COURT FILE NUMBER	25-3336652 B301-336652
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JUDICIAL CENTRE	CALGARY

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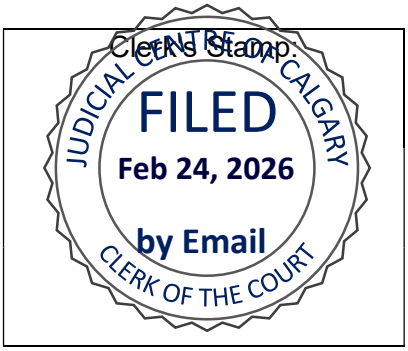

MATTER	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF IGNITE ALLIANCE CORP.
APPLICANT	IGNITE ALLIANCE CORP.
DOCUMENT	**BOOK OF AUTHORITIES OF IGNITE ALLIANCE CORP.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT

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File No. 69910-19

Hearing via Webex before the Honourable Justice M.H. Bourque on the Commercial List, on March 2, 2026, commencing at 3:00PM

TABLE OF AUTHORITIES

AUTHORITIES	
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Kids' Farm Inc., Re*, 2011 NBQB 240, 84 CBR (5th) 91
3.	*Petrolama Energy Canada Inc., Re* (10 August 2022), 25-2851343, Judicial Centre of Calgary (Alta QB, Horner J)
4.	*Wallace & Carey Inc. et al., Re* (22 June 2023), 2301-08305, Judicial Centre of Calgary (Alta KB, Campbell J)
5.	*Re Comark Inc,* 2015 ONSC 2010 at para 19, 266 ACWS *(3d)*
6.	*Re Performance Sports Group Ltd.,* 2016 ONSC 6800
7.	*Blue Sky Resources Ltd. et al., Re* (17 December 2025), 25-3276975, Judicial Centre of Calgary (Alta KB), Dunlop J)
8.	*Aralez Pharmaceuticals Inc. (Re),* 2018 ONSC 6980
9.	*Danier Leather Inc., Re*, 2016 ONSC 1044 (Canlii), 33 CBR (6th) 221
10.	*Just Energy Group Inc.,* 2021 ONSC 7630
11.	*Re Essar Steel Algoma Inc. et al,* 2015 ONSC 7656
12.	*Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184, 59 CBR (5th) 72
13.	*Altus Energy Services Ltd., Re*, 2011 CarswellAlta 2781 (QB)
14.	*Ontario Securities Commission v. Bridging Finance Inc*., 2021 ONSC 4347

1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

KeyCite treatment

Most Recently Cited in: HealthHub Patient Engagement Solutions Inc. (Re) , 2025 NSSC 261, 2025 CarswellNS 816, 20 C.B.R. (7th) 271, 2025 A.C.W.S. 3989 | (N.S. S.C., Aug 5, 2025)

R.S.C. 1985, c. B-3, s. 64.2

s 64.2

Currency

64.2

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.

64.2(3)Individual

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.

Amendment History

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

Currency

Federal English Statutes reflect amendments current to December 3, 2025
Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

KeyCite treatment

Most Recently Cited in:2585929 Alberta Ltd (Re) , 2026 ABKB 75, 2026 CarswellAlta 241 | (Alta. K.B., Feb 4, 2026)

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

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).

50.4(2)Certain things to be filed

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

50.4(3)Creditors may obtain statement

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

50.4(4)Exception

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.

50.4(5)Trustee protected

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.

50.4(6)Trustee to notify creditors

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).

50.4(7)Trustee to monitor and report

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 — (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.

50.4(8)Where assignment deemed to have been made

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.

50.4(9)Extension of time for filing proposal

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

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

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

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

50.4(10)Court may not extend time

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

50.4(11)Court may terminate period for making proposal

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.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Judicial Consideration (3)

Currency
Federal English Statutes reflect amendments current to December 3, 2025
Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

KeyCite treatment

Most Recently Cited in: HealthHub Patient Engagement Solutions Inc. (Re) , 2025 NSSC 261, 2025 CarswellNS 816, 20 C.B.R. (7th) 271, 2025 A.C.W.S. 3989 | (N.S. S.C., Aug 5, 2025)

R.S.C. 1985, c. B-3, s. 50.6

s 50.6

Currency

50.6

50.6(1)Order — 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(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.

