipment
Ricoh Canada Inc	Equipment
RV Service Inc - St-Eustache	Equipment
Seccuris Inc	Equipment
Thermal Manufacturing Inc	Equipment
Tim Brown Refrigeration Services Ltd	Equipment
Turbo Images	Equipment
Xiotech Corporation	Equipment

Application granted.

End of Document

TAB 15

Court File No. 31-1513595

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE ~~MR.~~ Madam	)	MONDAY, THE 11TH DAY
	)	
JUSTICE ~~PERELL~~ HOY	)	OF JULY, 2011

IN THE MATTER OF THE PROPOSAL OF CLOTHING FOR MODERN TIMES LTD., A COMPANY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO, WITH A HEAD OFFICE IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

ORDER

THIS MOTION, made by Clothing For Modern Times Ltd. (the "**Debtor**") for an Order, *inter alia*,:

1. abridging the time for service of the Debtor's Notice of Motion so that the motion is properly returnable on July 11, 2011;

2. approving the Forbearance Agreement dated June 24, 2011 among Roynat Asset Finance, a Division of Roynat Inc. ("**Roynat**") as lender, the Debtor as borrower and CMT America Holdings Inc., CMT Wholesale Corp., 928338 Ontario Inc. and 1583679 Ontario Inc. as guarantors (the "**Forbearance Agreement**");

3. approving the post-filing advances, including monies advanced in excess of the availability (hereafter, "**Overadvances**") under a Loan Agreement between the Debtor and Roynat dated February 19, 2010, as amended by an Amendment to Loan Agreement dated June

29, 2010, as further amended by a Second Amendment to Loan Agreement dated April 6, 2011 (collectively, the "**Loan Agreement**");

4. approving a charge in favour of Roynat to secure payment of the money advanced by Roynat post filing;

5. approving the Administration Charge (as defined below);

6. approving self-liquidation by the Debtor of the stores set out in Exhibit I to the Johnson Affidavit; and

7. approving a key employee retention and incentive plan,

was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Debtor, including the Affidavit of Chris Johnson sworn July 5, 2011 (the "**Johnson Affidavit**"), and the exhibits thereto, First Report of A. Farber & Partners Inc, in its capacity as the Proposal Trustee of the Debtor, and on hearing the submissions of counsel for the Proposal Trustee, the Debtor, Roynat and certain landlords, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Lynn Lee sworn July 6, 2011, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the notice of motion and the motion record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

FORBEARANCE AGREEMENT

2. **THIS COURT ORDERS** that the Forbearance Agreement be and is hereby approved, and that, in addition to advances in accordance with availability under the Loan Agreement, the Debtor shall be at liberty and is hereby authorized and empowered to borrow, repay and re-borrow monies from Roynat after June 27, 2011, including Overadvances, in order to finance the Debtor's day-to-day operating expenses substantially in accordance with the cash flow budget attached ~~hereto~~ as ~~**Schedule "A"**~~ Exhibit F to the Johnson Affidavit all on the terms and subject to the conditions set forth in the Forbearance Agreement, the Loan Agreement and a blocked account agreement between the Debtor, Roynat and Bank of Montreal dated February 19, 2010 (the "**Blocked Account Agreement**"), or such other terms and conditions as Roynat shall agree.

3. **THIS COURT ORDERS** that the Debtor is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to Roynat under and pursuant to the Loan Agreement and in accordance with the Blocked Account Agreement when the same become due and are to be performed, notwithstanding any other provision of this Order, provided that Roynat shall reimburse the Debtor any monies received by Roynat which it may not have been entitled to pursuant to any liens, charges, security interests or other claims having priority over Royant's security.

DIP LOAN

4. **THIS COURT ORDERS** that Roynat shall be entitled to the benefit of and is hereby granted a charge (the "**Roynat Borrowings Charge**") on of all of the assets, undertakings and properties of the Debtor (the "**Property**"), as security for all post filing advances, including Overadvances, together with interest and charges thereon, and the forbearance fee provided for

in the Forbearance Agreement, and that the Roynat Borrowings Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subject to the charges set out in subsections 14.06(7), 81.4(4) and 81.6(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and paragraph 8 below.

5. **THIS COURT ORDERS** that the filing, registration or perfection of the Roynat Borrowings Charge shall not be required, and that the Roynat Borrowings Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Roynat Borrowings Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

6. **THIS COURT ORDERS** that upon the occurrence of an event of default under the Forbearance Agreement, Roynat, upon prior approval of this Court on two (2) business days notice to the Debtor, the Proposal Trustee and the service list, may exercise any and all of its rights and remedies against the Debtor or the Property under or pursuant to the Loan Agreement and such rights and remedies shall be enforceable against the Proposal Trustee, any trustee in bankruptcy, receiver or receiver and manager of the Debtor or the Property, but subject to the charges created by this Order.

ADMINISTRATION CHARGE

7. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee, RSM Richter Inc. in its capacity as financial advisor to the Debtor and counsel to the Debtor, shall be paid their reasonable fees and disbursements in each case at their standard rates and charges, and that such parties and their counsel shall be and hereby entitled to a charge (the

"**Administration Charge**") on the Property of the Debtor as security for such fees and disbursements both before and after the making of this Order in respect of these proceedings and that the Administration Charge shall form a charge on such Property with the priority provided for in this Order, but subject to subsections 14.06(7), 81.4(4) and 81.6(2) of the BIA and also subject to paragraph 8 below.

PRIORITY OF COURT ORDERED CHARGES

8. **THIS COURT ORDERS** that the priority of the charges granted in this Order shall be as follows:

(a) firstly, the Roynat Borrowings Charge to the extent of any unpaid Overadvances;

(b) secondly, the Administration Charge to a maximum of $400,000;

(c) thirdly, any other indebtedness of the Debtor to Roynat secured by the Roynat Borrowings Charge or by a valid and perfected security interest in favour of Roynat; and

(d) fourthly, the balance of any indebtedness under the Administration Charge.

LIQUIDATION

9. **THIS COURT ORDERS** that the Debtor is authorized to self-liquidate inventory and fixtures at the stores referenced as Exhibit I to the Johnson Affidavit.

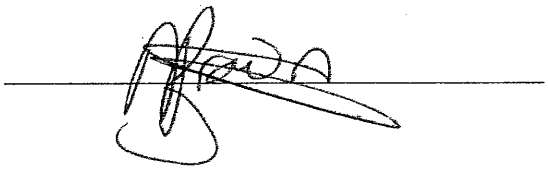
KEY EMPLOYEE RETENTION PLAN

10. **THIS COURT ORDERS** that the Debtor's key employee retention plan in the form attached as Exhibit I to the Johnson Affidavit (the "**KERP**") is hereby approved and the Debtor

is authorized and directed to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

AID AND ASSISTANCE

11. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Proposal Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Proposal Trustee and its agents in carrying out the terms of this Order.



IN THE MATTER OF THE PROPOSAL OF CLOTHING FOR MODERN TIMES LTD., A COMPANY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO, WITH A HEAD OFFICE IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No. 31-1513595

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

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Lawyers for Clothing for Modern Times Ltd.

TAB 16

Case Name:

Nortel Networks Corp. (Re)

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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (the "Applicants") application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2009] O.J. No. 1044

2009 CarswellOnt 1330

Court File Nos. 09-CL-7950 and 09-CL-7951

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 6, 2009.
Judgment: March 12, 2009.

(20 paras.)

Bankruptcy and insolvency law -- Motion by restructuring company for approval of plans designed to retain key employees during restructuring allowed -- Applicant obtained independent advice regarding the relevant industry standards -- Record established that the employees who were covered by the plans were key to the operations of the applicant and were sought after by competitors -- The Monitor reviewed the details of the applicant's proposed plans and believed that they provided reasonable compensation in the current situation.

Motion by Nortel for approval of certain payment plans designed to retain key employees during its restructuring. In designing the plans, Nortel obtained independent advice regarding the relevant

industry standards. The applicant argued that the commitment and retention of key employees was essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement. The motion was not opposed by any party or the Monitor.

HELD: Motion allowed. It was appropriate to approve the plans in question. The record established that the employees who were covered by the plans were key to the operations of Nortel and were sought after by competitors. The Monitor reviewed the details of the applicant's proposed plans and believed that they provided reasonable compensation in the current situation.

Counsel:

Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al.

J. Pasquariello, for Ernst & Young Inc., Monitor.

Jonathan Bell, for Informal Group of Nortel Networks Noteholders.

R. Moncur and M. Barrack, for Flextronics.

M. Starnino, for Pension Benefits Guarantee Fund.

Harvey Chaiton, for IBM.

D. Ullman, for Verizon Communications Inc.

Harvey Garman, for U.K. Protection Fund and Nortel Networks UK Pension Trust Limited.

Demetrios Yiokaris, for Certain Former Salaried Employees of Nortel Networks.

Alex MacFarlane, for the U.S. Unsecured Creditors' Committee.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- This motion was heard on March 6, 2009 and the requested relief was granted, with brief reasons to follow.

2 At the outset of the Nortel proceedings on January 14, 2009, Mr. Tay, on behalf of Nortel Networks Corporation (the "Applicants or Nortel"), indicated that the Applicants would be seeking approval of a Key Employee Incentive Plan ("KEIP") and a Key Employee Retention Plan ("KERP"). Such approval was sought on this motion, together with a request to approve the Calgary Retention Plan (the "Calgary Retention Plan") providing for retention bonus payments promised to

employees in connection with the closing of the Westwinds facility.

3 This motion was not opposed.

4 The record establishes that the commitment and retention of key employees will be essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement.

5 The KEIP applies to certain executives of the Senior Leadership Team ("SLTs") and the Executive Leadership Team ("ELTs") and the KERP applies to certain other key employees.

6 The Monitor reports that these plans have been developed to incent those employees who are:

(i) absolutely key to the success of the restructuring; and
(ii) to remain with the Applicants and U.S. Debtors through to the completion of the Canadian and U.S. proceedings

7 In designing the plans, Nortel obtained independent advice from Mercer (U.S.) Inc. ("Mercer") which included benchmarking total direct compensation levels against industry standards in comparing other key employee incentive plans approved by the courts in recent comparable North American restructurings. In addition, the Monitor reports that Nortel's financial advisor, Lezard Fréres & Co., as well as the Monitor were consulted by Nortel throughout the development process with respect to the plans and have provided Nortel with appropriate input.

