

COURT/ESTATE FILE
NO.

25-2958981

25-2958977

COURT

COURT OF KING'S BENCH OF
ALBERTA

JUDICIAL CENTRE

CALGARY



IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OGEN HOLDINGS LTD. AND OGEN LTD

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

APPLICANT

OGEN HOLDINGS LTD. AND OGEN LTD.

DOCUMENT

BENCH BRIEF OF OGEN HOLDINGS LTD. AND OGEN LD.

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

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July 21, 2023

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Commercial List Chambers Application Scheduled for the 21st day of July, 2023
before The Honourable Justice E. J. Sidnell

ENTERED

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I. INTRODUCTION

1. This bench brief is provided in support of an application (the "**Application**") filed by Ogen Holdings Ltd. ("**OHL**") and Ogen Ltd. ("**OL**") (OHL and OL are collectively "**OGEN**" or the "**Company**") before the Court of King's Bench of Alberta (the "**Court**").

2. The Application is for an order, among other things:

- (a) consolidating the respective estates of OHL and OL herein, being Estate Nos. 25-2958981 and 25-2958977 under the single estate number 25-2958977;
- (b) extending the time by which the Company may file a proposal to its creditors pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**");
- (c) expanding the scope of the stay of proceedings (the "**Stay**") as it relates to the terms of supply and service to the COMPANY on a basis consistent with the provisions of the model Initial Order in a proceeding under the *Companies' Creditors Arrange Act*, RSC 1985, c C-36 (the "**CCAA**");
- (d) granting an administration charge (the "**Administration Charge**") as security for the payment of professional fees and disbursements incurred and to be incurred by counsel for the Company, KSV Restructuring Inc. (the "**Proposal Trustee**") and the Proposal Trustee's counsel (collectively, the "**Administrative Professionals**");
- (e) granting a charge in favour of the Company's directors and officers (the "**D&O Charge**") to secure the Company's obligations to indemnify them for obligations and liabilities they may be subject to in carrying out their duties in the NOI Proceeding (as defined below); and
- (f) granting a charge in favour of the Company's interim lenders to secure the interim loan facility described in the Interim Financing Term Sheet among the Company and G. Edwards Holdings Ltd. and Hawksworth Holdings Ltd. (the "**Interim Lenders**").

3. Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Affidavit of Darren Brisebois, sworn July 10, 2022 (the "**First Brisebois Affidavit**").

II. STATEMENT OF FACTS

4. The facts relevant to the Application are set out in detail in the First Brisebois Affidavit and the first report of the Proposal Trustee dated July 12, 2023 (the "**First Proposal Trustee's Report**"). A summary of the key facts as they relate to the relief requested in the Application is set out in the following section.

A. Background

5. OL was incorporated pursuant to the laws of Alberta on April 26, 2013. OL changed its name from Bloom Cultivation Ltd. to OGEN Ltd. on June 9, 2020. OHL was incorporated pursuant to the laws of Alberta on January 12, 2017. OHL changed its name from Bloom Cultivation Holdings Ltd. to OGEN Holdings Ltd. on January 24, 2020. Shortly after the incorporation of OHL, the original shareholders of OL transferred all their shares to OHL, in consideration for receiving shares of OHL. As a result, OL has been a wholly-owned subsidiary of OHL since early 2017.¹

6. OL is an active operating company, that cultivates and processes cannabis products for sale in the retail and wholesale markets in Canada, and internationally. The registered head office of OHL and OL is 5430 30 Street SE, Calgary, Alberta, Canada.²

7. OGEN cultivates, processes, and sells cannabis flower products under the OGEN brand in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and New Brunswick. OGEN also sells bulk flower business to business. OGEN operates a purpose-built indoor production facility located at its registered head office (the "**OGEN Facility**"). The OGEN Facility is 57,387 sq ft and the total site is 2.32 acres OHL owns the OGEN Facility and related production equipment and leases it to OL. OHL does not conduct any active business operations.³

¹ First Brisebois Affidavit at paras 2-4

² First Brisebois Affidavit at para 5

³ First Brisebois Affidavit at para 6-7

B. The Insolvency

8. Competition, over supply, regulatory complexity, inflation, a strong black market, and high levels of excise tax have contributed to industry-wide struggles. Insolvencies in the sector are widespread. OGEN has been unable to achieve profitability after almost five (5) years of legalization although it believes it can become cash flow positive in the future. Increased distribution, product count, and decreased competition due to insolvencies contribute to the OGEN's ability to be profitable in the future, albeit with a lowered debt burden⁴.

9. The total cost to purchase the land, construct the OGEN Facility and obtain necessary equipment was approximately \$31,000,000. However, Avison Young recently appraised the property including the OGEN Facility in early 2023 at a much lower value⁵.

10. OGEN has incurred, and continues to incur significant and recurring losses, including a net loss of (\$1,463,911.00) in 2021 and (\$2,001,809.00) in 2022. Through the five months ended May 31, 2023, OGEN is in a net-loss position of (\$1,011,253.00).⁶

11. Connect First Credit Union ("CFCU") is OGEN's primary secured lender. As at the Filing Date, OGEN owed CFCU approximately \$22,115,502, comprised of:

- (a) \$21,411,380 in mortgage loans advanced by CFCU to OHL, which is secured against all of OHL's present and after-acquired real and personal property (including the OGEN Facility) (the "**OHL Mortgage Loans**"); and
- (b) \$704,122 by way of a margined overdraft account made available by CFCU to OL and secured against all of OL's present and after-acquired personal property (the "**Margined Overdraft Account**").

12. OGEN has additional unsecured obligations totaling approximately \$6,238,290.00 owing primarily to the Canada Revenue Agency, Health Canada and various trade creditors.⁷

⁴ First Brisebois Affidavit, at para 9

⁵ First Brisebois Affidavit, at para 9

⁶ First Proposal Trustee's Report at para 2.3.1

⁷ First Proposal Trustee's Report at paras 2.3.1 and 2.3.5

13. Due to the depressed value of the OGEN Facility, OGEN has insufficient assets available to repay the total amounts outstanding to CFCU and its unsecured creditors.

C. The NOI

14. On June 26, 2023, OHL and OL each filed a notice of intention to make a proposal (collectively the "**NOI**") under section 50.4(1) of the BIA. The NOI was filed in consultation with the Company's professional advisors in order to try to restructure or sell the Company as a going concern for the benefit of its stakeholders and after identifying no viable alternative process due to the Company's insolvency (the "**NOI Proceeding**")⁸.

III. DISCUSSION

15. The following issues are before the Court:

- (a) Should the proceedings be consolidated?
- (b) Should the Court extend the time to file a proposal?
- (c) Should the enhanced Stay language be approved?
- (d) Should the Court grant the Administration Charge?
- (e) Should the Court grant the D&O Charge?
- (f) Should the Court approve the Interim Lender's Charge?

A. The Court should consolidate the proceedings

16. It is appropriate to consolidate notice of intention proceedings where doing so will avoid a multiplicity of proceedings and will reduce costs due to multiple filings. This is particularly the case where the debtors are closely aligned.⁹

⁸ First Brisebois Affidavit, at para 18

⁹ [Re Mustang GP Ltd](#), 2015 ONSC 6562, paras 25 [*Mustang*] [TAB 1]

17. In this case, OHL and OL operate as a single business, and consolidation of the two estates will avoid a multiplicity of proceedings and encourage efficiency, to the benefit of all stakeholders.

B. The Court should extend the time to file a proposal

18. OGEN filed its NOI on June 26, 2023. Pursuant to section 50.4(8) of the BIA, the Company is required to file a proposal with the official receiver within 30 days (the "**Proposal Period**") unless it otherwise obtains an extension of time from the Court. OGEN currently seeks such an extension.

19. Pursuant to section 50.4(9) of the BIA, before the expiry of the Proposal Period, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days. The BIA provides that for a Court to grant an extension, the Court must be satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.¹⁰

20. To advance a proposal to present to the Company's creditors, the Company is seeking a 45-day extension from the current deadline of July 26, 2023 (to and until September 5, 2023, which is the first business day following the September labour-day long weekend). The factors set out above are met in the circumstances of this case:

- (a) OGEN is insolvent and acting in good faith and with due diligence to work towards a restructuring and to be in a position to be able to formulate a proposal to OGEN's creditors;

¹⁰ *BIA*, *supra*, s 50.4(9) [TAB 2]; [Castle Rock Research Corp v AGC Investments Ltd](#), 2012 ABQB 208, para 8 [TAB 3]

- (b) the extension will enhance the likelihood that OGEN will be able to make a viable proposal to its creditors;
- (c) the extension should not adversely affect or prejudice any group of creditors as OGEN is projected to have funding to pay post-filing service and supplies;
- (d) an extension will provide OGEN with the additional time it requires to further advance their restructuring, which is in the interest of all stakeholders¹¹.

21. Based on the above considerations, OGEN submits that the Court should extend the Proposal Period to and until September 5, 2023.

C. The Expanded Stay

22. OGEN seeks an expansion of the traditional stay of proceedings language normally granted in NOI proceedings. In particular, OGEN seeks the language listed in the proposed form of order included under the heading "Continuation of Services".

23. OGEN notes the Proposal Trustee is supportive of this additional language and that it mirrors the enhanced stay provisions from the model CCAA Initial Order¹². This language will facilitate the orderly operation of the business, and will help stabilize OGEN's operations during these proceedings. Any supply disruptions would impair OGEN's ability to continue to operate in the normal course. OGEN submits the Stay language proposed is fair and reasonable.

24. Notably, this Court has recently granted an extension order in the Nilex NOI proceedings containing the same language.¹³

D. The Administration Charge should be granted

25. OGEN seeks the Administration Charge to secure the fees of the Administrative Professionals in connection with the NOI Proceeding, in priority to existing creditors of the Company.