50.6(2)Individuals

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.

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.

50.6(4)Priority — previous orders

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.

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.

Amendment History

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

Currency
Federal English Statutes reflect amendments current to December 3, 2025
Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Jurisdiction of Courts

KeyCite treatment

Most Recently Cited in:TSA CORPORATION et al v. KPMG LLP, 2026 NWTSC 2, 2026 CarswellNWT 1 | (N.W.T. S.C., Jan 14, 2026)

R.S.C. 1985, c. B-3, s. 183

s 183.

Currency

183.

183(1)Courts vested with jurisdiction

The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed 2001, c. 4, s. 33(2).]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench of the Province;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

183(1.1)Superior Court jurisdiction in the Province of Quebec

In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

183(2)Courts of appeal — common law provinces

Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

183(2.1)Court of Appeal of the Province of Quebec

In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with the power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

183(3)Supreme Court of Canada

The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Amendment History
R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); 1990, c. 17, s. 3; 1993, c. 28, s. 78 (Sched. III, item 6) [Repealed 1999, c. 3, s. 12 (Sched., item 3).]; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 2001, c. 4, s. 33(2), (3); 2002, c. 7, s. 83; 2015, c. 3, s. 9

Judicial Consideration (6)

Currency
Federal English Statutes reflect amendments current to December 3, 2025
Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

KeyCite treatment

Most Recently Cited in: In the Matter of the Notice of Intention to Make a Proposal of The Body Shop Canada Limited , 2024 ONSC 1651, 2024 CarswellOnt 3932, 2024 A.C.W.S. 1021 | (Ont. S.C.J. [Commercial List], Mar 4, 2024)

R.S.C. 1985, c. B-3, s. 64.1

s 64.1

Currency

64.1

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 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.

64.1(3)Restriction — indemnification insurance

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.

64.1(4)Negligence, misconduct or fault

The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Amendment History

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

Currency

Federal English Statutes reflect amendments current to December 3, 2025
Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

KeyCite treatment
Most Recently Cited in: Millhouse Farms Inc. v. De Lage Landen Financial Services Canada Inc., 2026 SKCA 21, 2026 CarswellSask 68 | (Sask. C.A., Feb 5, 2026)

R.S.C. 1985, c. B-3, s. 244

s 244.

Currency

244.
244(1)Advance notice
A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

244(2)Period of notice
Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

244(2.1)No advance consent
For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

244(3)Exception
This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

244(4)Idem
This section does not apply where there is a receiver in respect of the insolvent person.

Amendment History
1992, c. 27, s. 89(1); 1994, c. 26, s. 9

Currency
Federal English Statutes reflect amendments current to December 3, 2025

Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

End of Document

2

2011 NBQB 240
New Brunswick Court of Queen's Bench

Kids' Farm Inc., Re

2011 CarswellNB 441, 2011 NBQB 240, 206 A.C.W.S. (3d) 663, 377 N.B.R. (2d) 283, 84 C.B.R. (5th) 91, 972 A.P.R. 283

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KIDS' FARM INC., a corporation incorporated under the laws of the Province of New Brunswick

AND IN THE MATTER OF AN APPLICATION BY KIDS' FARM INC. for the granting of an extension of time for filing a Proposal pursuant to Section 50.4 of the Bankruptcy and Insolvency Act

Michael J. Bray Reg.

Heard: September 9, 2011
Judgment: September 14, 2011
Docket: NB 17490, Estate No. 51-1523569