8 A total of 972 employees are eligible for the plans. This represents approximately 5% of Nortel's global workforce (excluding employees of the EMEA Filed Entities and the joint venturers). The KEIP covers 92 participants, of which, 29 are employed by the Applicants. The potential dollar value to be paid out under the KEIP is approximately $23 million, of which $6.8 million is allocated to the Canadian Applicants. With respect to the KERP, this plan covers 880 participants, of which 294 are employed by the Canadian Applicants. The total potential dollar value to be paid out under the KERP is approximately $22 million, of which $6.2 million is allocated to the Canadian Applicants.

9 The awards under both the KEIP and the KERP will vest based on the achievement of three milestones, namely, achievement of North American objectives; achievement of certain parameters that will result in a leaner and more focussed organization; and court-approved confirmation of a plan of restructuring.

10 The Unsecured Creditors' Committee ("UCC") in the Chapter 11 proceedings has indicated that it supports the plans, although such support with respect to the KEIP for the SLTs is conditional upon the delivery to the UCC of Nortel's 2009 financial projections.

11 Counsel to the Applicants advised that the U.S. Bankruptcy Court has approved the KEIP (except as it relates to the SLTs) and the KERP.

12 In order to maintain consistency between Canada and the U.S., the Applicants' motion to approve the KEIP excludes the SLTs. The Monitor reports that the Applicants have advised that they intend to request approval of the KEIP for the SLTs at a future date.

13 With respect to the Calgary Retention Plan, a decision was made in July 2008 to close the Westwinds facility and transfer R & D and global operations to other facilities over a period of 12 months. In July 2008, Nortel developed the Calgary Retention Plan that provided for retention payments to be made to those Westwinds facility employees who Nortel determined were critical to the successful shutdown of the facility. The Applicants have indicated that the maximum cost of the Calgary Retention Plan is estimated to be approximately $727,000 to be paid to 45 employees at the time the employees have completed their portion of the project.

14 I am satisfied that the record establishes that the employees who are covered by the KEIP, the KERP and the Calgary Retention Plan are key to the operations of Nortel and are sought after by competitors, even given current market conditions.

15 The Monitor has reviewed the details of the Applicants proposed plans and Mercer's analysis and believes that the proposed plans provide reasonable compensation in the current situation.

16 Full details with respect to the plans are contained in the Confidential Report. I have reviewed this Report and agree with the submissions of both the Applicants and the Monitor that the Report contains sensitive commercial information that would be harmful to the Applicants if it were disclosed in the marketplace. In addition, the Confidential Report contains sensitive personal information relating to Nortel's employees, the disclosure of which, in my view, would be harmful.

17 The Applicants and the Monitor request that the Confidential Report be sealed, pending further order of the court. I am satisfied that the test for sealing the Confidential Report, as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 has been satisfied and it is appropriate to grant the sealing order.

18 I have been satisfied that it is appropriate to approve the plans in question.

19 An order shall therefore issue approving:

(i) the KEIP except as it relates to the Applicants' employees whose are designated members of the SLT;
(ii) the KERP; and
(iii) the Calgary Retention Plan

20 An order shall issue sealing the Confidential Report pending further order of this court.

G.B. MORAWETZ J.

TAB 17

Case Name:

Grant Forest Products Inc. (Re)

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 Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc. and Grant U.S. Holdings GP, Applicants

[2009] O.J. No. 3344

57 C.B.R. (5th) 128

2009 CarswellOnt 4699

179 A.C.W.S. (3d) 517

Court File No. CV-09-8247-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: August 6, 2009.
Judgment: August 11, 2009.

(25 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act matters -- Compromises and arrangements -- With unsecured creditors -- Claims -- Priority -- Motion by GE Canada Leasing Services Co. for an order deleting the Key Employee Retention Plan provisions in the June 25, 2009 initial order in these Companies' Creditors Arrangement Act proceedings, dismissed -- It was clear on the record that the KERP agreement and charge contained in the order were appropriate and ought to be maintained -- The Monitor and other parties supported the agreement and charge in order to retain Lynch, a seasoned executive, as his continued presence was important for the stability of the business and to enhance the effectiveness of the marketing process -- Companies' Creditors Arrangement Act.

Motion by GE Canada Leasing Services Company for an order deleting the Key Employee Retention Plan provisions in the initial order of June 25, 2009 in these Companies' Creditors Arrangement Act proceedings. A KERP agreement between Grant Forest Products Inc. and a Mr. Lynch was approved, and a KERP charge on all the property of the applicants as security for the amounts that could be owing to Lynch under the agreement was granted to Lynch, ranking after the administration charge and the investment offering advisory charge. GE argued that these KERP provisions had the effect of preferring the interest of Lynch over the interest of the other creditors, including itself. Under the terms of the KERP agreement, if at any time before Lynch turned 65 a termination event occurred, he was to be paid three times his then base salary.

HELD: Motion dismissed. It was clear on the basis of the record that the KERP agreement and charge contained in the initial order were appropriate and ought to be maintained. The Monitor supported the agreement and charge. Lynch was a very seasoned executive, and the Monitor expected he would consider other employment options if the agreement were not secured by the charge, and that his doing so could only distract from the marketing process that was underway with respect to the applicants' assets. Lynch's continuing role as a senior executive was important for the stability the business and to enhance the effectiveness of the marketing process. The concern of the Monitor and of Stephen, the Chief Restructuring Advisor, that Lynch might consider other employment opportunities if the KERP provisions were not kept in place was not an idle concern. A three-year severance payment was not so large on the face of it to be unreasonable, or unfair to the other stakeholders. The first lien security holders owed approximately $400 million also supported the KERP agreement and charge.

Statutes, Regulations and Rules Cited:

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

Counsel:

A. Duncan Grace for GE Canada Leasing Services Company.

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP.

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank.

Stuart Brotman for the Independent Directors.

ENDORSEMENT

1 F.J.C. NEWBOULD J.:-- KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

6 Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE

Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis -- Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from Re *Warehouse Drug Store Ltd.,* [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp.* [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a

role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in

> the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

20 The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon

termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *Re MEI Computer Technology Group Inc.* (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

F.J.C. NEWBOULD J.

TAB 18

Court File No. CV13-10034-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

THE HONOURABLE MR.	)	FRIDAY, THE 15th
JUSTICE NEWBOULD	)	DAY OF MARCH, 2013

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 STARFIELD RESOURCES INC. OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

~~INITIAL ORDER~~ AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by Starfield Resources Inc. (the "Debtor") pursuant to, *inter alia*, sections 64.1 and 64.2 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended (the "BIA"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Philip S. Martin sworn March 8, 2013 and the exhibits thereto, the First Report of PricewaterhouseCoopers Inc., in its capacity as Proposal Trustee (the "Proposal Trustee") dated March 8, 2013 and the appendices thereto (the "First Report"), and on hearing the submissions of counsel for the Debtor, the Proposal Trustee and the directors of the Debtor, no one appearing for any other party although duly served as appears from the affidavit of service of Tasha Boyd sworn March 8, 2013, and on being advised that there are no secured creditors of the Debtor:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF SALES PROCESS

2. **THIS COURT ORDERS** that the Sale Process, as set out and defined in the First Report, be and is hereby approved and that the Debtor and the Proposal Trustee are hereby authorized and empowered take such steps as are necessary or desirable to carry out the Sale Process, provided that any definitive agreement executed by the Debtor in respect of the sale of all or any part of the Property (as defined herein) shall require the further approval of this Court.

EXTENSION OF STAY PERIOD

3. **THIS COURT ORDERS** that, pursuant to subsection 50.4(9) of the BIA, the time within which a proposal must be filed with the Official Receiver under section 62(1) of the BIA be and is hereby extended to April 26, 2013.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

4. **THIS COURT ORDERS** that the Debtor shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Debtor from and after the filing of the Debtor's notice of intention under section 50.4 of the BIA, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

5. **THIS COURT ORDERS** that the directors and officers of the Debtor shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceed thereof (the "Property"), which charge shall not exceed an aggregate amount of $100,000, as security for the indemnity provided in paragraph 4 of this Order. The Directors' Charge shall have the priority set out in paragraphs 11 and 13 herein.

6. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Debtor's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any

directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 4 of this Order.

ADMINISTRATION CHARGE

7. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee, counsel to the Debtor and counsel to the directors of the Debtor shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Debtor as part of the costs of these proceedings. The Debtor is hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel for the Proposal Trustee, counsel for the Debtor and counsel for the directors of the Debtor as such accounts are rendered and, in addition, the Debtor is hereby authorized to pay to the Proposal Trustee, counsel to the Proposal Trustee, counsel to the Debtor and counsel to the directors of the Debtor, retainers in the amounts of $50,000, $15,000, $25,000, and $20,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time

8. **THIS COURT ORDERS** that the Proposal Trustee and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Proposal Trustee and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

9. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee, counsel to the Debtor and counsel to the directors of the Debtor shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $100,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Proposal Trustee and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 11 and 13 hereof.

EMPLOYEE RETENTION PAYMENTS

10. **THIS COURT ORDERS** that the Retention Payments, as described and defined in the First Report, are hereby approved and that the Debtor is hereby authorized and empowered to make the Retention Payments in accordance with the terms set out in the First Report.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

11. **THIS COURT ORDERS** that the priorities of the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – Administration Charge; and

Second – Directors' Charge.

12. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge and the Administration Charge (collectively, the "Charges") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

13. **THIS COURT ORDERS** that each of the Directors' Charge and the Administration Charge (each as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

14. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Debtor shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge or the Administration Charge, unless the Debtor also obtains the prior written consent of the Proposal Trustee, the beneficiaries of the Directors' Charge and the Administration Charge or further Order of this Court.

15. **THIS COURT ORDERS** that the Directors' Charge and the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made (expressly or impliedly) herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) any assignment for the general benefit of creditors made or deemed to have been made pursuant to

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

(a) neither the creation of the Charges nor the payment of the Retention Payments shall create or be deemed to constitute a breach by the Debtor of any Agreement to which it is a party;

(b) none of the Key Employees (as defined in the First Report) or the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Debtor paying the Retention Payments, the creation of the Charges, or the execution, delivery or performance of any related documents; and

(c) the payments made by the Debtor pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

16. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Debtor's interest in such real property leases.

SERVICE AND NOTICE

17. **THIS COURT ORDERS** that the Debtor and the Proposal Trustee be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

18. **THIS COURT ORDERS** that the Debtor, the Proposal Trustee, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Proposal Trustee may post a copy of any or all such materials on its website at www.pwc.com/car-starfield.