¹¹ First Brisebois Affidavit at paras 29-32; First Proposal Trustee's Report at para 8.1

¹² See [Model CCAA Initial Order](#), para 17 [TAB 4]

¹³ See Order of the Honourable Justice J.S. Little dated November 8, 2022 in Court/Estate File Number 24-2879521 In the Matter of the Notice of Intention to Make a Proposal Under Section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as Amended, at para 4 [TAB 5]

26. Section 64.2 of the BIA confers on this Court the statutory jurisdiction to grant the Administration Charge:

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;

[...]

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.¹⁴

27. Administration charges have been approved in BIA proposal proceedings, where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful restructuring under the BIA.¹⁵

28. The Company submits that granting the Administration Charge to provide the Administration Professionals with security for payment of their services is necessary to effect the completion of the Sale Process and the restructuring of the Company as a going concern. The Proposal Trustee is supportive of the Administrative Charge.¹⁶

E. The D&O Charge should be granted

29. Section 64.1 of the BIA confers on the Court the statutory jurisdiction to grant the D&O Charge during proposal proceedings:

64.1(1) Security or charge relating to director's indemnification: 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

¹⁴ *BIA, supra*, s 64.2 [TAB 2]

¹⁵ *Mustang, supra*, para 33 [TAB 1]

¹⁶ First Brisebois Affidavit at paras 23-24; First Proposal Trustee's Report at paras 7.1.1-7.1.3

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.

[...]

64.1(2) Priority: The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.¹⁷

30. The purpose of the D&O Charge is to:

- (a) keep directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the process, and in addition avoid a potential destabilization of the business;¹⁸ and
- (b) enable a debtor company to benefit from an experienced board of directors and senior management.¹⁹

31. In *Colossus*, Justice Wilton-Siegel approved the request for a charge to indemnify directors and officers pursuant to section 64.1 of the BIA, and in so doing, highlighted the fact that the continued involvement of the remaining directors and officers was critical to the operations of the company during its proposal proceedings. Additionally, Justice Wilton-Siegel noted that a D&O Charge was appropriate given that limitations and exclusions of the directors' and officers' insurance policies which created uncertainty as to coverage of all potential claims.²⁰

32. Similarly, in *Mustang*, Justice Rady approved a D&O charge, and determined it was warranted for the following reasons:

- (a) 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;

¹⁷ *BIA, supra*, s 64 [TAB 2]

¹⁸ *Re Northstar Aerospace Inc*, 2013 ONSC 1780, para 29 [*Northstar*] [TAB 6]

¹⁹ *Northstar, supra*, para 29 [TAB 6]

²⁰ *Re Colossus Minerals Inc*, 2014 ONSC 514, paras 16-21 [TAB 7]

- (b) it is required only in the event that a sale is not concluded and a wind-down of the facility is required;
- (c) 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;
- (d) the proposal trustee and the proposed DIP lender are supportive.²¹

33. In the present case, the directors and officers of the Company do not have the benefit of insurance policies in respect of their potential liabilities. The D&O Charge will provide additional certainty to the directors and officers with respect to potential personal liability if they continue in their current capacities in the context of the NOI Proceeding.²²

34. The D&O Charge is to ensure to ongoing involvement of the directors and officers, who are critical to the restructuring.²³ The amount of the D&O Charge was reached in consultation with the Proposal Trustee, which is supportive of the proposed amount of the D&O Charge.²⁴

F. The Interim Lenders Charge should be approved

35. The Company seeks an Interim Lender Charge in the principal amount of \$500,000.00.

36. Subsection 50.6(1) of the BIA provides this Court with the jurisdiction to order a charge to secure interim financing advanced to a debtor on notice to the secured creditors who are likely to be affected by the charge in an amount that the court considers appropriate.²⁵ Such a charge may not "secure an obligation that exists before this order is made."²⁶ Pursuant to subsection 50.6(3), the charge may "rank in priority over the claim of any secured creditor."²⁷

37. When determining whether to grant a charge securing interim financing, subsection 50.6(5) of the BIA requires the Court to consider, among other things:

²¹ *Mustang, supra*, para 35 [TAB 1]

²² First Proposal Trustee's Report at paras 7.2.1-7.2.3

²³ First Brisebois Affidavit at paras 25-38

²⁴ First Proposal Trustee's Report at paras 7.4.1-7.4.2

²⁵ *BIA, supra*, s 50.6(1) [TAB 2]

²⁶ *Ibid* [TAB 2]

²⁷ *Ibid* at ss 50.6(1), 50.6(3) [TAB 2]

- (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

38. The factors listed under section 50.6 are non-exhaustive. They are subject to judicial discretion and are highly fact specific²⁹.

39. In considering the appropriateness of interim financing, this Court should consider the benefit to preserving the *status quo* to allow for OGEN and the Proposal Trustee to establish a proposal to the benefit of OGEN's stakeholders.³⁰

40. While the Cash Flow Forecast currently indicates that no additional financing would be required outside of amounts available from CFCU on normal lending terms, OGEN views it as a prudent step to have interim funding available in the event it is required.³¹

41. The Proposal Trustee supports the Interim Lending Charge and recommends that this Court approve the Interim Financing Term Sheet and the Interim Lending Charge in reliance upon the following factors enumerated in section 50.6(5) of the BIA, including:

²⁸ *Ibid* at s 50.6(5) [TAB 2]; *Re Eureka 93 Inc et al*, 2020 ONSC 1482, para 16 [*Eureka*] [TAB 8]

²⁹ *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66, para 19 [TAB 9]

³⁰ *Eureka, supra*, para 24 [TAB 8]

³¹ First Brisebois Affidavit at para 21; First Proposal Trustee's Report at para 7.3.1

- (a) The facts and circumstances of the Companies;
- (b) The financial terms of the Interim Financing Term Sheet, including the fee and interest rate to be charged, relative to comparable facilities in similar restructuring proceedings; and
- (c) The stability and flexibility the Interim Loan will provide to the Companies to ensure there is sufficient liquidity to facilitate the Proceedings; and
- (d) The interests of the Companies' Stakeholders. In particular, the Proposal Trustee is of the view that no creditor will be materially prejudiced as a result of the Interim Lenders' Charge³².

42. If the Interim Lenders' Charge is not granted at this time, but interim funding is subsequently required, it will require a further application, the expense for which will deplete the Companies' assets further at the expense of OGEN's stakeholders.

G. Priority of BIA Charges

43. The Company requests that the priorities of the Administration Charge, the D&O Charge, Interim Lender's Charge as follows:

- (a) First – the Administration Charge;
- (b) Second – D&O Charge; and
- (c) Third – the Interim Lender's Charge.

44. The Court may order, pursuant to section 50.6(3), 64.1(2), and 64.2(2) of the BIA that the charges rank in priority over the claim of any secured creditor of the debtor.³³

IV. RELIEF SOUGHT

45. For the reasons set out above, the Company requests that this Honourable Court grant the relief sought in the Application.

³² First Proposal Trustee Report, at paragraph 7.3.5

³³ *BIA*, *supra*, ss 50.6(3), 64.1(2), and 64.2(2) [TAB 2]

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 18th day of July, 2023.

Estimated Time for
Argument: 30

BENNETT JONES LLP

Per:



Michael Selnes
Counsel for the Applicant,
Ogen Holdings Ltd. and Ogen Ltd.

V. TABLE OF AUTHORITIES

TAB

1. [Re Mustang GP Ltd](#), 2015 ONSC 6562
2. [Bankruptcy and Insolvency Act](#), RSC 1985, c B-3
3. [Castle Rock Research Corp v AGC Investments Ltd](#), 2012 ABQB 208
4. [Model CCAA Initial Order \(Alberta\)](#)
5. Order of the Honourable Justice J.S. Little dated November 8, 2022 in Court/Estate File Number 24-2879521 In the Matter of the Notice of Intention to Make a Proposal Under Section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as Amended
6. [Re Northstar Aerospace Inc](#), 2013 ONSC 1780
7. [Re Colossus Minerals Inc](#), 2014 ONSC 514
8. [Re Eureka 93 Inc et al](#), 2020 ONSC 1482
9. [Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd](#), 2021 ABCA 66

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: 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.

BEFORE: Justice H. A. Rady

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.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

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 *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

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 *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (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 diminished.

[30] In *Re Comstock Canada Ltd.*, 2013 ONSC 4756 (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 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 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 *Re Colossus Minerals Inc.*, 2014 ONSC 514 (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 *Re Brainhunter* (2009), 62 C.B.R. (5th) 41, 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 *CCM Master Qualified Fund Ltd. v. blutip Power Technologies* 2012 ONSC 175 (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.

Justice H.A. Rady
Justice H.A. Rady

Date: October 28, 2015



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to June 21, 2023

À jour au 21 juin 2023

Last amended on April 27, 2023

Dernière modification le 27 avril 2023

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to June 21, 2023. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of June 21, 2023 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité – lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 21 juin 2023. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 21 juin 2023 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

- a) son intention de faire une proposition;
- b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;
- c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

- a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;
- b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;
- c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable

cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

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

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

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

Court may not extend time

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

Court may terminate period for making proposal

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

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

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

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

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

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

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

(2) In the case of an individual,

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

Priority

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

Priority — previous orders

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

Factors to be considered

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

- (a)** the period during which the debtor is expected to be subject to proceedings under this Act;
- (b)** how the debtor's business and financial affairs are to be managed during the proceedings;
- (c)** whether the debtor's management has the confidence of its major creditors;
- (d)** whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e)** the nature and value of the debtor's property;
- (f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g)** the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;
- b)** la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;
- c)** la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d)** la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;
- e)** la nature et la valeur des biens du débiteur;
- f)** la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

file a report thereof in the prescribed form with the official receiver, who shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 49.

R.S., 1985, c. B-3, s. 63; 1992, c. 27, s. 28; 2004, c. 25, s. 34(F).

Removal of directors

64 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor in respect of whom a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

R.S., 1985, c. B-3, s. 64; 1992, c. 27, s. 29; 1997, c. 12, s. 40; 1999, c. 31, s. 20; 2005, c. 47, s. 42.

Security or charge relating to director's indemnification

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.