Counsel: Kevin C. Toner for Kid's Farm Inc.
Josh J. B. McElman, Rebecca M. Atkinson for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Bank issued notice of intention to enforce its security against applicant, debtor company — Applicant filed notice of intention to make proposal under Bankruptcy and Insolvency Act on July 27 — On August 26, applicant filed notice of motion seeking 45 day extension to file proposal — Bank requested hearing — At hearing on September 9, Bank argued that because extension was not granted within thirty days of filing of notice of intention to make proposal, debtor should be deemed to have made assignment — Application granted in part — Application for 45 day extension denied; extension granted until October 4 — Delay between filing of motion, hearing, and decision did not constitute deemed assignment — Language in s. 50.4(9) of Act states that debtor must apply to court for extension prior to expiration of thirty day period, and this was done — No draft proposal had been filed — Court was given contradictory sworn testimony without adequate support — Court on s. 50.4(9) application will not examine secured creditor's motivations for its lack of support — Analysis was limited to objective evaluation of good faith and diligence, absence of material prejudice and whether projected proposal was viable — This was difficult to ascertain based on available evidence — There was adequate reason to postulate applicant was acting in good faith and with sufficient diligence — Applicant attested to meeting three required criteria with supporting evidence that questionably met burden of proof required to establish factors on balance of probabilities.

Table of Authorities

Cases considered by *Michael J. Bray Reg.*:

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

Royalton Banquet & Convention Centre Ltd., Re (2007), 2007 CarswellOnt 3796, 33 C.B.R. (5th) 278 (Ont. S.C.J.) — referred to

Statutes considered:

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

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

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

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

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

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

s. 50.4(10) [en. 1992, c. 27, s. 19] — considered

Farm Debt Mediation Act, S.C. 1997, c. 21
Generally — referred to

Rules considered:

Rules of Court, N.B. Reg. 82-73
R. 3 — referred to

R. 3.02(1) — referred to

APPLICATION for 45 day extension to file proposal pursuant to s. 50.4 (9) of *Bankruptcy and Insolvency Act*.

***Michael J. Bray Reg.*:**

Introduction

This matter comes before the court as an application for a 45 day extension to file a proposal pursuant to subsection 50.4 (9) of the *Bankruptcy and Insolvency Act* ("the Act").

Facts

1 Kids' Farm Inc. ("KFI") is a farming enterprise being prepared to produce hay for feed pellets. It is noted that the corporation was referred to as Kid*'s* Farm Inc. in the Superintendent's documents. In this decision the spelling used in the style of cause in documents presented to the Court has been followed.

2 Green Grass Comfort Inc. ("GGC") is the proposed purchaser of the hay for pellet production at a plant to be

constructed for this purpose on land presently owned by KFI.

3 Since 2002 KFI has received its financing from Bank of Montreal ("the Bank"). KFI's former dairy production activity had become unprofitable and between 2008 and 2009 it sold milk quotas to pay down its liability to the Bank, its major secured creditor.

4 There was a disagreement between KFI and the Bank concerning the distribution of funds received from the milk quota sales and KFI became unable to meet its obligations as they became due. Gerben Klompmaker, Managing Director of KFI, attests to this disagreement but the details thereof are not material to the present instance.

5 The Bank issued a Notice of Intention to enforce security on October 28, 2010 and appointed PricewaterhouseCoopers Inc. as receiver on August 2, 2011.

6 Attempts to achieve a resolution under the *Farm Debt Mediation Act* were apparently to no avail. KFI had filed a Notice of Intention to Make a Proposal pursuant to subsection 50.4 (1) of the Act on July 27, 2011 with A.C. Poirier & Associates Inc. to be the Trustee administering the intended proposal.

7 On August 26, 2011, KFI filed a Notice of Motion requesting a 45 day extension to file the proposal. On the same day the Bank, when served, notified the court office that it opposed the motion being heard on an *ex parte* basis and requested a hearing. The Deputy Registrar arranged for a date to be set for the Registrar to hear the motion.

8 An affidavit filed by Paul A. Stehelin of A.C. Poirier & Associates Inc. attests that the Bank and other creditors have security over sufficient real property and chattels to avoid their being prejudiced by an extension.

9 Randolph Jones, the receiver of the Bank, deposes to the fact that the Bank is not fully secured and to his belief that there is no certainty of the date of completion of the proposed pellet production plant.

Issues

10 Does the delay between the filing of the motion, its hearing and consequent decision constitute a deemed assignment since the hearing date is more than thirty days from the filing of the Notice of Intention?

11 Has KFI met the burden of proof of showing an extension to be justified and that no creditor will be prejudiced by this extension?