GENERAL

19. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Debtor, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtor and to the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding, or to assist the Debtor and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

20. **THIS COURT ORDERS** that each of the Debtor and the Proposal Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, including the enforcement of any Charge established hereby.

21. **THIS COURT ORDERS** that any interested party (including the Debtor and the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
MAR 15 2013

Court File No. CV13-10034-00CL

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 STARFIELD RESOURCES INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced in Toronto

ORDER

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Solicitors for the Applicant, Starfield Resources Inc.

TAB 19

Court File No. 32-1896275

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE Mr.	)	WEDNESDAY, THE 6th
JUSTICE PENNY	)	DAY OF AUGUST, 2014
	)	

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

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF XS CARGO LIMITED PARTNERSHIP

ORDER

THIS MOTION, made by XS Cargo Limited Partnership ("**XS LP**"), pursuant to, *inter alia*, sections 64.1, 64.2 and 183 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Duncan Reith sworn August 1, 2014 and the exhibits thereto (the "**Reith Affidavit**"), and on hearing the submissions of counsel for XS LP and XS Cargo GP Inc. ("**XS GP**, together with XS LP, "**XS Cargo**"), counsel for the Canadian Imperial Bank of Commerce ("**CIBC**") and of PricewaterhouseCoopers Inc., in its capacity as trustee to the Notices of Intention to Make a Proposal (collectively, the "**NOIs**") of each of XS LP and XS GP (the "**Trustee**"), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

ADMINISTRATIVE CONSOLIDATION

2. **THIS COURT ORDERS** that the proposal proceedings of XS LP (estate number: 32-1896275) and XS GP (estate number 32-1896278) (collectively, the "**Proposal Proceedings**") are hereby administratively consolidated and the Proposal Proceedings are hereby authorized and directed to continue under the following joint title of proceedings:

Estate Number: 32-1896275
Court File Number: 32-1896275

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF XS CARGO LIMITED PARTNERSHIP

Estate Number: 32-1896278
Court File Number: 32-1896278

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF XS CARGO GP INC.

3. **THIS COURT ORDERS** that all further materials in the Proposal Proceedings shall be filed with the Commercial List Office only in the XS LP estate and court file, estate number 32-1896275 and court file number 32-1896275.

APPROVAL OF SISP

4. **THIS COURT ORDERS** that the sale, refinancing and investment solicitation process in respect of XS Cargo's assets (the "**SISP**"), as set out in the Reith Affidavit, be and is hereby

approved and that the Trustee is hereby authorized and empowered to take such steps as are necessary or desirable to carry out the SISP, provided that any definitive agreement to be executed by XS Cargo in respect of the sale of all or part of the Property (as defined below) shall require further approval of this Court.

ACCOMMODATION AGREEMENT

5. **THIS COURT ORDERS** that the Accommodation Agreement (Exhibit B to the Reith Affidavit) (the "**Accommodation Agreement**"), is hereby approved, the execution thereof is hereby ratified and that XS Cargo is hereby authorized and empowered to perform its obligation thereunder.

CASH MANAGEMENT

6. **THIS COURT ORDERS** that all cash management and banking arrangements presently in existence between XS LP and CIBC shall be maintained during these proceedings.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

7. **THIS COURT ORDERS** that XS Cargo shall indemnify its directors and officers (collectively, the "**D&Os**") against obligations and liabilities that they may incur as directors or officers of XS Cargo after the filing of the NOIs, except to the extent that, with respect to any of the D&Os, the obligation or liability was incurred as a result of the such D&O's gross negligence or wilful misconduct.

8. **THIS COURT ORDERS** that the D&Os of XS Cargo shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of XS Cargo's current and future

assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceed thereof (the "**Property**"), which charge shall not exceed an aggregate amount of $1,571,000, as security for all claims relating to any obligations or liabilities the D&Os may incur after the filing of the NOIs in relation to their respective capacities as directors or officers for: (a) goods and services tax and all other amounts payable under Part IX the *Excise Tax Act* (Canada) (the "**ETA**") or any similar legislation in any other jurisdiction of Canada, including the Quebec sales tax imposed pursuant to an *Act Respecting the Québec Sales Tax* and any amount payable as harmonized sales tax in any applicable province under the ETA, (b) all other provincial taxes payable under any provincial jurisdiction of Canada, (c) wages and vacation pay not already covered by Section 81.3 of the BIA, and (d) for severance obligations for XS LP's current employees in the Province of Saskatchewan up to a maximum of $41,397, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, willful misconduct or gross or intentional fault. The D&O Charge shall have the priority set out in paragraphs 15 and 17 herein.

9. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the D&Os shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 8 of this Order.

ADMINISTRATION CHARGE

10. **THIS COURT ORDERS** that the Trustee, counsel to the Trustee and counsel to XS Cargo shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by XS Cargo as part of the costs of these proceedings. XS Cargo is hereby authorized and directed to pay the accounts of the Trustee, counsel for the Trustee and counsel for XS Cargo as such accounts are rendered.

11. **THIS COURT ORDERS** that the Trustee and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Trustee and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

12. **THIS COURT ORDERS** that the Trustee, counsel to the Trustee and counsel to XS Cargo shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed $260,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Trustee and such counsels, after the filing of the NOIs in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 15 and 17 herein.

KERP CHARGE

13. **THIS COURT ORDERS** that the Key Employee Retention Plans (the "**KERP**") filed with the Court are hereby ratified and that XS Cargo is hereby authorized and empowered to perform its obligation thereunder and to make the payments in accordance with the terms set out in said KERP.

14. **THIS COURT ORDERS** that the employees eligible under the KERP shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property, which charge shall not exceed $380,000, as security for payment of the obligations set forth under the KERP. The KERP Charge shall have the priority set out in paragraphs 15 and 17 herein.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

15. **THIS COURT ORDERS** that the priorities of the D&O Charge, the Administration Charge, the KERP Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $260,000);

Second – D&O Charge (to the maximum amount of $1,571,000); and

Third – KERP Charge (to the maximum amount of $380,000).

16. **THIS COURT ORDERS** that the filing, registration or perfection of the D&O Charge, the Administration Charge or the KERP Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

17. **THIS COURT ORDERS** that the Charges shall constitute a charge on the Property and such Charges shall rank ahead in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, except for the Encumbrances in favour of those

that have not been served with notice of this application. XS Cargo and the beneficiaries of the Charges shall be entitled, if necessary, to seek priority ahead of any Encumbrances in favour of any person that have not been served with notice of this application and that are likely to be affected by such priority.

18. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, XS Cargo shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless XS Cargo also obtains the prior written consent of the Trustee, the beneficiaries of the Charges, or further Order of this Court.

19. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency (expressly or impliedly) made herein; (b) any motion(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such motion(s); (c) any assignments for the general benefit of creditors made or deemed to have been made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds XS Cargo, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the payments made in accordance with the KERP shall create or be deemed to constitute a breach by XS Cargo of any Agreement to which it is a party;

(b) none of the Key Employees (as defined in the Motion) or Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from XS Cargo making payments in accordance with the KERP, the creation of the Charges, or the execution, delivery or performance of any related documents; and

(c) the payments made by XS Cargo pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

20. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in XS Cargo's interest in such real property leases.

CONFIDENTIALITY

21. **THIS COURT ORDERS** that XS Cargo' financial statements (Exhibit C to the Reith Affidavit) and the unredacted versions of the KERP filed with the Court shall be kept confidential and under seal with the Court until, as the case may be, further order of this Court.

SERVICE AND NOTICE

22. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'www.pwc.com/car-xscargo'.

23. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to XS Cargo's creditors or other interested parties at their respective addresses as last shown on the records of XS Cargo and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

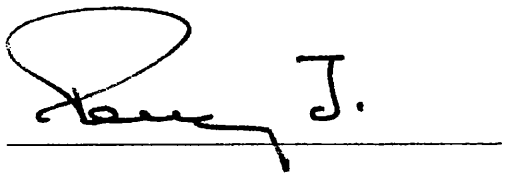
24. **THIS COURT ORDERS** that the Trustee shall not take possession of the Property and shall take no part whatsoever in management or supervision of the management of the business of XS Cargo and shall not, in carrying out the SISP or otherwise fulfilling its obligations hereunder or under the BIA, be deemed to have taken possession or control of the Business or Property, or any part thereof.

25. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Trustee under the BIA or as an officer of this Court, the Trustee shall incur no liability or obligation as a result of its appointment or the carrying out of the SISP or the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Trustee by the BIA or any applicable legislation.

26. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist XS Cargo, the Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to XS Cargo and to the Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Trustee in any foreign proceeding, or to assist XS Cargo and the Trustee and their respective agents in carrying out the terms of this Order.

27. **THIS COURT ORDERS** that each of XS Cargo and the Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, whereby located, for the recognition of this Order and for assistance in carrying out the terms of this Order, including the enforcement of any Charge established hereby.

28. **THIS COURT ORDERS** that any interested party (including XS Cargo and the Trustee) may apply to this court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any as this court may order.



IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3

MOTION OF XS CARGO LIMITED PARTNERSHIP UNDER SECTION 64.1, 64.2 and 183 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3

Court File No: 32-1896275

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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TAB 20

Case Name:

Sierra Club of Canada v. Canada (Minister of Finance)

Atomic Energy of Canada Limited, appellant;
v.
Sierra Club of Canada, respondent, and
The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, respondents.

[2002] S.C.J. No. 42

[2002] A.C.S. no 42

2002 SCC 41

2002 CSC 41

[2002] 2 S.C.R. 522

[2002] 2 R.C.S. 522

211 D.L.R. (4th) 193

287 N.R. 203

J.E. 2002-803

40 Admin. L.R. (3d) 1

44 C.E.L.R. (N.S.) 161

20 C.P.C. (5th) 1

18 C.P.R. (4th) 1

93 C.R.R. (2d) 219

113 A.C.W.S. (3d) 36

2002 CarswellNat 822

2002 CarswellNat 823

File No.: 28020.

Supreme Court of Canada

2001: November 6 / 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (92 paras.)