Priority

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

Restriction — indemnification insurance

(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.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific

la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49.

L.R. (1985), ch. B-3, art. 63; 1992, ch. 27, art. 28; 2004, ch. 25, art. 34(F).

Révocation des administrateurs

64 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur d'un débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) s'il est convaincu que l'administrateur, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de faire une proposition viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacances

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

L.R. (1985), ch. B-3, art. 64; 1992, ch. 27, art. 29; 1997, ch. 12, art. 40; 1999, ch. 31, art. 20; 2005, ch. 47, art. 42.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la personne peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le

obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Court may order security or charge to cover certain costs

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

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal

dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

- a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;
- b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;
- c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnement à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement

Court of Queen's Bench of Alberta

Citation: Castle Rock Research Corporation (Re), 2012 ABQB 208

Date: 20120329
Docket: BK03 115587
Registry: Edmonton

In the Matter of the Notice of Intention to make a proposal filed by Castle Rock Research Corporation

Under the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended

Between:

Castle Rock Research Corporation

Applicant

- and -

A.G.C. Investments Ltd. And Osman Auction Inc.

Respondents

And Between:

A.G.C. Investments Ltd.

Applicants
(Cross-Application)

- and-

**Castle Rock Research Corporations and BDO Canada Limited in its capacity as Trustee
under the Notice of Intention to make a proposal**

Respondents
(Cross-Application)

**Reasons for Judgment
of the
Honourable Mr. Justice R. Paul Belzil**

The Applications

[1] Castle Rock Research Corporation seeks an order for extending the time within which it must file a Proposal to Creditors. Its main creditor A.G.C. Investments Ltd. has filed a cross-application seeking an order declaring that the time for Castle Rock to file a Proposal to Creditors has expired.

Factual Background

[2] Castle Rock filed a Notice of Intention (NOI) to make a proposal to its creditors on February 15, 2012 pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended (*BIA*).

[3] On February 28, 2012 Burrows, J. issued an order naming BDO Canada Ltd. as the Interim Receiver of Castle Rock.

[4] Pursuant to section 50.4(8) Castle Rock is required to file a proposal to its creditors within 30 days of the filing of a Notice of Intention to make a proposal unless this time is extended pursuant to section 50.4(9). On March 16, 2012 Veit, J. issued a Consent Order extending the deadline for filing of the proposal to March 23, 2012.

[5] On March 20, 2012 the Interim Receiver filed a Second Report. Paragraphs 6 to 10 of which read as follows:

6. That since filing the Trustee's Report of March 9, 2012, the Trustee has been provided weekly Monitoring Reports in adherence with the Monitoring Program initiated by the Trustee;
7. That the Debtor and management have been co-operative in addressing queries in relation to the Monitoring Reports which have satisfied the Trustee;
8. That while the Trustee has expressed to the Debtor concerns over the financial reporting system utilized by the Debtor, management indicates that they are

prepared to take the necessary steps to implement a suitable financial reporting system;

9. That since filing of the Trustee's Report on March 9, 2012, the Trustee is in receipt of a Business Plan dated March 6, 2012 which provides detailed information about the Company Plan including Profile, Products and Services, Marketing Plan and the Future Direction of the Company. The Trustee has not had an opportunity to review and assess that Business Plan; and
10. That it is the Trustee's opinion that the Debtor is acting in good faith and with due diligence and that the Debtor will be able to make a viable Proposal if an additional extension were granted.

[6] The application and cross-application were heard by me on March 22, 2012. Counsel for BDO confirmed that its opinion contained in the Second Report remains unchanged. Counsel for Osman Auction Inc. supports the Castle Rock Application.

[7] I undertook to render a decision on March 28 and with the consent of all parties, extended the deadline for filing of the proposal to 4:30 p.m. that day.

Discussion

[8] It is common ground that the Court may grant an extension for the filing of a Proposal to Creditors not exceeding 45 days if three requirements outlined in section 50.4(9) are satisfied:

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

[9] It is also common ground that Castle Rock bears the burden of establishing its entitlement to an extension.

[10] As part of its Application, Gautam Rao, President and CEO of Castle Rock swore an affidavit on March 9, 2012 in which he deposed that since the filing of Castle Rock's NOI, it has continued to operate in the ordinary course of business without the necessity for debtor in possession financing.

[11] He further deposed that Castle Rock does not anticipate the need for further financing in the course of the proposal proceedings.

[12] In the course of argument, counsel for Castle Rock provided two License Agreements both dated February 24, 2012. The first provides for payments to Castle Rock of \$600,000.00 together with royalty payments and the second 1.5 million dollars together with royalty payments.

[13] In his affidavit Rao also deposed to other pending business opportunities which were not specified and that senior staff within the company are supportive.

[14] Finally, he deposed that the company is proceeding in good faith, with due diligence and that no creditor will be prejudiced if an extension were granted.

[15] Andrew Clark, the President of A.G.C., deposed in an affidavit that Castle Rock is being mismanaged and that funds are being transferred to a related company in India. He also deposed that no proposal would be acceptable to A.G.C.

[16] Clark was questioned on his affidavit and acknowledged that the existence of the related company in India was known to him and indeed the India company is referred to in Castle Rock's financial statements.

[17] It is highly significant that the Trustee supports this request for the extension. BDO was appointed by Court Order and as such is acting as an Officer of the Court.

[18] It has expressed no concern that Castle Rock is acting in bad faith or without due diligence and if it is suspected that this was the case, it would be duty bound to report this to the Court. The Second Report asserts that Castle Rock will make a proposal.

[19] A.G.C. argues that it is suffering material prejudice because Castle Rock is transferring funds to its related company in India.

[20] As noted above, this was well known to Clark before he invested in Castle Rock and therefore this cannot constitute material prejudice.

Conclusion

[21] I find that Castle Rock has met the burden of establishing that an extension of time for the filing of the proposal to creditors should be granted. The cross-application by A.G.C. is

dismissed. Counsel may speak to the terms of the Order granting the extension, including costs.

Heard on the 22nd day of March, 2012.

Dated at the City of Edmonton, Alberta this 28th day of March, 2012.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

Michael McCabe, Q.C.
Reynolds Mirth Richards Farmer LLP
for the Applicant

Darren Bieganeck, Q.C.
Duncan & Craig LLP
for the Respondent

Rick Reeson, Q.C.
Miller Thomson
Independent Counsel for BDO

Clerk's Stamp:



COURT FILE NUMBER
COURT
JUDICIAL CENTRE OF

COURT OF QUEEN'S BENCH OF ALBERTA



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 **[THE
DEBTOR(S)]**

APPLICANT:
RESPONDENT(S):
DOCUMENT
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT:

ALBERTA TEMPLATE CCAA INITIAL ORDER

[LAW FIRM NAME]

[Address]

[Address]

Solicitor: ●

Telephone: ●

Facsimile: ●

Email: ●

File Number: ●

**DATE ON WHICH ORDER WAS
PRONOUNCED:
NAME OF JUDGE WHO MADE THIS
ORDER:
LOCATION OF HEARING:**

**[*NOTE: DO NOT USE THIS ORDER AS A PRECEDENT WITHOUT REVIEWING
THE ACCOMPANYING EXPLANATORY NOTES.]**

UPON the application of **[NAME]** (the “**Applicant**”); **AND UPON** having read the Originating Application, the Affidavit of ●; and the Affidavit of Service of ● **[if applicable]**, filed; **AND UPON** reading the consent of **[NAME]** to act as Monitor; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within Order **[if applicable]**; **AND UPON** hearing counsel for ●; **AND UPON** reading the Pre-Filing Report of **[Monitor’s Name]**; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order (the “**Order**”) is hereby abridged and deemed good and sufficient **[if applicable]** and this application is properly returnable today.

APPLICATION

2. The Applicant is a company to which the *Companies’ Creditors Arrangement Act* of Canada (the “**CCAA**”) applies.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the “**Plan**”).

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:
 - (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “**Property**”);
 - (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the “**Business**”) and Property;
 - (c) be 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 it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and
 - (d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of **[NAME]** sworn **[DATE]** 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 Applicant 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 Applicant, 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.] **[See Explanatory Note]**

5. To the extent permitted by law, the Applicant shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:
 - (a) all outstanding and future 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 reasonable fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

6. Except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant 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 directors and officers insurance), maintenance and security services; and
 - (b) payment for goods or services actually supplied to the Applicant following the date of this Order.

7. The Applicant 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 that 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,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, 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 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 that are attributable to or in respect of the carrying on of the Business by the Applicant.
8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant may 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 as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicant from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.
9. Except as specifically permitted in this Order, the Applicant 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 the Applicant to any of its creditors as of the date of this Order;
 - (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and
 - (c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicant shall, subject to such requirements as are imposed by the CCAA **[and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph [33]),]** have the right to:
 - (a) permanently or temporarily cease, downsize or shut down any portion of its business or operations and to dispose of redundant or non-material assets not exceeding **[\$]** in any one transaction or **[\$]** in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicant (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;
 - (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 Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;
 - (c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicant deems appropriate, in accordance with section 32 of the CCAA; and
 - (d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicant shall provide each of the relevant landlords with notice of the Applicant'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. If the landlord disputes the Applicant'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 Applicant, or by further order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant 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 Applicant's claim to the fixtures in dispute.

12. 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 Applicant 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 Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant 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.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

13. Until and including **[DATE – MAX. 30 DAYS]**, or such later date as this Court may order (the “**Stay Period**”), no proceeding or enforcement process in any court (each, a “**Proceeding**”) shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

14. 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**”), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:
- (a) empower the Applicant to carry on any business that the Applicant is not lawfully entitled to carry on;
 - (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;
 - (c) prevent the filing of any registration to preserve or perfect a security interest;
 - (d) prevent the registration of a claim for lien; or

- (e) exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety or the environment.

15. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

16. During the Stay Period, no person shall accelerate, suspend, 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 Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

- (a) statutory or regulatory mandates for the supply of goods and/or services; or
- (b) oral or written agreements or arrangements with the Applicant, 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 Applicant

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicant or exercising any other remedy provided under such agreements or arrangements. The Applicant 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 usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with the payment practices of the Applicant, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or

after the date of this Order, nor shall any person, other than the Interim Lender where applicable, 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 Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph [15] of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.
21. The directors and officers of the Applicant 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 [\$], as security for the indemnity provided in paragraph [20] of this Order. The Directors' Charge shall have the priority set out in paragraphs [37] and [39] herein.
22. 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 Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph [20] of this Order.

APPOINTMENT OF MONITOR

23. [MONITOR'S NAME] is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicant with the powers

and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant 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.

24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:
- (a) monitor the Applicant's receipts and disbursements, Business and dealings with the Property;
 - (b) 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, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicant;
 - (c) assist the Applicant, to the extent required by the Applicant, in its dissemination to the Interim Lender and its counsel on a **[TIME INTERVAL]** basis of financial and other information as agreed to between the Applicant and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;
 - (d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than **[TIME INTERVAL]**, or as otherwise agreed to by the Interim Lender;
 - (e) advise the Applicant in its development of the Plan and any amendments to the Plan;
 - (f) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
 - (g) 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 Applicant to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicant or to perform its duties arising under this Order;
 - (h) 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;

- (i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and
 - (j) perform such other duties as are required by this Order or by this Court from time to time.
25. 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, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, 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 or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. 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 within the meaning of any federal or provincial environmental legislation.
26. The Monitor shall provide any creditor of the Applicant and the Interim Lender with information provided by the Applicant 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 Applicant 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 Applicant may agree.
27. 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.
28. The Monitor, counsel to the Monitor, and counsel to the Applicant shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a **[TIME INTERVAL]** basis and, in

addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers in the respective amount[s] of \$●, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

29. The Monitor and its legal counsel shall pass their accounts from time to time.
30. The Monitor, counsel to the Monitor, if any, and the Applicant's counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of **[\$]**, as security for their professional fees and disbursements incurred at the normal 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 paragraphs **[37]** and **[39]** hereof.

INTERIM FINANCING

31. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from **[INTERIM LENDER'S NAME]** (the "**Interim Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed **[\$]** unless permitted by further order of this Court.
32. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicant and the Interim Lender dated as of **[DATE]** (the "**Commitment Letter**"), filed.
33. The Applicant is 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 Interim Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.
34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before this the date this Order is made. **[see**

Explanatory Notes] The Interim Lender's Charge shall have the priority set out in paragraphs [37] and [39] hereof.

35. Notwithstanding any other provision of this Order:
- (a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;
 - (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon [●] days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the Commitment Letter, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lender to the Applicant against the obligations of the Applicant to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's 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 Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and
 - (c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the Property.
36. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES

37. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:
- First – Administration Charge (to the maximum amount of [\\$]);
- Second – Interim Lender's Charge; and
- Third – Directors' Charge (to the maximum amount of [\\$]).

38. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
39. Each of the Directors' Charge, the Administration Charge, and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person. **[See Explanatory Notes.]**
40. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the Interim Lender's Charge, unless the Applicant also obtains the prior written consent of the Monitor, the Interim Lender, and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.
41. The Directors' Charge, the Administration Charge, **[the Commitment Letter, the Definitive Documents,]** and the Interim Lender's 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**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:
 - (a) the pendency of these proceedings and the declarations of insolvency made in this Order;
 - (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**") that binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:
 - (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof **[, including the**

Commitment Letter or the Definitive Documents,] shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

- (ii) 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 creation of the Charges, **[the Applicant entering into the Commitment Letter,]** or the execution, delivery or performance of the Definitive Documents; and
- (iii) the payments made by the Applicant pursuant to this Order, **[including the Commitment Letter or the Definitive Documents,]** 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.

ALLOCATION

- 42. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge, the Interim Lender's Charge, and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

- 43. The Monitor shall (i) without delay, publish in **[newspapers specified by the Court]** a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than \$1,000 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.
- 44. The E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: **[●]**) shall be valid and effective service. Subject to Rules 11.25 and 11.26 this Order shall constitute an order for substituted service pursuant to Rule 11.28 of the Rules of Court. Subject to paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL **'[●]'**."

GENERAL

45. The Applicant 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.
 46. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.
 47. 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 Applicant, the Business or the Property.
 48. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.
 49. Each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
 50. Any interested party (including the Applicant 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.
 51. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.
-

Clerk's stamp:

COURT/ESTATE FILE NUMBER 24-2878531
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL UNDER SECTION 50.4(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c B-
3, AS AMENDED
APPLICANT: NILEX INC.
DOCUMENT **ORDER (approving extension of time to file a
proposal, administration charge, and other relief)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT BLAKE, CASSELS & GRAYDON LLP
3500, 855 – 2nd Street S.W.
Calgary, AB T2P 4J8
Attn: Kelly Bourassa / Alexia Parente
Telephone: 403-260-9697 / 416-863-2417
Facsimile: 403-260-9700
E-mail: kelly.bourassa@blakes.com /
alexia.parente@blakes.com
File Ref.: 99580/8

DATE ON WHICH ORDER WAS PRONOUNCED: November 8, 2022

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta (via Webex)

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice J.S. Little

UPON THE APPLICATION by Nilex Inc. (the "**Company**"), for an order, among other things: (a) extending the time for the Company to file a proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (the "**BIA**"); (b) approving an Administration Charge (defined below); (c) approving the Sale Process (defined below) and its continuation; (d) approving the continued use of the Cash Management System (defined below); and (e) approving the distribution of the Garnished Funds (defined below) out of Court to the Company and directing any future Garnished Funds to be paid to the Company;

AND UPON HAVING READ the Application, the Affidavit of Jeff Allen sworn October 31, 2022 (the "**First Allen Affidavit**"), the First Report of KSV Restructuring Inc. in its capacity as proposal trustee of the Company (in such capacity, the "**Proposal Trustee**") dated October 31, 2022 (the "**First Report**"), and the Affidavit of Service of Lindsay Farr sworn November 3, 2022;

AND UPON HEARING the submissions of counsel for the Company, the Proposal Trustee, the Canadian Imperial Bank of Commerce ("**CIBC**"), and such other counsel in attendance;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application, and time for service of this application is abridged to that actually given.

EXTENSION OF TIME TO FILE A PROPOSAL

2. Pursuant to Section 50.4(9) of the BIA, the time for the Company to file a proposal is hereby extended to January 10, 2023 (as that date may be extended by further order of the Court, the "**Proposal Extension Date**").

NO INTERFERENCE WITH RIGHTS

3. Until and including the Proposal Extension Date, no individual, firm, corporation, governmental body, or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") shall accelerate, suspend, 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 Company, or take any further action to issue or enforce any garnishee summons, except with the written consent of the Company and the Proposal Trustee, or leave of this Court.

CONTINUATION OF SERVICES

4. **Until and including the Proposal Extension Date, all Persons having:**
 - (a) **statutory or regulatory mandates for the supply of goods and/or services; or**

- (b) oral or written agreements or arrangements with the Company, including without limitation all purchase orders, supply agreements, computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Company;

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 Company or exercising any other remedy provided under such agreements or arrangements. The Company 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 usual prices or charges for all such goods or services received after the date of this Order are paid by the Company in accordance with the payment practices of the Company, or such other practices as may be agreed upon by the supplier or service provider and each of the Company and the Proposal Trustee or as may be ordered by this Court.

ADMINISTRATION CHARGE

5. The Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Company (collectively, the "**Administrative Professionals**") shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Administrative Professionals on a bi-weekly basis, or as they may otherwise agree.
6. The Administrative Professionals shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all of the Company's present and future assets, undertakings and property of every nature and kind whatsoever and wherever situate, including all proceeds thereof (collectively, the "**Property**"), which charge shall not exceed an aggregate amount of \$350,000 (before GST), as security for payment of their respective professional fees and disbursements incurred at their normal rates and charges, both before and after the making of this Order, in respect of this proceeding.
7. The Administration Charge shall have the priority set out in paragraphs 21 and 23 hereof.

CASH MANAGEMENT SYSTEM AND LENDER PRIORITY CHARGE

8. The Company's execution and performance under the forbearance agreement dated as of October 17, 2022 between the Company and CIBC (among others), as may be amended from time to time (the "**Forbearance Agreement**") is hereby approved.
9. The Company shall be entitled to continue to utilize the credit facilities (the "**Cash Management System**") granted by CIBC under the Credit Agreement, as defined and described in the First Allen Affidavit (the "**Credit Agreement**"). For greater certainty, (i) the Company is authorized to borrow, repay and re-borrow such amounts from time to time as the Company may consider necessary or desirable under the Credit Agreement, subject to the terms and conditions of the Forbearance Agreement; and (ii) CIBC is authorized to apply receipts and deposits made to the Company's bank accounts, whether directly or through blocked accounts, against the indebtedness of the Company to CIBC in accordance with the Forbearance Agreement, whether such indebtedness arose before or after the date of this Order; provided, however that no advances made by CIBC to the Company under the Credit Agreement on or after the date hereof shall be used to pay the Company's obligations that were owing to CIBC prior to the date hereof.
10. The Cash Management System will be governed by the terms of the Credit Agreement and the Forbearance Agreement and such other documentation applicable to the Cash Management System. CIBC shall be an unaffected creditor in these proceedings, and the rights and remedies of CIBC shall be unaffected by paragraphs 3 and 4 of this Order or any other stay of proceedings that may be granted in these proceedings.
11. CIBC shall be entitled to the benefit of and is hereby granted a charge (the "**Lender Priority Charge**") on the Property, which charge shall not exceed an aggregate principal amount of 20,000,000 plus interest, fees and expenses, as security for any advances made under the Credit Agreement from and after the filing of the NOI.
12. The Lender Priority Charge shall have the priority set out in paragraphs 21 and 23 hereof.
13. The payments made by the Company pursuant to this Order, the Credit Agreement and the Forbearance Agreement, and the granting of the Lender Priority Charge shall not constitute or be deemed to be a preference, fraudulent conveyance or transfer at undervalue or other challengeable or reviewable transaction under the BIA or any

applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law. The rights of CIBC under this Order, including without limitation the Lender Priority Charge, shall be enforceable in any bankruptcy, interim receivership, or receivership or in any proceedings under the *Companies' Creditors Arrangement Act* (Canada) of the Company or Property.