Analysis

12 Concerning the question of time limitation, subsection 50.4(9) of the Act reads as follows:

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

13 The Bank argues that the fact that the extension was not granted by the court within the thirty day period means that the debtor must be deemed to have made an assignment. The case of *Royalton Banquet & Convention Centre Ltd., Re* (2007), 33 C.B.R. (5th) 278 (Ont. S.C.J.), was listed in support.

14 With the greatest respect to Deputy Registrar Diamond, I do not interpret the section in a similar manner. The language is clear in subsection (9) concerning the obligations incumbent upon the debtor. It must apply to the court for an extension prior to the expiration of the thirty day period. This was done. The court may grant the extension but may require notice to interested persons. Surely this notice presupposes that such interested persons have the right to appear and make representations before an order is granted. It would obviously be impractical in many if not most cases to do this appropriately in less than one day. One cannot postulate that Parliament legislated a provision that would be incongruous in its practical application. The Act is a commercial code amenable to common-sense interpretation and the conclusions of such interpretation should be accepted unless clear language of the drafting otherwise dictates. Pursuant to Rule 3 of the Act, Rules of Court of New Brunswick not inconsistent with the Act and its associated Rules are may apply. In a motion such as that currently under consideration Rule 3.02(1) could be applied for an expedited hearing in a case of demonstrated urgency. Parliament could have clearly mandated limits to the court's discretion to deal with applications for extension. It did not do so with the exception of subsection 50.4 (10).

50.4(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

15 I read this provision to be limited to restricting the court from extending the debtor's time for making an application beyond that of 30 days or from granting extensions in excess of 45 days or for a total period exceeding five months.

16 The applicant, not being deemed to have made an assignment and being allowed to present its request, must convince the court that the extension is justified, that there are diligent efforts being pursued with a probability that a viable proposal can be achieved and that no creditor will be prejudiced by the extension, if granted.

17 Although documents submitted for the consideration as evidence gave a wide contextual view of the applicant's prior dealings with the Bank and possible future litigation concerning differences and alleged wrongdoing, the court on a motion pursuant to subsection 50.4(9) of the Act, is constrained by the confines of the manner in which paragraphs a), b), and c) are drafted. Only those considerations are material and the provisions are conjunctive so the applicant must prove all three.

18 The affidavit of Mr. Klompmaker, President and Managing Director of KFI, attests that he is acting diligently and in good faith. The Bank counters that this is a shallow statement and otherwise unsupported. The reference made in this affidavit to his partner's arrangements with the ACOA, Province of New Brunswick and BDC to supplement his personal resources, however, are not contradicted. The extent of his efforts might not appear to be maximal but they are sufficient to meet a minimal test of diligence if the other two criteria are clearly met.

19 Allegations of wrongdoing by the Bank and possible misunderstandings in interpreting agreements between the parties will not be accepted either to show bad faith on the part of the applicant or misconduct by the Bank. These issues are not subject to adjudication in this forum.

20 Although the evidence is not fulsome, I am satisfied there is adequate reason to postulate for this analysis that the Applicant is acting in good faith and with sufficient diligence.

21 As to whether the Bank will be materially prejudiced we have the affidavit of Mr. Stehelin attesting that the Bank is sufficiently secured to avoid prejudice. The Bank counters that the statement by the intended administrator is brief and is not well supported.

22 The affidavit of Anna Graham, the Senior Account Manager of the Special Accounts Management of the Bank, attests to KFI's capital indebtedness of $1,006, 973.77 plus interest of approximately $57,000.00. Mention is made of security in inventory and accounts receivable. There is a general statement that inventory will be depleted, accounts receivable will be

more difficult to collect and assets will depreciate.

23 Unless there is a danger of assets being removed and sequestered and of agricultural inventory being abandoned with a failure of harvesting, I view with difficulty that a short extension of time will significantly alter the security position.

24 The ratio of security to the value of the assets secured in KFI is not stated. The Bank says that it is unable to quantify. It would however, be helpful to know the probable extent of the asset diminution compared to the total value of security held.

25 There may well be some level of prejudice to the Bank if an extension is granted but would it be a "material" prejudice? By "material" I understand that which is more than a minor change such as those which happen in the daily operations of a business that is a going concern. Would the change in the security position be such that a reasonable creditor would probably not consent thereto? To evaluate this without the ratio of debt to security position of the parties being clearly exposed is difficult.