Practice -- Federal Court of Canada -- Filing of confidential material -- Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors -- Crown corporation requesting confidentiality order in respect of certain documents -- Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order -- Whether confidentiality order should be granted -- Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the Canadian Environmental Assessment Act ("CEAA"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, inter alia, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by

AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with Charter principles because a confidentiality order will have a negative effect on the s. 2(b) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the CEAA, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a Charter right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, [2001] 3 S.C.R. 442, 2001 SCC 76; M. (A.) v. Ryan, [1997] 1 S.C.R. 157; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Keegstra, [1990] 3 S.C.R. 697; referred to: AB Hassle v. Canada (Minister of National Health and Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; Ethyl Canada Inc. v. Canada (Attorney General) (1998), 17 C.P.C. (4th) 278; R. v. Oakes, [1986] 1 S.C.R. 103; R.

v. O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77; F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35; Eli Lilly and Co. v. Novopharm Ltd. (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(b), 8, 54, 54(2)(b).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and Peter Chapin, for the appellant.
Timothy J. Howard and Franklin S. Gertler, for the respondent Sierra Club of Canada.
Graham Garton, Q.C., and J. Sanderson Graham, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

IACOBUCCI J.:--

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and accordingly would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Limited ("AECL") is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the Canadian Environmental Assessment Act, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Mr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the Federal Court Rules, 1998, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the

supplementary affidavit of Dr. Pang which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order, otherwise it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Mr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 Federal Court Rules, 1998, SOR/98-106

> 151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments Below

A. Federal Court, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought interlocutory motions which had

contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and

thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under Rule 151 of the Federal Court Rules, 1998, and Sierra Club cross-appealed the ruling under Rule 312.

22 With respect to Rule 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b) which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under Rule 312.

23 On the issue of the confidentiality order, Evans J.A. considered Rule 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in AB Hassle v. Canada (Minister of National Health and Welfare), [2000] 3 F.C. 360 (C.A.), where the court took into consideration the relatively small public interest at stake, and Ethyl Canada Inc. v. Canada (Attorney General) (1998),

17 C.P.C. (4th) 278 (Ont. Ct. (Gen. Div.)), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence, or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale

underlying the commitment to the principle of open justice, referring to Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326. There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets", this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a prima facie right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site plans for

nuclear installations were not, for example, posted on a Web site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35 A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the Federal Court Rules, 1998?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835. Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the

circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the Dagenais framework utilizes overarching Canadian Charter of Rights and Freedoms principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under Rule 151 should echo the underlying principles laid out in Dagenais, although it must be tailored to the specific rights and interests engaged in this case.

39 Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the Charter. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-Charter common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from R. v. Oakes, [1986] 1 S.C.R. 103. At p. 878 of Dagenais, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In New Brunswick, supra, this Court modified the Dagenais test in the context of the related issue of how the discretionary power under s. 486(1) of the Criminal Code, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": New Brunswick, at para. 33; however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the Charter. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the Criminal Code, closely mirrors the Dagenais

common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
(b) the judge must consider whether the order is limited as much as possible; and
(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in R. v. Mentuck, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case R. v. O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77. In Mentuck, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the Charter. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while Dagenais dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both Dagenais and New Brunswick was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the Charter than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the Charter and the Oakes test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in Dagenais, but broadened the Dagenais test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper

administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve Charter rights, and that the ability to invoke the Charter is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflec[t] the substance of the Oakes test", we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the Dagenais framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 Mentuck is illustrative of the flexibility of the Dagenais approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with Charter principles, in my view, the Dagenais model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in Dagenais, New Brunswick and Mentuck, granting the confidentiality order will have a negative effect on the Charter right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with Charter principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a Charter right, the right to a fair trial generally can be viewed as a fundamental principle of justice: M. (A.) v. Ryan, [1997] 1 S.C.R. 157, at para. 84, per L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the Charter: New Brunswick, supra, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: New Brunswick, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of Dagenais and subsequent cases discussed above, the test for whether a confidentiality order ought to be

granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in Mentuck, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in Eli Lilly and Co. v. Novopharm Ltd. (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: AB Hassle v. Canada (Minister of National Health and Welfare) (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the AB Hassle test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (at para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially

sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal, in the sense that, at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to

argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a Charter right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: Ryan, supra, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected Charter right, the proper administration of justice calls for a confidentiality order: Mentuck, supra, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) Charter right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: New Brunswick, supra, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 976; R. v. Keegstra, [1990] 3 S.C.R. 697, at pp. 762-64, per Dickson C.J. Charter jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the Charter: Keegstra, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to Charter principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: Edmonton Journal, supra, at pp. 1357-58, per Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be promoted by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If

the order is denied, then the most likely scenario is that the appellant will not submit the documents with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would in turn assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in Edmonton Journal, supra, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in Keegstra, supra, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the

core values, "we must guard carefully against judging expression according to its popularity".

86 Although the public interest in open access to the judicial review application as a whole is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in Edmonton Journal, supra, at pp. 1353-54:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the CEAA, or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential

and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under Rule 151 of the Federal Court Rules, 1998.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.
Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.
Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The

Deputy Attorney General of Canada, Ottawa.

TAB 21

Case Name:

Stelco Inc. (Re)

APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement with respect to Stelco Inc. ~~and the~~ other applicants listed in Schedule "A"

[2006] O.J. No. 275

17 C.B.R. (5th) 76

145 A.C.W.S. (3d) 230

2006 CarswellOnt 394

Court File No. 04-CL-5306

Ontario Superior Court of Justice
Commercial List

J.M. Farley J.

January 17, 2006.

(8 paras.)

Civil evidence -- Documentary evidence -- Publication bans and confidentiality orders -- Motion for permanent sealing order of confidential information allowed -- There was minimal redaction of material related to Stelco's revenues, costs, selling prices and profitability -- Disclosure of such information to competitors, suppliers and customers could be injurious to Stelco's business activities, and benefits of confidentiality order with respect to elements redacted outweighed deleterious effects of confidentiality order -- Accordingly there was to be a permanent sealing order -- Three lines of an affidavit that were inadvertently not blacked out were to be treated as having been blacked out ab initio.

Civil procedure -- Discovery -- Production and inspection of documents -- Confidentiality orders -- Motion for permanent sealing order of confidential information allowed -- There was minimal redaction of material related to Stelco's revenues, costs, selling prices and profitability -- Disclosure of such information to competitors, suppliers and customers could be injurious to Stelco's business activities, and benefits of confidentiality order with respect to elements redacted outweighed deleterious effects of confidentiality order -- Accordingly there was to be a permanent sealing order -- Three lines of an affidavit that were inadvertently not blacked out were to be treated as having been blacked out ab initio.

Counsel:

Geoff R. Hall, for the Stelco Applicants

Kyla Mahar, for the Monitor

Peter Jacobsen, for Globe & Mail

Kevin Zych, for the 8% and 10.4% Stelco Bondholders

Peter Jervis and Karen Kiang, for the Equity Holders

Sharon White, for USW Local 1005

ENDORSEMENT

(Motion by Applications for permanent sealing order
of confidential information)

1 J.M. FARLEY J. (endorsement):-- This Endorsement deals with two of the three issues, the third will be forthcoming.

2 I am satisfied that there has been minimal redaction of material related to Stelco's revenues, costs, selling prices and profitability (directly or implied) which would be ordinarily kept confidential as disclosure of such information to competitors, suppliers and customers would be injurious to Stelco's business activities. Reasonable alternative measures would not prevent the risk to Stelco. The salutory effects of a confidentiality order as to the elements redacted, including the ability of the participants in this CCAA proceeding to deal reasonably pursuant to Non-Disclosure Agreements with submissions related to such confidential financial information, outweigh the deleterious effects of such confidentiality order.

3 I am satisfied that there has been a minimal effect negative to the concept of an open court. The Globe was not opposed to this redaction effort.

4 It appears to me that the principles and tests involved in Sierra Club of Canada v. Canada (Minister of Finance) (2002), 211 D.L.R. (4th) 193 (S.C.C.) has been met. See also Re Air Canada (S.C.J.) released September 26, 2004.

5 There is to be a permanent sealing order subject to any interested party asking for a review of same upon notice to Stelco.

6 The second issue relates to the inadvertence as to not blanking/blacking out three lines in an affidavit of one Fabrice Taylor. The first part of the paragraph, all on the preceding page, had been blacked out. Upon reasonable reflection, it would be obvious to a person receiving same that the part not so blacked out did not make any sense on any stand-alone basis. Unfortunately, the incompletely blacked-out affidavit was flipped over to a reporter at the Globe who was not permitted to review unredacted copy (Stelco and the Globe had worked out a very reasonable and common sense arrangement whereby unredacted copy could be reviewed by counsel for the Globe and a Globe employee who was restricted from using same or disclosing such to others). The flip-over by counsel for the Globe was "innocent" as he had not reviewed the material before doing the flip and he had not expected that there would have been a problem with the blacking out.

7 The reporter has quite responsibly agreed to treat the three lines not previously blacked-out as having been blacked out ab initio.

8 The remaining third issue is whether the portion of the affidavit and exhibits which were blacked out (including the subject 3 lines) and as agreed by Stelco and the equity holders' counsel were to be blacked-out qualify for such redaction. I will deal with that in a further endorsement.

J.M. FARLEY J.

cp/e/qw/qljxh

TAB 22

Case Name:

Hollinger Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement with Respect to Hollinger Inc., 4322525 Canada Inc. and Sugra Limited, Applicants

[2011] O.J. No. 3977

2011 ONCA 579

283 O.A.C. 264

107 O.R. (3d) 1

84 C.B.R. (5th) 79

341 D.L.R. (4th) 182

12 C.P.C. (7th) 29

2011 CarswellOnt 9272

207 A.C.W.S. (3d) 234

Docket: C53706

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.J. Sharpe and A. Karakatsanis JJ.A.

Heard: August 24, 2011.
Judgment: September 8, 2011.

(32 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents --

Confidentiality orders -- Privileged documents -- Documents prepared for the purpose of settlement -- Appeal by Black and Conrad Black Corporation from sealing order redacting amounts to be paid by law firm and accounting firm to Hollinger pursuant to proposed settlement agreements dismissed -- After Hollinger, law firm and accounting firm entered into settlement agreement, amounts agreed to be paid were redacted and agreements were distributed to other parties and sealing order was obtained -- Sealing order protected litigation settlement privilege and fostered public interest in settling disputes -- Litigation settlement privilege applied as Hollinger, law firm and accounting firm had legally protected interest in settlement and salutary effects of sealing order outweighed deleterious effects.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Discovery -- Appeal by Black and Conrad Black Corporation from sealing order redacting amounts to be paid by law firm and accounting firm to Hollinger pursuant to proposed settlement agreements dismissed -- After Hollinger, law firm and accounting firm entered into settlement agreement, amounts agreed to be paid were redacted and agreements were distributed to other parties and sealing order was obtained -- Sealing order protected litigation settlement privilege and fostered public interest in settling disputes -- Litigation settlement privilege applied as Hollinger, law firm and accounting firm had legally protected interest in settlement and salutary effects of sealing order outweighed deleterious effects.