D&O CHARGE

14. The Company shall indemnify the directors and officers against obligations and liabilities that they may incur in their role as directors and officers after the filing of the NOI, 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 and officer's gross negligence or wilful misconduct.
15. Each of the directors and officers of the Company shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of the Property, which charge shall not exceed an aggregate amount of \$925,000, as security for the indemnity provided in this Order.
16. The D&O Charge shall have the priority set out in paragraphs 21 and 23 hereof.
17. 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 Company's directors and officers 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.

KERP

18. The Company's key employee retention plan (the "**KERP**") described in the First Report is hereby approved and the Company is authorized and directed to make the payments contemplated thereunder should the beneficiaries become entitled thereto in accordance with the terms and conditions of the KERP.

19. The beneficiaries of the KERP are hereby granted a charge (the "**KERP Charge**") on the Property which charge shall not exceed an aggregate amount of \$800,000, as security for all obligations under the KERP.
20. The KERP Charge shall have the priority set out in paragraphs 21 and 23 hereof.

PRIORITY OF CHARGES

21. The priorities of the Administration Charge, the Lender Priority Charge, the D&O Charge, and the KERP Charge, as between them, shall be as follows:
 - (a) First – Administration Charge;
 - (b) Second – Lender Priority Charge;
 - (c) Third – D&O Charge; and
 - (d) Fourth – KERP Charge.(collectively, the "**Charges**").
22. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
23. The Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.
24. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Company also obtains the prior written consent of the Proposal Trustee and the other beneficiaries of the Charges affected thereby, or further order of this Court.

SALE PROCESS

25. The sale process (the "**Sale Process**") commenced prior to the filing of the notice of intention to file a proposal by the Company in this proceeding, as described in the First Report, is commercially reasonable and is hereby ratified and approved.
26. The Company, with the assistance of the Proposal Trustee and Valitas Capital Partners, is hereby authorized and directed to continue the Sale Process, and do all things reasonably necessary to conduct and give full effect to the Sale Process and carry out the obligations thereunder, including taking any additional steps or executing additional documents as may be necessary or desirable in order to carry out and complete the Sale Process and a transaction or transactions thereunder.
27. The Company is authorized to apply to this Honourable Court for advice and directions in connection with the Sale Process.

FUNDS PAID OUT OF COURT

28. The Clerk of the Court of the King's Bench of Alberta is hereby directed to release to the Company all funds currently being held by it, or which may be paid into Court subsequent to this Order, pursuant to garnishee summons issued in Court of King's Bench File Number 1903-07838 (the "**Garnished Funds**").
29. The Company shall deposit the Garnished Funds in the Company's accounts with CIBC and they shall be applied in accordance with the provisions of the Credit Agreement and the Cash Management System to reduce the amounts outstanding to CIBC as first priority secured creditor.
30. Any Person who has received a garnishee summons directing it to pay funds to the Clerk of the Court is hereby directed to pay any such funds directly to the Company to be deposited by the Company into its accounts with CIBC and applied in accordance with the provisions of the Credit Agreement and the Cash Management System.

SEALING

31. Notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*, Alta Reg 124/2010, confidential appendix 1 ("**Confidential Appendix**") of the First Report shall until further

Order of this Honourable Court, be sealed on the Court file and kept confidential to be shown only to a Justice of the Court of King's Bench of Alberta, and accordingly, shall be filed with the Clerk of the Court who shall keep the Confidential Appendices in a sealed envelope attached to a notice that sets out the style of cause of these proceedings and states:

THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS FILED IN COURT FILE NO. 24-2878531. THE CONFIDENTIAL MATERIALS ARE SEALED PURSUANT TO THE SEALING ORDER ISSUED BY THE HONOURABLE JUSTICE C.M. JONES ON NOVEMBER 9, 2022.

32. The Company and the Proposal Trustee are empowered and authorized, but not directed, to provide the Confidential Appendix (or any portion thereof, or information contained therein) to any interested party, entity or person that the Company or Proposal Trustee considers reasonable in the circumstances, subject to confidentiality arrangements satisfactory to the Company or the Proposal Trustee.
33. Any party may apply to set aside paragraph 31 of this order upon providing the Company, Proposal Trustee and all other interested parties with 5 days notice of such application.

MISCELLANEOUS MATTERS

34. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Proposal Trustee will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Proposal Trustee's reports shall be filed by the Clerk of the Court notwithstanding that they do not include an original signature.
35. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, 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 order and to provide such assistance to the Proposal Trustee, as an officer of the 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.

36. Each of the Company or the Proposal Trustee shall be at liberty and are 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.
37. Any interested party (including 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.

SERVICE OF ORDER

38. Service of this Order shall be deemed good and sufficient:
- (a) by serving same on the persons who were served with notice of this Application and any other parties attending or represented at the hearing of the Application; and
 - (b) by posting a copy of this Order on the Proposal Trustee's website at: [Nilex Inc. \(ksvadvisory.com\)](http://Nilex Inc. (ksvadvisory.com)).
39. Service of this Order on any other person is hereby dispensed with.
40. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.



Justice of the Court of King's Bench of Alberta

CITATION: Northstar Aerospace, Inc. (Re), 2013 ONSC 1780
COURT FILE NO.: CV-12-9761-00CL
DATE: 20130409

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

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

**RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF NORTHSTAR AEROSPACE, INC., NORTHSTAR AEROSPACE
(CANADA) INC., 2007775 ONTARIO INC. AND 3024308 NOVA SCOTIA
COMPANY, Applicants**

BEFORE: MORAWETZ J.

COUNSEL: C. J. Hill and J. Szumski, for Ernst & Young Inc., Court-Appointed Monitor

**J. Wall, for Her Majesty the Queen in Right of Ontario, as Represented by
the Ministry of the Environment**

P. Guy and K. Montpetit, for the Former Directors and Officers Group

Steven Weisz, for Fifth Third Bank

ENDORSEMENT

Motion Overview

[1] This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the “Monitor”) of Northstar Aerospace, Inc. (“Northstar Inc.”), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the “Applicants”), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the “Claims Procedure”) authorized by order of August 2, 2012 (the “Claims Procedure Order”) are valid claims for which the former directors and officers of the Applicants (the “D&Os”) are indemnified pursuant to the indemnity (the “Directors’ Indemnity”) contained in paragraph 23 of the Initial Order dated June 14, 2012 (the “Initial Order”).

[2] If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the “D&O Charge Reserve”) to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the “Pre-Filing Agent”).

[3] For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

[4] In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to “MOE Pre-Filing D&O Claim”, “MOE Post-Filing D&O Claim” and “WeirFoulds Post-Filing D&O Claim” have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

[5] The two claims at issue are described in proofs of claim (collectively, “the Proofs of Claim”) filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the “MOE”) and by WeirFoulds LLP (“WeirFoulds”) on behalf of certain of the D&Os (“WeirFoulds D&Os”).

[6] The MOE proof of claim (the “MOE Proof of Claim”) asserts, among other things, a “Pre-Filing D&O Claim” (the “MOE Pre-Filing D&O Claim”) and a “Post-Filing D&O Claim” (the “MOE Post-Filing D&O Claim”) (collectively, the “MOE D&O Claims”), for costs incurred and to be incurred by the MOE in carrying out certain remediation activities originally imposed on the Applicants in an Ontario MOE Director’s Order issued under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the “EPA”) on March 15, 2012 (the “March 15 Order”). The basis for the D&Os’ purported liability is a future Ontario MOE Director’s Order (the “Future Director’s Order”), which the MOE intends to issue against the D&Os. According to the Monitor’s counsel, the Future Director’s Order will require the D&Os to conduct the same remediation activities previously required of the Applicants.

[7] The WeirFoulds proof of claim (the “WeirFoulds Proof of Claim”) responds to the threat of the Future Director’s Order. It asserts a Post-Filing D&O Claim (the “WeirFoulds Post-Filing D&O Claim”) by the individual WeirFoulds D&Os for contribution and indemnity against each other, and against the former directors and officers of the predecessors of Northstar Inc., in respect of any liability that they may incur under the Future Director’s Order.

[8] Neither the MOE nor the D&Os object to the Monitor’s proposed adjudication procedure.

Background to the CCAA Proceedings

[9] On May 14, 2012, the Applicants obtained protection from their creditors under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C. 36 (“CCAA”); Ernst & Young Inc. was subsequently appointed as the Monitor (the “CCAA Proceedings”).

[10] A number of background facts have been set out in *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 4423 (*Northstar*) and *Northstar Aerospace, Inc. (Re)* 2012 ONSC 6362. A number of the issues with respect to MOE's claims against the Applicants have been covered in a previous decision. See *Northstar, supra*.

Directors' Indemnification and Directors' Charge

[11] The Initial Order provided that the Applicants would grant the Directors' Indemnity, indemnifying the D&Os against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings.

[12] Paragraph 23 of the Initial Order provides:

23. This court orders that the CCAA Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the CCAA entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[13] Paragraph 24 of the Initial Order further provides that the D&Os and the chief restructuring officer would have the benefit of a charge, in the amount of US\$1,750,000, on the Applicants' current and future assets, undertakings and properties, to secure the Directors' Indemnity (the "Directors' Charge").

[14] The Directors' Charge, as established in the Initial Order, was fixed ahead of all security interests in favour of any person, other than the "Administration Charge", "Critical Suppliers' Charge" and the "DIP Lenders' Charge".