26 The affidavit of Mr. Klompmaker attests to assets of $4,437.000.00 being owned by KFI with an equity of $2,437,000.00, making an asset to debt ratio of more than 2:1. The Bank objects that the appraisal annexed as an exhibit in support is incomplete and should not be given weight because important portions that would give context have been omitted.

27 The Bank has had an appraisal done by the Altus Group which it alleges shows a much lesser value based upon the assumption of a forced sale. The Bank considered submitting this as an exhibit if a sealing order were granted to avoid a publication of information that might adversely affect any potential sale. The Court was disposed to grant that relief but would direct that the applicant have a period to respond, its agents having never before seen the document. The Bank elected not to file the appraisal.

28 The Court is placed in the inappropriate position of speculation having been given contradictory sworn testimony without adequate support.

29 The issue of whether the Applicant would be likely to make a viable proposal if the extension were granted will therefore be the turning point of this particular application.

30 In the *Baldwin Valley* case at para. 4, Farley J. discussed a viable proposal as contemplated by the second branch of the test as follows:

> 4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10 - 11 in Re Cumberland Trading Inc. released January 2, 199. "Likely" as defined in the Concise Oxford Dictionary of Current English, 7th ed. (1987; Oxford, The Claredon Press) means: *likely* 1. such as *might well happen*, or turn out to be the thing specified, *probable* 2. to be *reasonably expected* [emphasis added] I do not see the conjecture of the debtor companies' rough submission as being *"likely"*.
>
> *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List])

31 No draft of the proposal has been filed with the Court. There have been no cash flow projections nor marketing surveys presented to support Mr. Klompmaker's assertions that a net profit of $1,750,000.00 would be realized in the first three years. If he is correct there is reason to believe that a proposal would be viable.

32 It is unclear from the evidence, however, if the restructuring plan is dependent upon the pellet mill being built on the specified ten acres upon which it is alleged that the Bank refuses to discharge its mortgage, thereby stymieing any progress. If the plan is thus structured and no other property is available, affordable or otherwise appropriate to the requirements, it would appear that the Bank holds the trump card and has shown itself to be opposed to the proposal. The conclusion would be that a proposal is not viable.

33 The Court on a section 50.4(9) application will not examine a secured creditor's motivations for its lack of support. If triable issues are involved therein they belong in another forum. In this instance we are limited to an objective evaluation of good faith and diligence, the absence of material prejudice and whether the projected proposal is viable. As previously noted, this is difficult to ascertain based on the available evidence.

Disposition

34 The applicant has attested to his meeting of the three required criteria with supporting evidence that questionably meets the burden of proof incumbent upon him to convince the Court of these factors on a balance of probabilities.

35 The application for a forty-five day extension for filing the proposal is denied. The applicant will be granted an extension to file a proposal until October 4, 2011. No request for any further extension will be considered by the Court unless the applicant files a draft of the proposal, a clear cash-flow projection, a complete appraisal of KFI assets and a business plan for the establishment of a feed production facility including a projected time for completion, a detailed indication of funding available and the sources thereof, and the contingency arrangements should the Bank not release its security on the land identified as the construction site.

Application granted in part.

3

COURT/ESTATE FILE NUMBER	25-2851343
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, OF PETROLAMA ENERGY CANADA INC.
DOCUMENT	**ORDER** **(Extension of Time to File Proposal, etc.)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Christa Nicholson QC / Angad Bedi Tel: 403 571 1053 Fax: 403 571 1528 nicholsonc@jssbarristers.ca / bedia@jssbarristers.ca File: 15378.001

Clerk's Stamp

DATE ON WHICH ORDER WAS PRONOUNCED:	August 10, 2022
NAME OF JUDGE WHO MADE THIS ORDER:	Justice K.M. Horner
LOCATION OF HEARING:	**Calgary, Alberta**

UPON THE APPLICATION of Petrolama Energy Canada Inc. (the "**Company**") filed August 2, 2022 (the "**Application**"); **AND UPON** having read the Application and the Affidavit of Paul Farley Joslyn sworn August 2, 2022 (the "**Joslyn Affidavit**"); **AND UPON** having read the First Report of the Proposal Trustee, Alvarez & Marsal Canada Inc. (the "**Proposal Trustee**") filed on [DATE]; **AND UPON** having read the Affidavit of Service, to be filed of [**TBD**], sworn August 2, 2022; **AND UPON** noting the submissions of counsel for the Company, counsel for the Proposal Trustee and the other parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