Appeal by Black and Conrad Black Corporation from a sealing order redacting the amounts to be paid by a law firm and an accounting firm to Hollinger Inc pursuant to two proposed settlement agreements. In 2007, Hollinger and two related corporations were granted Companies' Creditor Arrangement Act ("CCAA") protection. Black made a claim against Hollinger in the CCAA proceedings. In addition, he claimed for contribution and indemnity against the law firm and the accounting firm in relation to several claims asserted against him by Hollinger. Hollinger, the law firm and the accounting firm entered into settlement agreements that required court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid redacted. Hollinger, the law firm and the accounting firm brought a motion for a sealing order. The motions judge granted the sealing order, finding that litigation settlement privilege applied and that a sealing order was in the public interest. The sealing order provided for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment. In addition, the sealing order provided that any non-settling party could access the redacted information to use in the settlement approval process upon signing a confidentiality agreement. Black and his corporation sought to appeal the sealing order on the basis that the evidence was insufficient to justify a sealing order and departure from the open court principle, that the requirement that a party seeking disclosure of the settlement amounts sign a confidentiality agreement imposed an undue burden, and that the parties to the agreements waived privilege.

HELD: Appeal dismissed. The motions judge made no error in granting the sealing order as it protected litigation settlement privilege and fostered public interest in settling disputes. Litigation

settlement privilege applied as Hollinger, the law firm and the accounting firm had a legally protected interest in the proposed settlement. It was open to the motions judge to find that the salutary effects of the sealing order outweighed its deleterious effects on the right to freedom of expression and the public interest in open and accessible court proceedings. Requiring parties who sought disclosure of the redacted information to sign a confidentiality agreement was not an undue burden as sanctions would only be imposed if the party used the information for an impermissible reason. Finally, as the terms of the order were imposed by the court, abiding by those terms did not result in a waiver of privilege.

Statutes, Regulations and Rules Cited:

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

Appeal From:

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice dated February 5, 2011.

Counsel:

Earl A. Cherniak Q.C., Kenneth D. Kraft and Jason Squire, for Conrad Black and Conrad Black Capital Corporation.

Paul D. Guy and Faren Bogach, for Daniel Colson.

Michael E. Barrack and Megan Keenberg, for Hollinger Inc.

John Lorn McDougall, Q.C., Norman J. Emblem and Matthew Fleming, for KPMG LLP.

Ronald Foerster, for Torys LLP.

David C. Moore, for Catalyst Fund General Partner I Inc.

George Benchetrit, for the Indenture Trustee.

Lawrence Thacker for Ernst & Young Inc., Monitor.

The following judgment was delivered by

1 THE COURT:-- Conrad Black and Conrad Black Capital Corporation ("Black") appeal a

sealing order redacting the amounts to be paid by the respondents, Torys LLP and KPMG LLP Canada, to the respondent, Hollinger Inc., pursuant to two proposed settlement agreements. The settlement agreements were made in the context of a *Companies' Creditor Arrangement Act* ("CCAA") proceeding and are subject to court approval. The sealing order provides for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment in the Torys agreement. The sealing order further provides that any non-settling party may have access to the redacted information upon signing a confidentiality agreement only to use the redacted information in the settlement approval proceeding. The sealing order terminates upon final approval of the settlements.

2 For the following reasons, we reject Black's argument that the sealing order constitutes a serious and unjustified infringement of the open court principle and dismiss the appeal.

FACTS

3 Hollinger and two related corporations have been granted CCAA protection pursuant to a Commercial List order made in August 2007. The order appoints a Litigation Trustee to deal with the assets available to Hollinger's creditors which consist almost entirely of Hollinger's claims against former officers, directors and advisors, including Black, Torys and KPMG.

4 Black asserts a claim against Hollinger in the CCAA proceedings, as well as claims for contribution and indemnity against Torys and KPMG in relation to several claims asserted against him by Hollinger.

5 Settlement discussions and mediations between Hollinger, the Litigation Trustee, Torys and KPMG led to two settlement agreements that require court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid by way of settlement redacted. The respondents moved before the judge dealing with the CCAA proceedings for the sealing order that is the subject of this appeal. The crucial paragraph of the affidavit filed by Hollinger in support of that motion reads as follows:

> 21. In my view, disclosure of the commercially sensitive terms contained in the Settlements and the strategy of the Litigation Trustee and other confidential details relating to Litigation Assets set out in the Litigation Trustee's Report would undermine the Litigation Trustee's initiatives with respect to the remaining Litigation Assets including, without limitation, any possible settlements the Litigation Trustee may reach in respect of any of the remaining Litigation Assets and litigation with KPMG or Torys, in the event that the settlements are not approved.

6 The Litigation Trustee's Report has since been disclosed. There was no cross-examination on that affidavit.

7 Although the terms of the settlements are not directly at issue on this appeal, Black relies on the fact that both settlement agreements provide for a "bar order" that would prevent anyone sued by Hollinger; any shareholder, officer, director, or creditor of Hollinger; and any person who could claim rights or interest through Hollinger, from making any claim against Torys or KPMG in relation to the advice given by those parties to Hollinger. Black points out that the bar orders would extinguish his indemnity claims against Torys and KPMG. On the other hand, the respondents submit that the bar orders are economically neutral for Black and other non-settling defendants. This is because Hollinger waives its right to claim joint and several liability with respect to shared liability between settling and non-settling defendants if the non-settling defendant can establish a right to contribution and indemnity from a settling defendant.

DECISION OF THE MOTION JUDGE

8 The motion judge found that litigation settlement privilege applied to the terms of the two settlement agreements. He concluded that the onus to establish that a sealing order protecting the confidentiality of the amounts of the settlements was in the public interest had been satisfied and that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance),* [2002] 2 S.C.R. 522 ("*Sierra Club*") had been met.

9 On the motion judge's suggestion, the sealing order included a "comeback" clause, permitting any party affected by the settlement motion to request relief from the sealing order if it operated in a manner that would prevent that party from making full submissions as to the approval of the settlement.

ISSUES

10 Black submits:

1. That the evidence was insufficient to justify a sealing order and departure from the open court principle;
2. That the requirement that a party seeking disclosure of the settlement amounts must sign a confidentiality agreement imposes an undue burden; and
3. That the respondents have waived privilege.

ANALYSIS

1. Sufficiency of the evidence to justify a sealing order.

11 It is common ground that the motion judge applied the correct legal test, namely that laid down by the Supreme Court of Canada in *Sierra Club* at para. 53:

> A confidentiality order ... should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

12 Before us, there were two significant concessions.

13 First, the respondents indicated that they place no reliance upon the portions of the Litigation Trustee's affidavit referring to the "commercial sensitivity" of the redacted terms of the settlement. They rely solely upon the evidence that public disclosure of the settlement amounts before the agreements had been approved "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved."

14 Second, Black conceded that his attack on the terms of the sealing order rests on the open court principle and that he does not assert that the terms of the sealing order give rise to any procedural disadvantage.

15 The respondents assert that their interest in maintaining the confidentiality of the amounts of the proposed settlements falls squarely within litigation settlement privilege. Simply put, the respondents say that should the settlement agreements not be approved, they would be unfairly prejudiced in the litigation that would follow if they had to disclose publicly the amounts they were prepared to pay or accept in settlement of the claims asserted by the Litigation Trustee.

16 It is well established that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where;

1) there is a litigious dispute;
2) the communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed;" and
3) the purpose of the communication is to attempt to effect a settlement: see Bryant, Lederman & Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at p. 1033, s. 14.322); *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83 (Div. Ct.).

17 We agree with the motion judge that those conditions are met here. We see no error in the motion judge's conclusion that "[l]itigation settlement privilege ... applies in this case at least until the Court either accepts or rejects the settlement". In the context of this case, Hollinger, Torys and

KPMG have a legally protected interest in being afforded a zone of confidentiality to shelter the most sensitive aspect of their proposed settlement.

18 The sealing order protects litigation settlement privilege and thereby fosters the strong public interest in the settlement of disputes and the avoidance of litigation. "This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system," (*Kelvin Energy Ltd. v. Lee,* [1992] 3 S.C.R. 235, at p. 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at p. 28 (emphasis added by the Supreme Court)).

19 The rationale for litigation settlement privilege is that unless parties have an assurance that their efforts to negotiate a resolution will not be used against them in litigation should they fail to resolve their dispute, they will be reluctant to engage in the settlement process in the first place. A legal rule that created a disincentive of that nature would run contrary to the public policy favouring settlements.

20 We agree with the respondents that litigation settlement privilege constitutes a social value of super-ordinate importance capable of justifying a sealing order that limits the open court principle.

21 In our view, it was open to the motion judge to conclude under the *Sierra* test that the salutary effects of the sealing order outweighed its deleterious effects on the important right to free expression and the public interest in open and accessible court proceedings.

22 While the evidence led in support of the sealing order is limited to a bald statement that full disclosure of the terms of the settlement agreement "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved," in light of the strong public policy favouring settlements and the recognized privilege that protects the confidentiality of settlement discussions, the motion judge did not err in concluding that the evidence was sufficient to satisfy the onus under the *Sierra* test.

23 We agree with the respondents that the motion judge's sealing order was a minimal intrusion on the open court principle and on the procedural rights of the non-settling parties. The sealing order protected only the amounts of the settlements and it gave the non-settling parties ready access to the amounts of the settlement upon signing a confidentiality agreement. The "come back" clause allowed any party to return to court for a reassessment of the need for the sealing order should the circumstances change.

24 We do not accept Black's submission that these are concluded agreements for which the litigation settlement privilege is spent. The settlement agreements at issue here have no legal effect until they are approved. In the context of this litigation and these settlement discussions, we are satisfied that just as the threat of disclosure of pre-resolution discussions would likely discourage parties from attempting to settle, so too would the threat of disclosure of their tentative settlement requiring court approval. We add, however, that our conclusion on the privileged nature of a

settlement requiring court approval is based on the facts and circumstances of this case, and we leave to another day the issue of whether the privilege always attaches to other settlements requiring court approval, for example, class action settlements or infant settlements, where different values and considerations may apply.