[15] The statutory basis for the Directors' Charge is set out in section 11.51 of the CCAA, which reads as follows:

11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[16] Any order under this provision affects, or potentially affects, the priority status of creditors. It is through this lens that the court considers motions. The order is discretionary in nature, is extraordinary in nature and should be, in my view, applied restrictively as it alters the

general priority regime affecting secured creditors. In this case, the order was made and it has priority over Fifth Third Bank.

D&O Claims

[17] On August 2, 2012, the Claims Procedure Order was issued to solicit the submissions of Proofs of Claim by the claims bar date of October 23, 2012 (the “Claims Bar Date”) in respect of all “D&O Claim[s]”.

[18] As indicated by the Monitor’s counsel, the definition of a “D&O Claim” is very broad. It includes both claims that arose prior to June 14, 2012 (pre-filing D&O claims) and claims that arose from and after June 14, 2012 (post-filing D&O claims). It also potentially includes both post-filing D&O claims which are secured by the Directors’ Charge and post-filing D&O claims which are not secured by the Directors’ Charge.

[19] Paragraph 25 of the Claims Procedure Order specifically recognizes this distinction:

25. This court orders that no Post-Filing D&O Claim shall be paid by the Monitor from the D&O Charge Reserve without the consent of the Pre-Filing Agent and the CRO Counsel and D&O Counsel or further Order of the court and the determination that a claim is a Post-Filing D&O Claim does not create a presumption that such D&O Claim is entitled to be paid by the Monitor from the D&O Charge Reserve.

[20] The MOE D&O Claims concurrently asserts the MOE Pre-Filing D&O Claim and the MOE Post-Filing D&O Claim for the same amounts, namely:

- (a) \$66,240.36 for costs incurred by the MOE to carry out the remediation activities described in the March 15 Order up to the date when the MOE Proof of Claim was filed;
- (b) \$15 million for future costs to be incurred by the MOE to carry out the remediation activities described in the March 15 Order; and
- (c) a presently unknown amount required to conduct additional environmental remediation work necessary to decontaminate the Site and the Bishop Street Community.

[21] As there are no funds available for distribution to unsecured pre-filing creditors in the CCAA Proceedings, the Monitor appropriately has not considered the validity of the MOE Pre-Filing D&O Claim. This motion, from the Monitor’s standpoint, therefore only addresses the MOE Post-Filing D&O Claim.

[22] The WeirFoulds Proof of Claim provides that:

This proof of claim is filed in order to preserve the right to commence:

- (1) any and all claims over that any of the [WeirFoulds D&Os] may have against each other; and
- (2) any and all claims that any of the [WeirFoulds D&Os] may have against any former director or officer of Northstar Aerospace, Inc., or predecessor companies, for contribution or indemnity, based upon any applicable cause of action in law or in equity, in relation to any liability that may be found to exist against any of the [WeirFoulds D&Os] in connection with the proofs of claim filed in the within proceedings by the Ontario Ministry of the Environment, dated October 19, 2012.

[23] For the purpose of resolving the entitlement of any claimant to the D&O Charge Reserve, paragraph 22 of the Claims Procedure Order allows the Monitor and certain other parties to bring a motion seeking approval of an adjudication procedure for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

[24] The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

[25] In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

[26] The Monitor's counsel appropriately sets out the issues of this motion, as follows:

- (a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;
- (b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;
- (c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and
- (d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

[27] I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

[28] The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

[29] The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications, Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) and *Canwest Publishing Inc., Re*, 2010 ONSC 222.

[30] In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

[31] The Yuen affidavit goes on to identify the specific obligations and liabilities for which the Directors' Charge was requested, including liability for unpaid wages, pension amounts, vacation pay, statutory employee deductions and HST. At paragraph 143 of his affidavit, Mr. Yuen states:

I am advised by Daniel Murdoch of Stikeman Elliott LLP, counsel to the CCAA Entities, and do verily believe, that in certain circumstances directors can be held liable for certain obligations of a company owing to employees and government entities. As at May 18, 2012, the CCAA Entities were potentially liable for some or all of unpaid wages, pension amounts, vacation pay, statutory employee deductions, and HST (Harmonized Sales Tax) of approximately CDN \$1.65 million ...

[32] The Monitor's counsel submits that the quantum of the Directors' Charge was tailored to the Applicants' existing liability for such amounts.

[33] The scope of a section 11.51 charge is limited in several ways:

- (a) section 11.51 does not authorize the creation of a charge in favour of any party other than a director or officer (or chief restructuring officer) of the companies under CCAA protection;
- (b) section 11.51 does not authorize the creation of a charge for purposes other than to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of its CCAA Proceedings; and
- (c) section 11.51(4) requires the court to exclude from the section 11.51 charge the obligations and liabilities of directors and officers incurred through their own gross negligence or wilful misconduct.

[34] In my view, it would be inappropriate to determine that the Proofs of Claim are claims for which the D&Os are entitled to be indemnified under the Directors' Indemnity, as doing so would wrongly and inequitably affect the priority of claims as between the MOE and the Fifth Third Bank.

[35] In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar, supra*, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.

[36] Simply put, the activity that gave rise to the MOE claims occurred prior to the CCAA proceedings. It is not the type of claim to which the Directors' Charge under section 11.51 responds. Rather, in the CCAA proceedings, it is an unsecured claim and does not entitle the MOE to obtain the remedy sought on this motion. The fact that the MOE seeks this remedy through the D&Os does not change the substance of the position.

[37] The situation facing the Applicants, the Monitor, Fifth Third Bank, and others affected by the Directors' Charge, has to be considered as part of the CCAA Proceedings. In my view, it would be highly inequitable to create a parallel universe, wherein certain MOE claims as against the Applicants are treated as unsecured claims and MOE D&O Claims and the WeirFoulds Post-Filing D&O Claim are treated as secured claims with respect to the Directors' Charge.

[38] It could be that the MOE has a remedy against the D&Os; however, any remedy they may have does not provide recourse against the D&O Charge in these CCAA Proceedings. Nevertheless, it remains open for the MOE to pursue its claims against the D&Os on the motion returnable on April 18, 2013.

Order

[39] In the result, I grant the Monitor's motion, approve the aforementioned adjudication process, and approve the activities of the Monitor as described in the Seventh Report of the Monitor dated November 7, 2012. I also direct the following:

- (1) The MOE Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity;
- (2) The WeirFoulds Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity; and
- (3) The US\$1,750,000 held by the Monitor in respect of the D&O Charge Reserve be paid to the Pre-Filing Agent.

MORAWETZ J.

Date: April 9, 2013

CITATION: Colossus Minerals Inc. (Re), 2014 ONSC 514
COURT FILE NO.: CV-14-10401-00CL
DATE: 20140207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, As Amended

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

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: S. Brotman and D. Chochla, for the Applicant Colossus Minerals Inc.

L. Rogers and A. Shalviri, for the DIP Agent, Sandstorm Gold Inc.

H. Chaiton, for the Proposal Trustee

S. Zweig, for the Ad Hoc Group of Noteholders and Certain Lenders

HEARD: January 16, 2014

ENDORSEMENT

[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 SISF.

[14] Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISF, 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 SISF 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.

Wilton-Siegel J.

Released: February 7, 2014

CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
COURT FILE NO.: 33-2618511
DATE: 2020/03/09

**COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

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

AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL
FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH
PRODUCTS INC.)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

HEARD: March 6, 2020

DECISION AND REASONS

[1] The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements (“DIP financing”).

[2] Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Act*¹. Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

[3] The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group

¹ RSC 1985, C. B-3 as amended

of three secured creditors (“the noteholders”). Dominion takes the view that “there is no business to rehabilitate, no air of reality to the NOI Companies’ business plan, no significant assets apart from the Ottawa facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings.”

[4] If an extension of time is not granted, then pursuant to s. 50.1 (8) of the *BIA* the NOI companies will be deemed to have made an assignment in bankruptcy on March 15th, 2020. If the interim financing is not granted then it is likely there will be a receivership and a liquidation of the assets. In that case there will be no recovery for the unsecured creditors. The total debt at this point in time appears to be in excess of \$28 million although that is inclusive of intercompany debt.

[5] If the plan is approved it is possible but not guaranteed that the value of the business as a going concern will be higher than the “as is” value of the land, it is possible the debtors will put forward an acceptable proposal and possible there will be full recovery for the secured creditors and something for those that are unsecured. On the other hand, the plan may fail, the proposal may be voted down but there will be another \$2.3 million in debt in priority to all other creditors.

[6] The court must decide if it is reasonable to authorize this additional debt while continuing to protect the debtors from their existing creditors in the hope that this will generate a better outcome. The noteholders urge the court not to do so.

Background

[7] Eureka 93 Inc. is the parent company of a corporate group that was intended to be a vertically integrated hemp and cannabis company. Livewell and Vitality are subsidiaries of Eureka and Artiva is a subsidiary of Livewell. Eureka is or was publicly traded until a cease trading order was issued by the Ontario Securities Commission (OSC) in September of last year when it ran into significant financial difficulty and was unable to meet its obligations as an issuer of securities.

[8] Eureka is a holding company and currently has five employees. Artiva owns a farm equipped with greenhouses and has a cannabis cultivation licence from Health Canada. This facility (the Ottawa facility) is not yet completed and it requires a further significant capital investment to begin production. None of the other corporations are operational at this time. The focus of the motion and of the intended proposal is to salvage the Ottawa facility and to generate positive cash flow through Artiva.

[9] Dominion describes the business of Artiva as more of an idea than a reality. They say that Artiva owns the land and the Ottawa facility but does not have a business. Despite the significant funds raised to date, the Ottawa facility remains incomplete and inoperable. The noteholders take the view that permitting the NOI companies to raise more funds in priority to the existing secured creditors is futile and will only result in further erosion of their collateral and any potential recovery for the existing creditors. Essentially, the moving party has no faith in Eureka’s remaining management nor in the business plan the proponents now seek to put forward.