Service of the Application

1. The time for service of this Application, together with all supporting materials, is hereby abridged, if necessary, and declared to be good, valid, timely and sufficient and no other person is required to have been served with such documents, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

Defined Terms

2. Unless otherwise expressly indicated, all capitalized terms used herein and not otherwise defined shall have the meanings used in the Sales and Investment Solicitation Process (the "**SISP**") attached as **Exhibit "2"** to the Joslyn Affidavit.

Administration Charge

3. The Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Company, 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 first ranking charge (the "**Administration Charge**") on all of the Collateral, which charge shall not exceed $150,000 in an aggregate amount.

Interim Financing

4. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from 884304 Alberta Ltd., (in such lender capacity, the "**Interim Lender**"; also referred to as the "**Stalking Horse Bidder**") in order to finance the Company's restructuring expenses, provided that borrowings under such credit facility (the "**Interim Facility**") shall not exceed $300,000 unless permitted by further order of this Court. The Interim Facility shall be extended on the terms and subject to the conditions set forth in the agreement entitled "Interim Financing Terms" between the Company and the Interim Lender, a copy of which is attached as **Exhibit "4"** to the Josyln Affidavit (the "**Interim Financing Terms**").

5. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender Charge**") on all of the Collateral to secure the Interim Financing Obligations (as defined in the "**Interim Financing Terms**" which are attached as **Exhibit "5"** to the Joslyn Affidavit) , which charge shall not exceed the aggregate amount advanced on or after the date of this Order together with any Interim Financing Obligations under the Interim Financing Terms, and which charge shall not secure an obligation that exists before this Order is made. The Interim Lender Change shall have the priority set out in paragraphs 8 and 10 hereof.

Directors' and Officers' Charge

6. The Company shall indemnify its directors and officers against obligations and liabilities that they may incur as its directors or officers after the commencement of the BIA Proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

7. Each of the directors and officers of the Company shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' and Officers' Charge**") on all of the Collateral, which charge shall not exceed an aggregate amount of $65,000, as security for the indemnity provided in this Order. The Directors' and Officers' Charge shall have the priority set out in paragraphs 8 and 10 hereof.

Priority of the BIA Charges

8. The priorities of the Administration Charge, the Interim Lender Charge and the Directors' and Officers' Charge (collectively, the "**BIA Charges**"), as among them, shall be as follows:

   (a) First: Administration Charge, up to the maximum amount of $150,000;

   (b) Second: Directors' and Officers' Charge, up to the maximum amount of $65,000. and

   (c) Third: Interim Lender Charge up to a maximum principal amount of $300,000 plus all other Interim Financing Obligations.

9. The filing, registration or perfection of the BIA 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.

10. Each of the BIA Charges (all as constituted and defined herein) shall constitute a charge on all the Collateral and each such charge 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 except in the case of the Interim Lender Charge which shall be subject to the Permitted Priority Liens as defined in the Interim Financing Terms.

11. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Collateral that rank in priority to, or *pari passu* with, any of the BIA Charges, unless the Company also obtains the prior written consent of the Proposal Trustee and the beneficiaries of the Administration Charge, the Interim Lender Charge, and the Directors' and Officers' Charge, or same is authorized by further order of this Court.

12. The BIA Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by:

(a) The pendency of these proceedings and the declarations of insolvency made 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 Company, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the BIA Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Company 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 BIA Charges; and

(iii) the payments made by the Company pursuant to this Order, and the granting of the BIA 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.

13. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the BIA Charges amongst the various assets comprising the Collateral.

Approval of SISP including Stalking Horse Proposal as a Qualified Bid

14. The SISP, including the SISP Procedures, substantially in the form attached as **Exhibit "2**" to the Joslyn Affidavit, shall be and are hereby approved, including its deeming of the Stalking Horse Proposal as a Qualified Bid and the Company and the Proposal Trustee are authorized and directed to carry out the SISP in accordance with the SISP Procedures and this Order, and are hereby authorized and directed to take such steps as they consider necessary or appropriate in carrying out each of their obligations thereunder, subject to prior approval of this Court being obtained before the completion of any transaction(s) resulting pursuant to the SISP.