25 Nor do we agree with Black's argument that because the litigation settlement privilege would still prevent any party from introducing the terms of the settlement into evidence in any trial that might follow should the court not approve the settlements, the information can now be made available to the public at large. We know of no authority that limits the reach of litigation settlement privilege in this manner. Moreover, the argument that no harm could flow from full public disclosure appears to us to ignore the practical reality that allowing for full public disclosure of all terms of the settlement agreements prior to court approval would have a very perverse effect on the desired incentives to engage in settlement discussions in the context of high stakes, high profile litigation.

2. Did the confidentiality agreement impose an undue burden?

26 We see no merit in the submission that Black's right to obtain disclosure of the settlement amounts was unduly burdened by the term of the sealing order requiring him to sign a confidentiality agreement as a pre-condition to disclosure. This term of the sealing order protects the non-settling parties' procedural right to have full access to the terms of the settlement agreements while maintaining the protection of the litigation settlement privilege. It is only if Black uses the privileged information for some improper purpose that he would face the prospect of some sanction for breach. Contrary to the submission that that sanction would inevitably be "draconian," it would be a matter for the discretion of the court to decide an appropriate sanction in the circumstances and we see no reason to fear that the court would decide to impose a sanction that did not fit the circumstances of the case.

27 We add here that we do not consider the terms of the bar orders relevant to the issue of the sealing order. Neither the motion judge nor this court was asked to pass upon the appropriateness of the bar orders at this stage and as the sealing order allows Black to obtain full disclosure of the terms of the settlement, Black suffers no disadvantage if he chooses to challenge the settlement on the ground that the bar orders should not be approved.

3. Did the respondents waive privilege?

28 Black submits that by putting virtually all of the terms of the settlements on the public record and by disclosing the redacted portions of the settlement agreements to those non-settling parties who sign confidentiality agreements, the respondents have waived privilege.

29 We disagree. These terms were imposed by court order (albeit at the suggestion of the parties) and we fail to see how or why abiding by the terms of a court order should result in a finding that a party has waived privilege. Moreover, in our view, this argument is inconsistent with Black's

purported reliance on the open court principle as requiring disclosure of the settlement amounts. The terms of the order said to amount to a waiver of privilege were plainly motivated to ensure that the sealing order was minimally intrusive on the open court principle. To accept Black's submission that those terms of the order constitute waiver would be to require sealing orders to be more restrictive than necessary to protect the public interest in fostering settlements. Such a rule would be self-defeating and contrary to the public interest in open access to court proceedings.

4. Conclusion

30 We conclude that the sealing order strikes an appropriate balance between the public interest in the promotion of settlements and the public interest in the open court principle:

(i) the public interest in the promotion of settlements and the protection of settlement privileged information and communications is met by the sealing of the redacted portions of the settlement agreements from the public record; and

(ii) the public interest in the open court principle is met by the public disclosure of all but the redacted terms of the settlement agreements, and the time-limited nature of the sealing order, lasting only so long as the settlements remain contingent on court approval.

31 In addition, the sealing order strikes the appropriate balance between the competing private interests of the parties:

(i) the settling parties' interest in maintaining the confidentiality of their privileged information is met by the sealing of the redacted portions of the Settlement Agreements;

(ii) the interests of all non-settling defendants (including Black) are met by the approval of the confidentiality agreement provision affording them access to the redacted portions of the settlement agreements and thereby enabling them to respond meaningfully to the settlement approval motion.

DISPOSITION

32 The appeal is dismissed. In accordance with the agreement of counsel, the respondents Hollinger, Torys and KPMG are entitled to costs of $10,000 each, inclusive of disbursements and applicable taxes.

S.T. GOUDGE J.A.
R.J. SHARPE J.A.
A. KARAKATSANIS J.A.

TAB 23

2005 ANNREVINSOLV 1

Annual Review of Insolvency Law

Annual Review of Insolvency Law 2005 Editor: Janis P. Sarra

Daniel Dowdall and Jane O. Dietrich

1 — Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?

1 — Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?

Daniel R. Dowdall and Jane O. Dietrich *

I. — Introduction

Asset sales in Canadian insolvency proceedings have normally been accomplished through a tender-type process, as opposed to asset sales in U.S. insolvencies that involve auction, often preceded by the approval of a stalking-horse bid. [2] While stalking-horse bidding processes have been used in numerous cross-border situations in order to harmonize sale proceedings, in the recent *Stelco* [3] case the court authorized a stalking-horse procedure to serve as an initial bid and as a precursor to the usual tender-type procedure, thus squarely raising the issue of when stalking-horse bids may be appropriate in wholly intra-Canadian proceedings.

This article will describe both the U.S. auction process and the Canadian tender-type process as they function in an insolvency context. Although the benefits of tender as opposed to auction in obtaining the highest price can be much debated, in an insolvency context a question of equal importance arises involving the minimization of the potential for manipulation of the process. As such, we also discuss the issues related to manipulation of each process with a particular focus upon whether limiting the granting of approval of certain types of agreements to a stalking-horse basis can be an effective tool to prevent manipulation and achieve a higher overall value for all stakeholders.

As is explained below, in Canada, it is the authors' view that there is a growing concern with our tender-type process when the process is run by a debtor in possession. Until relatively recent times, asset sales in insolvencies were conducted by licensed trustees or receivers, and, as such, the integrity of the process was not a significant issue, given the role of the trustee or receiver as a court officer. However, in the last decade as more and more sales are being conducted in proceedings under the *Companies' Creditors Arrangement Act* [4] (CCAA) and are, therefore, if not controlled, at least shaped by the debtor itself, concerns about the integrity of the process are becoming more apparent. Although the court-appointed monitor oversees and reports to the court on the process, many critical decisions are made by the debtor, and, therefore, concerns that did not arise in receivership sales (i.e., the inclusion of management incentives or the shopping of bids by the debtor) are becoming of much greater concern. This should not be surprising. The name of the game in insolvency is control. To the extent that the debtor stays in control of the process, it should not be surprising that those who control the debtor will attempt to use their position to promote their agenda such that issues of fair process may surface, which did not arise when the process was under more neutral control.

Time constraints or potential manipulation will create situations where the court is presented with a "Hobson's Choice", in that it will be asked to approve an agreement despite the fact that there may be concerns about the adequacy of the canvassing of the market or as to potential manipulation of the process by a stakeholder. In such a case, the court's only option may be to approve the available arrangement, as otherwise operations may cease. Below, we suggest that the court should, in such circumstances, consider adopting a practice whereby whenever the court is in this type of situation and cannot be satisfied that a transaction itself or the process through which it has been reached is both fair and represents a complete canvas of the market, the court should consider limiting its approval of the arrangement to that of a stalking horse only, such that the debtor company remains open (and bound) to seek and accept higher or better bids. Wide adoption of such a practice would create incentives for all

parties to proposed transactions to ensure a fair and complete process prior to seeking court approval in order to avoid a more limited approval.

As well, approval of a bid on a stalking-horse basis can be used, as it purportedly was used in *Stelco*, where there is an urgent need to create stability within a time framework that is shorter than what is required for an adequate sales process. In such situations, one would expect to see break fees and other economic incentives (as discussed below) as the price of creating such stability. It is also suggested that this approach could apply not only to agreements of purchase and sale, but also to other agreements approved by the court in an insolvency proceeding, including the approval of DIP financing and liquidation and advisory agreements.

II. — The U.S. "Auction" Process

The defining feature of an auction is its open nature. All bidders are aware of the other bidders' bid terms and conditions. At its basic level, an auction requires that subsequent bidders exceed the terms of the previous bid. At the end of the auction, the highest bidder is successful, and other bidders have had the opportunity to make a definitive choice as to whether or not to win the bid. In effect, every unsuccessful bidder makes a choice not to buy. There are, however, numerous variations in the auction process. For example, auction protocols may restrict bidding to previously determined qualified bidders, require minimum bid increments, or provide a stalking-horse bidder with a right of first refusal over any other successful bid.

In the U.S. bankruptcy process, assets are sold using an auction process that most often commences with a stalking-horse bid. There are, consequently, two stages of competition: first, to become the stalking-horse bidder and, second, to become the successful bidder. At both stages, concerns about manipulation exist and, to the extent that a stalking-horse bidder shapes the second round of the auction, controls should be exercised at the first stage of competition to ensure a fair process in the second.

American commentary suggests that a stalking-horse bid is necessary to start the auction but provides many cautions about the stalking-horse bid shaping the auction and otherwise manipulating the sales process.[5] Concerns specific to stalking-horse bids include the payment of break-up fees, various restrictions being placed on the debtor by the terms of the bid with respect to its ability to freely pursue competing bids (such as restraints on its ability to have discussions with other potential purchasers), and the amount that the stalking-horse bid influences or shapes the subsequent bidding process (i.e., the form of offer required and auction timelines). As we will discuss later in this article, concerns about manipulation of the sales process are not restricted to the auction process and are equally applicable to the tender-type process generally used in Canada.

III. — The Canadian "Tender Type" Process

In contrast to an auction, the defining feature of a tender-sales process is its closed nature. Bidders are typically given a specific period to put forth their best bid, and bids are submitted without knowledge of other bidders' bids. This secrecy theoretically encourages each bidder to submit their highest and best bid in hopes of succeeding and not losing to a competing bid that is only slightly higher. While the advocates of auctions focus upon the fact that an auction is best at squeezing the very last cent out of bidders when the asset is keenly pursued by multiple motivated parties, where there is a limited market, the auction process can also act to ensure that a bidder who is intent on buying pays the minimum that it must, while by contrast, in a tender, the same purchaser might be inclined to bid much higher because it will have no assurance about the amount of competing bids.

In a tender or tender-type process, controls are put in place to ensure secrecy of bids. However, as the process has evolved in the Canadian insolvency context, formal tender has morphed into something less. Typically, bidding procedures simply call for the receipt of letters of intent or offers, which may or may not be binding, by a certain deadline. The party conducting the sale will usually select some subset of the offers for further negotiation. Even when dealing with neutral parties, such as receivers or trustees, bidders express concern about whether there are some elements of bid shopping. This is all the more the case where the sale is conducted by the debtor corporation and when a sale process is running parallel and in competition with an investment process. Although Canadian courts have clearly held that bankruptcy trustees have a duty to maintain secrecy of the bids in order to ensure the integrity of the bidding process and that trustees are not permitted to shop bids,[6] the extent that this "no

shop duty" extends to debtors who control the sales process in a restructuring is not clear, and, in practice, there is growing concern among bidders about the fairness of debtor-run sales processes.