[10] I have reviewed the First Report of the Proposal Trustee (Deloitte). The Proposal Trustee has not audited the financial statements or verified any of the representations made by management. The trustee has reviewed the proposed cash flow and is satisfied that the interim financing would provide sufficient liquidity to bring the facility to completion and to begin. The Proposal Trustee recommends the plan. It believes it is a better option than either an immediate bankruptcy or uncontrolled efforts by secured creditors to realize on their security. The facility is largely completed to Health Canada standards. It was successful in obtaining the licence to grow and sell cannabis in September of last year. No crop could have been legally grown before that date. It requires roughly \$650,000.00 to complete the construction and \$160,000.00 to purchase inventory.

[11] The interim financing plan is expensive and would add \$2.3 million in debt to the burden already in place. A large portion of the cost is the cost of professional fees to work through the insolvency and restructuring and the cost of high risk borrowing. The plan involves at least three significant assumptions which cannot be tested and carry significant risks. There is the risk that the remaining construction will not be completed on time, to specification and within budget. There is the risk that production of cannabis will not ramp up as smoothly as predicted. There is the risk that buyers of the product will not be found in sufficient time or numbers to meet the cash flow predictions.

[12] In addition, there is always the risk that even if all of this falls into place, the proposal or proposals will prove unacceptable to the creditors and an insolvency or a receivership will still result. The debtors have reason to believe that if the facility is completed, they will be able to refinance the project or to sell it as a going concern. On the evidence before me, those are not empty hopes, but they are by no means guaranteed.

Analysis

[13] All parties agree to administrative consolidation of the four intended proposals. This makes sense. It is necessary for each corporation to make a proposal because of the ownership structure. All shares of the subsidiaries are owned by Eureka. There is no benefit to having four separate court files.²

[14] All parties are in agreement with the proposed sealing. It is not in the public interest to have sensitive financial information such as appraisals of the land or the identity of potential purchasers in the public domain at this time. The documents contained in the “confidential document brief” will be sealed until further order.³

[15] This is not a plan of rearrangement under the *Companies’ Creditors Arrangement Act*⁴ nor is it even a proposal at this point. It is a notice of intention to make a proposal under s. 50.4 (1) of the *BIA*. This procedure permits the debtor to gain the statutory protection of a stay of

² See *Electro Sonic Inc. (Re)*, 2014 ONSC 942 (Commercial List)

³ See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 (Commercial List) @ paras 63 - 65

⁴ *Companies’ Creditors Arrangement Act*, R.S.C., 1985 c. C-36

proceedings without initial court approval while, subject to compliance with the terms of the Act, it attempts to put itself in the position to make a proposal. But the Act only permits this for 30 days within which time it is necessary to either put together a proposal or to obtain further approval and protection from the court.⁵

[16] The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the Act. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including those set out in subsection (5). That subsection reads as follows:

Factors to be considered

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

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[17] It is the position of the noteholders that the proposed interim financing would materially prejudice the noteholders by placing another \$2.3 million in debt in priority to its security. This of course is inherent in approving DIP financing and is not the only consideration.⁶ Still it is part of the analysis. \$2.3 million in additional debt over the next month is significant. It is also the position of the noteholders that they have no confidence in management or the ability of that management to successfully bring the project to fruition and generate positive cash flow.

[18] I appreciate the concerns of the noteholders. I share the concern that there is a significant risk inherent in cultivating a first crop of cannabis and finding buyers. This is an industry in its infancy and the struggles of some of the established companies in this area are public knowledge. In fact, on the day of the hearing Canopy Growth Corp. announced it was closing two greenhouse facilities in British Columbia and cancelling a project planned for Ontario.⁷

⁵ See *Cumberland Trading Inc. (Re)*, (1994) 23 CBR (3d) 225 (Ont. Ct., Gen Div., Commercial List)

⁶ See *OVG Inc., (Re)*, 2013 ONSC 1794

⁷ See: <https://business.financialpost.com/cannabis/canopy-growth-lays-off-500-workers-shuts-massive-b-c-greenhouse-facilities>

[19] Counsel for the debtor submitted that this was not an appropriate area for judicial notice particularly in light of the specific evidence before me. The affidavit evidence filed on behalf of the debtors indicated a different business strategy focused on seedlings or “clones” and painted an optimistic picture of quickly generating positive cash flow. I agree that a news report should not be taken as evidence, but it is useful background. There is no doubt that there is significant risk for any new business particularly in an evolving and volatile sector such as legal cannabis production.

[20] The question is whether this is a risk worth taking despite the misgivings of the noteholders and the potential prejudice to their position. I am encouraged by the First Report of the Proposal Trustee and the support for the plan set out therein. I am also impressed by the support for the plan voiced by the representative of the first mortgagee and the interim lenders.

[21] I appreciate that both the interim lender and the first mortgagee are fully secured against the value of the land but the willingness to lend the additional funds is supported by their analysis of the plan as viable. Mr. Martin deposes that he has been working with Mr. Poli since September of 2019 and has full confidence in the plan. It is his position that the interim financing plan and proposal proceedings based on a completed and operational facility is likely to generate greater value for all stakeholders than would be the case in a liquidation.

[22] There are other stakeholders, not the least of which are two lien claimants and the unsecured creditors. There is at least \$15 million in secured debt and over \$9 million in unsecured debt. As noted, the other secured creditors support the motion and neither the lien holders nor the unsecured creditors appeared to oppose it.

[23] There are five current employees but perhaps 20 other employees who were laid off from the various companies. The completion of the project and the start of cannabis production would involve calling some of those employees back to work.

[24] I am persuaded that immediate liquidation would have dire effects whereas the brief extension of time and the interim financing hold at least the prospect of increased value and a successful proposal.⁸

Conclusion & Order

[25] I am granting the proposed order substantially in the form proposed although I have simplified the title of the proceedings in paragraph 2 of the draft order as shown at the top of these reasons. I am also imposing an additional term.

⁸ See *Mustang GP Ltd (Re)*, 2015 ONSC 6562

[26] During the extension period, the court will require a bi-weekly status report confirming the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop.

[27] In the event that there is a significant deviation from the plan as proposed or if any of the assumptions built into the interim financing plan fail to materialize or require significant readjustment, the noteholders or any other creditor may move to lift the stay or for amendment of the order.

[28] I may be spoken to for further direction if required or if there is any dispute as to the form of the order.

[29] The parties may also arrange to speak to the matter if any party seeks costs.

Mr. Justice C. MacLeod

Date: March 9, 2020

CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
COURT FILE NO.: 33-2618511
DATE: 2020/03/09

2020 ONSC 1482 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

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

AND IN THE MATTER OF THREE RELATED
PROPOSALS (LIVEWELL FOODS CANADA INC.,
ARTIVA INC., and VITALITY CBD NATURAL
HEALTH PRODUCTS INC.)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

DECISION AND REASONS

Mr. Justice C. MacLeod

Released: March 9, 2020

In the Court of Appeal of Alberta

Citation: Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66

Date: 20210218

Docket: 2101-0002-AC

2101-0004-AC

Registry: Calgary

Docket: 2101-0002-AC

Between:

Athabasca Workforce Solutions Inc.

Applicant

- and -

**Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation**

Respondents

- and -

**Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation**

Not a Party to the Application

- and -

**Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition
Corporation**

Respondents on Application

Docket: 2101-0004-AC

Between:

**Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish,
Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi,
Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli,**

**Maryam Mohsen Zadeh, Parham Minoo, Haleh Peiravi,
Mohammad Ahadzadeh Ardebili, Ramin Jalalpoor, Elham Vakili Azghandi,
Tariq Mahmood Roshan, Amin Jalalpoor, Faisal Khan, Poonam Dharmani
and Ali Nilforoush**

Applicants

- and -

**Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation**

Respondents

- and -

**Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation**

Not a Party to the Application

- and -

**Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition
Corporation**

Respondents on Application

**Reasons for Decision of
The Honourable Madam Justice Marina Paperny**

Application for Permission to Appeal

**Reasons for Decision of
The Honourable Madam Justice Marina Paperny**

Introduction

[1] The applicants seek a declaration that they, as proposed appellants, do not require leave to appeal the decision of a supervising judge under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). If leave is required, they seek leave to appeal the decision.

[2] The impugned decision approved a sale and vesting order (SAVO), an interim financing order, and an interim financing charge order (collectively, the IFO) over the assets of Greenfire Hangingstone Operating Corporation. The applicant Athabasca Workforce submits it is a creditor of Greenfire Hangingstone as well as a significant shareholder of its parent company, Greenfire Oil & Gas Ltd. (collectively, Greenfire). The second set of applicants are individual investors in Greenfire.

Background

[3] On April 3, 2018, Greenfire purchased the Hangingstone Facility, a bitumen production plant in Alberta's oilsands region. On July 5, 2019, Athabasca and Greenfire Hangingstone entered into a transportation agreement related to the plant's operations. Athabasca Workforce says that, after Athabasca was required to purchase shares in the parent company, Greenfire failed to pay them for their services. On August 20, 2020, Athabasca Workforce filed an application that Greenfire be declared bankrupt. Greenfire disputed the bankruptcy, claimed that in fact it was a creditor of Athabasca Workforce, and, in an effort to keep the facility viable, filed a Notice of Intention to Make a Proposal under the BIA on October 8, 2020.

[4] During this time, Greenfire sought interim financing from potential lenders. Greenfire was required to extend its time to submit a proposal on several occasions thereafter. Meanwhile, the Hangingstone facility was non-operational and began to accrue damage due to freezing temperatures and inactivity. In December 2020, Greenfire sought court approval of the SAVO and IFO. Absent an interim lender and therefore a resumption in operations, damage to the Hangingstone facility and associated environmental liability would continue to increase. With respect to the SAVO and IFO, Greenfire negotiated an Asset Purchase Agreement with an arm's length party, Greenfire Acquisition Co, and negotiated an Interim Financing Agreement with Trafigura Canada General Partnership (Trafigura), the terms of which were contingent on court approval. In December 2020, Greenfire filed an application to approve interim financing, grant Trafigura a priority charge (the interim lender), and approve the Asset Purchase Agreement.