As well, it should be remembered that not all sales of assets in a Canadian insolvency context proceed through a tender process. This is most especially apparent with pre-packaged plans where the debtor has canvassed the market and substantially finalized the agreement prior to the insolvency filing and then comes to court seeking approval of the sale.

A tender process, like an auction, is subject to manipulation. As discussed below, many of the same manipulation concerns regarding timelines and decision making exist in both processes. However, as will be discussed in more detail below, the most significant concern that exists with a tender process and not in an auction process is the shopping of bids and the related process-integrity issues. Bid shopping effectively turns a tender into an auction, so the bidder gets the worst of both worlds. In an auction, the bidder, while knowing that it will have to pay the highest price that the market will demand, has the comfort of knowing that it will pay no more than the market requires. In a tender, the bidder has to pay what it perceives the market to be, which may prove to be much more than what it could have paid at auction, while if there are competing bids and the bids are shopped, it will end up having to have its price bid up by those with lower bids who did not take as much risk on the lower side of the equation.

IV. — Manipulation of Auctions and Tenders

No sales process is immune to manipulation by interested parties. Any party who has an interest in the outcome and has some elementary control will be tempted to manipulate the process to dictate an outcome that is to its advantage.

The important question, therefore, becomes whether particular types of sales processes are more or less susceptible to manipulation in certain conditions. In other words, are there situations in which a stalking-horse/auction process is less subject to manipulation than a tender-type process, or vice versa?

In order to answer this question, the potentials for manipulation must be examined. As we will discuss, the primary ways that an interested party can manipulate the process can be broken down into two general categories: economic and control incentives.

Although these incentives are traditionally discussed in relation to a sale of assets of a company, consideration should also be given to these concerns in the context of debtor-in-possession (DIP) financing or other contracts entered into during the proceedings.

1. — Economic Incentives

Various economic restraints through which an interested party can influence a sale process have been examined in detail in U.S. literature as they apply to stalking-horse processes and will be summarized here. For the most part, these economic incentives do not apply in a tender process and are unique to a stalking-horse/auction process.

(a) — Break fees

Often, a break fee may be incorporated into a stalking-horse bid. Although variations of break-fee arrangements exist, typically such a fee would become payable to the potential purchaser if their bid does not become the successful bid. The U.S. courts seem to have settled in on break fees in the range if 1-2 per cent as being reasonable. [7]

Courts in the U.S. have examined break-fee arrangements with the concern that excessive break fees would chill the market and deter other potential bidders; however, commentators also suggest that break fees are necessary to attract a first bidder and get the auction process going. Generally, three lines of analysis have been used by courts to determine the appropriateness of the break fee.

First, in some situations courts have relied on the business-judgment rule and left to the seller's discretion the appropriateness of the existence of and/or amount of a break fee.

Second, courts in some situations have taken a harder look and applied a more thorough best interests of the estate test. For example in *Re Hupp Industries* [8] the court stated that the business-judgment rule was not appropriate in the insolvency context with respect to break fees because of the potentially detrimental effect that the allowance of such a fee would have on the debtor's estate. The court suggested the following factors be examined before approval of a break fee:

1. whether the fee requested co-relates with a maximization of value to the debtor's estate;

2. whether the request is arm's-length;

3. whether the principal stakeholders are supportive;

4. whether the break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;

5. whether the dollar amount of the break-up fee would have a "chilling effect" on the market;

6. the existence of available safeguards; and

7. whether there exists a substantial adverse impact upon unsecured creditors where such creditors are in opposition.

Third, some U.S. case law has indicated that break fees should only be allowed to the extent that they compensate the stalking-horse bidder for the administrative expense associated with such role.

In an insolvency context, as explained below, a break fee may be the price of stability, and thus some premium over simply providing for administrative expense may be expected. The seven factors outlined in the *Re Hupp Industries* approach, above, appear to provide the parties negotiating the transaction, and a court reviewing same, with a reasonable method of gauging the appropriateness of the break fee in the circumstances. As such, this line of analysis appears to be preferable to the other two, which are either too broad or too restricted.

As a general proposition, break fees are a burden on the balance of the auction, in that competing bidders essentially have to pay these fees in order to succeed. While this may be fair in a situation when such bidder was allowed to compete for stalking-horse status, it could be more problematic when this is not the case. This was a complaint lodged by one bidder in the *Stelco* case.

(b) — Topping fees

Topping fees are closely related to break fees and typically provide that the stalking-horse bidder receive a certain percentage of the amount by which the successful bidder exceeds the stalking-horse bid. Generally, topping fees have been considered alongside break fees by the courts. [9]

(c) — Overbid increment protections

In many auctions, the stalking-horse bid is considered the base bid, and additional bids are accepted only at certain additional increments. In other words, each bid must outbid the last by a certain dollar amount. The size of the overbid protection increment, however, may influence the auction process. U.S. case law has indicated that the courts should focus on whether the increments are reasonable in relation to the proposed transaction. [10]

(d) — Rights of first refusal

It is possible that a stalking horse may be granted rights of first refusal to match what would otherwise be the winning bid in an auction that may follow its bid. Effectively, this allows the stalking-horse bidder to forgo any overbid increment required by the specific auction process, thus giving it an advantage against competing bidders. American commentators have noted that there is little case law considering rights of first refusal granted to stalking-horse bidders, but it is difficult to see how such an advantage could be countenanced by a court.

2. — Control Incentives

In contrast to the economic incentives described above, the control incentives outlined below are, for the most part, common to both stalking-horse and tender-sale processes. In Canada, however, control incentives have not been of great concern where insolvency sales were conducted by a court officer (i.e., a trustee or receiver) whose reputation and duties as a court officer mitigated against the use of control incentives to manipulate the bidding process. However, as more and more asset sales in insolvency proceedings are being conducted by the debtor's management team and only monitored by a court officer, other stakeholder concerns related to control incentives are increasing.

Control incentives deal with the integrity of the process itself. These factors are considered in relation to manipulation of the actual bidding process and/or tender process and often potential bidders may, if they suspect that the integrity of the process is flawed, forgo the bidding process and the cost associated therewith.

(a) — Controlling and shaping the bid process (timelines)

A primary method of controlling a bid process is to influence timelines. The shorter the timeline, the less time other parties have to conduct due diligence, communicate with management, negotiate a deal, and, hence, submit an informed offer. As timelines are often driven off of the amount of funding available to the debtor company, they become especially subject to manipulation where the DIP lender is a potential bidder.

Along with timelines in a stalking-horse auction, the bid process itself can be materially influenced by the form of the stalking-horse bid where subsequent bids are required to conform to the format of the stalking-horse bid. This is especially true in combination sales/equity-raising processes.

Stalking-horse bidders may also have considerable control and influence over the auction process, not only through the economic incentives discussed above, but also in setting the timelines and determining who may be treated as a qualified bidder at the auction.

Given the amount of control and influence a stalking-horse bid has on the ensuing auction, it should be clear that the stalking-horse bid is a viable and binding agreement. In this respect, specific attention should be focused on the conditionality of the bid. For example, where the bid contains conditions that are likely never to be fulfilled, the stalking-horse benefits of the bid become illusive. For instance, a stalking-horse bid from, or sponsored by, an existing stakeholder who has an economic interest in obtaining the highest price might be, or operate as, nothing more than a shill.

Consequently, fairness and completeness in the competition to become the stalking-horse bid is, in many respects, just as important as it is in the final bid-approval process.

(b) — Management incentives

Bids that contain various management incentives — whether they take the form of key employee retention packages, bonuses, or otherwise — have the effect of, at the very least, appearing to skew the bidding process. In a stalking-horse bid, these payments must be approved by the court prior to the auction and, thus, some level of control exists. However, in the race to become a stalking-horse bidder (a role that we have seen provides substantial influence over the sale process) management incentives may play a large role.

As well, in a tender process where the form of bids may vary substantially from one bid to another, thus making direct comparisons more difficult, management incentives may sway the process at the final selection phase.

Further, in Canada it is becoming more common to run concurrent sale and equity-raising processes. Equity-raising scenarios are often viewed in a more favourable light by existing management, as a sale of the business will most often be accompanied by a change of control. Again, these concerns are highlighted where sale processes are run by existing management, rather than a court-appointed officer.

(c) — No shop and window shop clauses

Commentary in the U.S. indicates that it is very rare to have stalking-horse bids that contain a no-shop clause, which provides that a company cannot look for, entertain, or negotiate with other bidders, or a modified window-shop clause, which provides that, although a company cannot solicit other bids, it can receive bids and respond to bids as well as provide information to and negotiate with other bidders. In the few situations where these terms have been approved, one commentator notes that it was only done after extensive marketing by the company prior to filing. [11]

Thought should be given to the appropriateness of these clauses within the Canadian context when the debtor comes to court with a pre-arranged agreement (whether it be for DIP financing, a sale of its assets, or some other transaction). Clearly, this kind of lock-up should only be allowed where the court is satisfied that it is looking at the best and final offer.

V. — The Role of Stalking-Horse Bids in Canada

1. — To Date

Although Canada has historically used and, therefore, is comfortable with a tender process for selling assets in an insolvency context, thought should be given to using an auction process in certain situations.

Courts have given no reason to shy away from the auction process solely on the basis that tender is better. Courts have, in fact, given the signal that, as long as the process meets the principles as laid out in *Soundair*, [12] the process will be considered acceptable. In cases that require cross-border harmonization, the use of the stalking-horse/auction process is clearly appropriate and has been recognized as such. There are also, however, a lesser number of cases where courts have approved of the stalking-horse concept where there was no cross-border element, the most notable of which has been *Stelco*.

In the A. & B. Sound Ltd. (A&B Sound) restructuring under the CCAA, the court at first approved a pre-packaged agreement whereby one bidder, Sun Capital (Sun Cap), was given an exclusive period in which to negotiate with A&B Sound. That period was later extended, and the court approved an agreement of purchase and sale between Sun Cap and A&B Sound, which included a break fee and a further exclusivity period. However, at the request of another bidder, Seanix Technology Inc. (Seanix), Seanix was granted access to all information that Sun Cap had been provided upon execution of a confidentiality agreement by Seanix. In effect, the court treated the Sun Cap bid as a stalking horse and, ultimately, Seanix submitted a higher offer that was approved.

As well, in *Re Stelco Inc.*, [13] the court explicitly approved an offer from Deutche Bank, one of Stelco's significant bond holders, as a stalking-horse bid. As explained further below, the court found itself confronted with a situation where the Deutche Bank offer had been put on the table as a stalking-horse bid to satisfy a concern by General Motors (GM) (one of Stelco's largest customers) about the certainty of Stelco emerging successfully from its CCAA proceeding. GM had notified Stelco that, unless it had a viable plan of exit from the CCAA and had reached certain labour-negotiation milestones, it would re-source its business by a stipulated time. In order to deal with this demand, the court approved a limited canvassing of existing stakeholders to see if a proposal could be found that would guarantee Stelco's emergence from the CCAA. This resulted in the Deutche Bank offer, as well as others. On the morning of the hearing to approve the Deutche Bank proposal as a stalking horse, GM notified Stelco that it had not met the labour-relations milestone and that it would be resourcing its business. However, Stelco proceeded with the approval of the Deutche Bank bid anyway, despite the fact that the underlying rationale had disappeared. The court approved the Deutche Bank bid as a stalking horse; however, the bid contained conditions that adverse stakeholders and one competing bidder argued could never be fulfilled.

Specifically, these conditions required that: (i) Stelco and its union enter into a binding collective agreement with respect to a facility where the collective agreement had expired and (ii) that Stelco continue to enjoy the benefit of a pension holiday that the government had previously permitted, such that it did not have to pay down the solvency deficiency in certain pension plans in the manner generally required of other companies in Ontario. The bids progressed. All were rejected and the stalking horse failed because, as predicted, the conditions (specifically those noted above) could not be met. Only once further facts come out

following the conclusion of the Stelco CCAA proceeding will an accurate picture emerge as to the positive or negative impact of the stalking-horse bidding procedure.

As well, in *Re Tiger Brand Knitting Co.*, [14] the court approved a stalking-horse bid by Geetex and approved a "stay fee", which had been negotiated by the monitor and Geetex, whereby Geetex received approximately $500,000 to leave its bid open as a stalking hosre for a certain period of time.

2. — Tomorrow

Building on the case law in Canada to date, it is suggested that stalking-horse bids do have a place in intra-Canadian insolvencies. We suggest that the court should develop a standard where upon the approval of an agreement (whether a purchase agreement, DIP financing agreement, *etc.*), if concerns exist about the completeness or fairness of the process generally, the approval should only be given as a stalking-horse bid, and not as a final agreement. If this standard were in place, debtor companies would come to court with the knowledge that, unless they could show that the process leading to the agreement in question was fair and complete, then it would be subject to approval as a stalking horse only. This would provide an incentive to ensure a fair and complete process in order to avoid approval as a stalking horse only.

It is recognized that even if such a standard was adopted there would still be circumstances where the court would be faced with a dilemma where concerns may exist about the fairness or completeness of the marketing process, but, nevertheless, approval of the agreement as a stalking horse may not be viable. The hope is that this will be less frequent. An emphasis on establishing a fair process would, in the context of DIP financing or pre-packaged arrangements, lead to greater involvement of the incumbent trustee, receiver, or monitor at a pre-filing stage so that a court officer and neutral third party could make a report and/or recommendation to the court regarding the adequacy of the marketing process right at the commencement of proceedings when such arrangements are, after approval, functionally entrenched.

Specific situations where stalking-horse bids may be appropriate to counteract potential unfairness or incompleteness of a marketing process include:

(a) — Tight timelines

Where the need for certainty that the debtor will emerge from protection is required within a short time frame, stalking-horse bids may be very useful. The certainty of the ability of a debtor to emerge from insolvency protection can be very important in gaining the company the stability it needs to continue operations and seek higher bids. In that situation, the economic incentives discussed above may be seen as a cost of this stability, and the stalking-horse-bid process should be considered as an alternative to the traditional tender process. This was professed to be the case in *Stelco*. However, as discussed, it is not clear that this was, in fact, the case. It is suggested that in the proper case, consideration should be given to the use of stalking-horse bids in circumstances where there is a need for stability within a very short time frame.

(b) — Limited market exposure

Where the sales process (or the DIP financing process) has received limited market exposure (whether as a function of timeliness or otherwise) stalking-horse bids may be appropriate. This would allow the agreement to be approved and the debtor to continue operations, while the market could continue to be canvassed for higher bidders. For example, the DIP approved in *Air Canada* arguably reflected an extremely limited market exposure. In approving the DIP, the court did so at the cost of a substantial preference in favour of the DIP lender. In response to arguments that the preference was not appropriate, the DIP lender's position was that other parties could supply the DIP and were free to do so. In essence, the DIP lender's argument was that, in effect, their DIP agreement should be seen as a stalking-horse. However, since the terms of the DIP agreement contained "window shop" provisions, the stalking-horse nature of the DIP agreement had little practical effect.

(c) — Pre-packaged plans

Where the debtor has come into the insolvency proceedings with an agreement with respect to which it intends to seek approval from the court, greater concern for the completeness and fairness of the marketing process exists, and the court should consider limiting its approval of the agreement so that it will function only as a stalking horse unless the court can be shown that the process was in fact fair and complete.

VI. — Intermixing Auction and Tender

It may be that the standard proposed above would lead to an intermixing between the traditional tender processes and the auction process. In each situation, thought should be given to any prejudice that may result from an intermixing of the two processes in the specific circumstances.

Clearly, it would not be appropriate to make a tender bid into a stalking horse without the consent of the bidder or, at least, in situations when the bidder knew that this was possible if the court was not satisfied with the bidding procedure since, in such circumstances, as discussed above, the bidder gets the worst of both systems. If, however, the standard proposed above was widely acknowledged as the process that would be followed by the court, concerns about imposing a stalking-horse bid on an unsuspecting tender bidder would be mitigated.

The question then becomes, once a stalking-horse bid procedure has been adopted, which is traditionally part of an auction process, is it necessary from a fairness perspective to adopt the full auction process, or can the bidding process revert back to a tender? In other words, while it is clear that there is prejudice switching from tender to auction, is there prejudice inherent in switching from auction to tender?

Consider the following scenario: at a live auction, bids are being accepted. As the bidding progresses, however, the auctioneer (realizing the auction will last only for five more minutes) closes the bidding and asks that bidders write down their highest bid (as long as it is higher than the last oral bid) on a piece of paper, submit it to him so that whichever bid is the highest (the last oral bid or a written submission) will succeed. There does not appear anything inherently prejudicial in this scenario. Admittedly, if the bidders were aware that at some point the auction would be changed into a tender, it might influence their willingness to make oral bids, but it is difficult to see that this would be a material impact.

In an insolvency process, there may also be merit in migrating from an auction process and the approval of a stalking-horse bid to a tender scenario, in that the scope of the tender bid may become more flexible, and this may encourage a wider range of bidders. On balance, there does not appear to be any prejudice inherent in mixing the two processes in this way.

VII. — Conclusion

There may be a role for stalking-horse bids in essentially Canadian insolvency proceedings. Neither tender nor auction processes are immune from manipulation. Consideration should be given, however, to selecting the process that is less subject to manipulation in the circumstances.

The courts in Canada have indicated a willingness to approve agreements on a stalking-horse basis in certain situations. It is suggested that this practice has merit in purely intra-Canadian insolvency proceedings, particularly in order to deal with inadequacies in the manner in which agreements that require court approval have been reached. Where there has not been an adequate canvas of the market for any reason, including lack of time or attempted manipulation of the process, it is suggested that, as a matter of practice, the court should grant an approval of an arrangement subject to overbid and further marketing. As such, the approved arrangement, be it a sale, DIP financing, or other agreement, will function as a stalking horse.

Footnotes

* The authors are members of the Insolvency and Workout Group of Fraser Milner Casgrain LLP in Toronto

2 The term "stalking horse" was originally a hunting term that referred to a horse trained to conceal a hunter as the horse and hunter moved closer to the prey, thereby allowing the hunter to get much closer to the prey while the horse acted as a decoy. In U.S.

insolvency proceedings today, a stalking-horse bid is the initial bid in an auction that competing bidders must exceed, usually by stipulated minimum increments.

3 *Stelco Inc., Re* (2004), 2004 CarswellOnt 5076 (Ont. S.C.J. [Commercial List]).

4 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

5 For example, see J. Robert Stole, Amy S. Karte, Sajida A. Ahdi, *Maximizing Disposition Value Through the "Stalking Horse" Bidding Process*, 2004 21 Nat'l Insolv. Rev 33; C. R. Bowles, John Egan, *The Sale of the Century or a Fraud on Creditors: The Fiduciary Duty of Trustees and Debtors in Possession Relating to the "Sale" of a Debtor's Assets in Bankruptcy*, Spring 1998, 28 U. Mem. L. Rev. 781; Debra I. Grassgreen, Laura Davis Jones, James H.M. Sprayregen, and James A. Stempel, *Who Wins in the Race to Get Break-up Fees Approved?* October 2003, 22-8 ABIJ 16; D. Peress: *Breaking Up Is Hard to Do*, February 2001 20-1 ABIJ 25; and Robert J. Keach, *Stalking-horse Lenders and Good Faith: The Availability of Appellate Protection under §§363(m) and 364(e) for Asset Purchasers Extending DIP Financing*, June 2004, 23-5 ABIJ 28.

6 See *Pretty Fashion Inc., Re* (1951), 31 C.B.R. 217 (Que. S.C.).

7 See Paul B. Lackey, *An Empirical Survey and Proposed Bankruptcy Code Section Concerning the Property of Bidding Incentives in a Bankruptcy Sale of Assets*, 93 Column L. Rev. 720.

8 *Re Hupp Industries*, 140 B.R. 191 (Bank N.D. Ohio 1992).

9 See Paul B. Lackey, *supra*, at note 6.

10 *Ibid.*

11 *Ibid.*

12 See *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para 16 where the Ontario Court of Appeal summarized the duties a court must perform when decided whether a receiver who has sold property acted appropriately:

> I summarize those duties as follows:
>
> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

13 *Re: Stelco*, *supra*, at note 2.

14 *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.).

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I THE MATTER OF THE PROPOSAL OF DANIER LEATHER INC., a company incorporated ursuant to the laws of the Province of Ontario, with a head office in the City of Toronto, in the rovince of Ontario

Court File No:

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF
DANIER LEATHER INC.
(Motion Returnable February 8, 2016)

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