[5] On December 17, 2020, the chambers judge granted the requested orders. The applicants wish to appeal those orders and submit that leave is not required, or in the alternative, that leave ought to be granted in the circumstances.

[6] For the reasons that follow, I have concluded that leave to appeal is required. I have considered the leave application and conclude that the test for leave has not been met.

Is leave to appeal required?

[7] Under section 193 of the BIA, an appeal exists as of right from bankruptcy proceedings in limited circumstances:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; or
- (e) in any other case by leave of a judge of the Court of Appeal.

[8] While at first blush the section, and in particular s 193(c), appears broad, the provision has been narrowly interpreted. The provision, and the BIA generally, are to be interpreted purposively, to ensure bankruptcy proceedings are administered efficiently and expeditiously.

[9] Applicants seeking to avoid the requirement for leave often rely on ss 193(a) and (c), and this appeal is no exception.

[10] Looking first at s 193(a), the investors submit that the SAVO approves vesting title to assets free and clear of all charges and claims, including those of the investors, and thus their future rights are being negatively impacted. I do not accept that submission. Future rights are not procedural rights or commercial advantages, which is in reality what the investors assert. The submission that they no longer have a claim against the assets of Greenfire overlooks the reality that they are not asserting future rights, but rather present rights, and that any proceeds of sale will be available for distribution to creditors in accordance with the BIA. See *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 15; *Ravelston Corp., Re*, 2005 CanLII 63802 at para 17, [2005] OJ No 5351 (Ont CA); *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 CBR 240 (Ont CA); *Dominion Foundry Co., Re* (1965), 1965 CanLII 596, 52 DLR (2d) 79 (Man CA); and *Fiber Connections Inc. v SVCM Capital Ltd.*, 2005 CanLII 15454, 10 CBR (5th) 201 (Ont CA).

[11] The situation is similar to that in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225. In *Bending Lake*, the Ontario Court of Appeal considered whether leave

to appeal a sale and vesting order was required under s 193, it having been submitted that “future rights” were engaged. The court held that to the extent a SAVO affects the rights of those with an economic interest in the debtor, only the present, existing rights of the debtor’s creditors and shareholders are affected, not their future rights (para 27). The court examined the applicant’s real complaint - the “commercial advantages or disadvantages that may accrue from the order challenged on appeal” (para 28), for example eliminating shareholder equity or precluding efforts by the shareholders to raise financing (the precise circumstances here). The court determined that those are existing, not future rights. The same is true in this case.

[12] Applicants also rely on s 193(c). They assert that the value of the property far exceeds the threshold of ten thousand dollars, because the value of the asset being sold exceeds that amount. This is a broad interpretation of “value of the property” within the meaning of s 193(c), and has been rejected. In *Dominion Foundry*, the Manitoba Court of Appeal noted that to allow an appeal as of right under subsection (c) where the property of the bankrupt exceeds this threshold would undermine the purpose of the BIA, which is to allow for the disposition of the bankrupt’s assets and the distribution of the proceeds amongst creditors. Almost every case would qualify, making the requirement for leave meaningless and undermining one of the most important purposes of the act, expeditious determination and the prospect of finality.

[13] The court in *Bending Lake* also considered the scope of s 193(c). Justice Brown adopted a contextual approach and identified two factors that should inform any interpretation of the subsections: first, the predecessor section to s 193(c) was enacted at a time when the BIA did not include the right to seek leave to appeal, and this prompted courts to give categories of appeals as of right a wide and liberal interpretation to avoid shutting out meritorious appeals. Second, Canada’s other major insolvency statute, the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, requires leave under s. 13. No principled basis exists to distinguish the treatment of a sale by a receiver or trustee from that under the CCAA. Brown JA concluded that these factors militated against employing an expansive interpretation. He favoured an approach alive to the needs of modern, real time insolvency litigation. He concluded that s 193(c) does not apply to: (i) orders procedural in nature; (ii) orders that do not bring into play the value of the debtor’s property; and (iii) orders that do not result in a loss.

[14] In *Dominion Foundry*, an attempt to set aside a sale of assets by a trustee as being improvident was considered procedural, and therefore not falling within s. 193(c). In *Alternative Fuel Systems Inc. v EDO (Canada) Limited*, 1997 ABCA 273, 206 AR 295, this court concluded that where the issue was an order directing acceptance of a tender for the assets of a bankrupt estate, the order was procedural – it was a challenge to the method by which assets were sold. The same is true here. The issue before the supervising judge was whether the SAVO and IFO were appropriate methods of securing financing for the current operation and a purchase of the assets so as to ultimately monetize them to satisfy creditors to the extent possible.

[15] In *Bending Lake*, an issue was raised as to whether a transaction ought to be postponed to let shareholders re-finance the company. The court held, and I agree, that such an appeal does not bring into play the value of the debtor's property. Rather, the effect of the SAVO is to generate sale proceeds that stand in place of the assets; it is a means to monetize the estate. As to whether the order results in a gain or loss, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.

[16] For these reasons, I conclude that neither s 193(a) nor (c) apply to the proposed appeal, and leave to appeal is therefore required.

Should leave to appeal be granted?

[17] The following factors are considered on an application for leave to appeal under s 193(e) of the BIA:

- a) whether the point on appeal is of significance to the practice;
- b) whether the point raised is of significance to the action itself;
- c) whether the appeal is *prima facie* meritorious or frivolous; and
- d) whether the appeal will unduly hinder the progress of the action.

[18] In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: see *Alternate Fuel Systems* at para 12; *Dykun v Odishaw*, 1998 ABCA 220 at para 4; *West Edmonton Mall Property Inc. v Duncan & Craig*, 2001 ABCA 40 at para 9; *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 at para 18.

(a) *Is the point on appeal significant to the practice?*

[19] The applicants submit the orders are novel in that approval of the IFO required the approval of the proposed sale of assets as a condition. Therefore, the SAVO was granted in the absence of a proper sale process being conducted and with inadequate evidence of value. I disagree. The approval of interim financing and sales of assets under sections 50.6 and 65.13 of the BIA are matters of judicial discretion and are highly fact dependent. The BIA includes a list of non-exhaustive factors to inform the exercise of that discretion. The reasons of the supervising judge demonstrate a balancing of interests of all stakeholders, having regard to the precarious financial situation, the already serious damage done to the asset, and the restarting and environmental risks. Having regard to the lack of other viable alternative proposals, the support of key stakeholders, the lack of prejudice to Greenfire's creditors as a result of the interim financing, and the attendant lenders charge, there is no basis on the record to suggest the appeal will have any broad significance to the practice.

(b) *Is the point raised of significance to the action?*

[20] It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) *Is the proposed appeal prima facie meritorious?*

[21] The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

[22] The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

[23] In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

[24] The supervising judge weighed the evidence before him, and his finding that any potential alternative source of interim financing was “too little too late” was grounded in that evidence. With respect to the applicants being denied an opportunity to test evidence through cross-examination, the critical information had already been filed in previous affidavits, and the supervising judge was aware of concerns with respect to the seventh affidavit. He put questions to Greenfire’s counsel about this evidence and was satisfied with the responses. He recognized that this transaction was not “the usual” transaction, but that no one had provided any other viable alternative. Speculation about what might be possible did not replace the significance of a certain transaction.

[25] The applicants do not point to any error of law in the analysis that would warrant judicial intervention. This was a discretionary decision that warrants a high degree of deference. The prospect of a successful appeal is doubtful.

(d) Will the appeal unduly delay the proceedings?

[26] Not only will an appeal delay the proceedings, it will also create further jeopardy for the stakeholders of Greenfire. Pursuant to the interim financing agreement, Trafigura has already advanced \$4 million between December 19 and 21, and a further \$4.5 million between December 29 and January 19. That is, \$8.5 million of a total of \$20 million has already been advanced. Granting leave to appeal in these circumstances risks serious potential damage to the facility, given that the additional funds are required to perform repairs and for maintainance. Moreover, there is no reason to believe that the sanctioned transaction can be delayed pending the outcome of an appeal, or for that matter that there will be another viable transaction for anyone to consider. Repairing the damage and returning the facility to an operational state depends on the transaction closing.

Fresh evidence application

[27] The applicant investors also seek leave to file an additional affidavit in which they put forward a term sheet to provide for further interim financing options. They submit the test for fresh evidence has been met because the affidavit material was not available before the chambers judge as it was yet to be completed, but now it could bear decisively on the issue before me – whether leave ought to be granted to appeal the decision to approve the interim financing and SAVO.

[28] In my view such affidavit evidence ought not to be allowed. This court in *Roswell Group Inc. v 1353141 Alberta Ltd*, 2020 ABCA 428 reiterated the test. That this document was not available to the chambers judge was due to the fact that it had not yet been agreed to. This supports his conclusion of “too little too late”. Moreover, I am persuaded that the conditional nature of the document would have been insufficient to displace the conclusion arrived at by the supervising judge. I also note that trying to bring an improved or better offer to the court on appeal is a dubious practice and may have the effect of undermining the principles of fairness articulated in *Soundair*.

Conclusion

[29] I have concluded that leave to appeal is required. The test for leave has not been met, and leave to appeal is denied.

Application heard on February 10, 2021

Reasons filed at Calgary, Alberta
this 18th day of February, 2021

Paperny J.A.

Appearances:

R. Zahara
J.J. Bouchier (no appearance)
for the Athabasca Workforce Solutions Inc.

D. LeGeyt
R.E. Algar
J.D. Murphy (no appearance)
for Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

A.C. Maerov
K. Ryland (no appearance)
for Alvarez Marsal Canada Inc.

K.L. Fellows Q.C.
J.J. Maslowski
R.L.R. Hamilton (no appearance)
for Trafigura Canada General Partnership

K. Kashuba
J. Mann (no appearance)
for McIntyre Partners

D.S. Nishimura
for Behrokh Azarian et al.

G.G. Plester
for Regional Municipality of Wood Buffalo

J.W. Reid
for ABC Funding LLC