15. For greater certainty, nothing herein approves the transaction contemplated in the Stalking Horse Proposal, and the approval of any transaction contemplated by the SISP shall be determined on a subsequent application made to this Court.

Extension of Time to file a Proposal

16. Pursuant to subsection 50.4(9) of the BIA, the period within which the Company is required to a file a proposal to its creditors with the Official Receiver under subsection 62(1) of the BIA shall be and is hereby extended to 11:59 pm (local Calgary time) on October 10, 2022.

Service of This Order

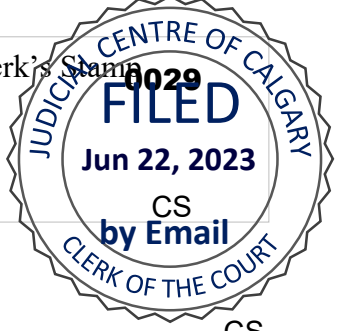
17. Service of this Order shall be deemed to be achieved by posting a copy of this Order on the website of the Proposal Trustee, namely www.alvarezandmarsal.com/petrolama and by delivering an electronic copy of this Order to those parties listed on the Service List prepared by counsel for the Company.

Justice of the Court of Queen's Bench of Alberta

4

I hereby certify this to be a true copy of
the original CCAA Initial Order
Dated this 22 day of June 2023
Hermosa Gek
for Clerk of the Court

Clerk's Stamp



CS

COURT FILE NUMBER	2301 - 08305
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF WALLACE & CAREY INC., LOUDON BROS LIMITED, and CAREY MANAGEMENT INC.
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP 3000, 700 - 9th Avenue S.W. Calgary, AB, Canada T2P 3V4 Attention: James W. Reid / Larry Ellis Telephone: 403.298.2418 / 416-595-8639 Fax: 403.262.0007 E-mail: jwreid@millerthomson.com lellis@millerthomson.com File No.: 0221652.0006

DATE ON WHICH ORDER WAS PRONOUNCED:	June 22, 2023
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Justice G.A. Campbell
LOCATION OF HEARING:	Calgary Courts Centre

UPON the application of Wallace & Carey Inc., Loudon Bros Limited, and Carey Management Inc. (collectively, the "**Applicants**"),

AND UPON having read the Originating Application, Affidavit No. 1 of Brian M. Birnie sworn June 21, 2023 ("**Birnie Affidavit No. 1**"), and the Pre-Filing Report of the Proposed Monitor;

AND UPON reading the consent of KSV Restructuring Inc. 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;

AND UPON hearing counsel for the Applicants, and counsel for the Monitor;

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 this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 ("**CCAA**") applies.

POSSESSION OF PROPERTY AND OPERATIONS

3. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their 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, the "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

   (d) be entitled to continue to utilize the Cash Management System (as hereinafter defined) in accordance with the Forbearance Agreement (as hereinafter defined) 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 Applicants 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 Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in their capacity as provider of the Cash Management System, unaffected creditors under any plan of arrangement or compromise with regard to any claims or expenses they may suffer or incur in connection with the provision of the Cash Management System.

4. To the extent permitted by law and subject to the terms of the Forbearance Agreement, the Applicants 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, employee incentive plan payments, 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 Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

5. Except as otherwise provided to the contrary herein and subject to the terms of the Forbearance Agreement, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants 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, maintenance, and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

6. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iii) 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 Applicants in connection with the sale of goods and services by the Applicants, 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 which are attributable to or in respect of the carrying on of the Business by the Applicants.

7. Subject to paragraph 8, and the Forbearance Agreement, the Applicants shall be entitled to remit or pay, in accordance with legal requirements, any provincial and territorial tobacco tax obligations under the *Tobacco Tax Act,* RSA 2000, c T-4 or under any other

applicable provincial legislation or laws (the "**Tobacco Taxes**") in the normal course, whether such Tobacco Taxes arose or were required to be remitted before or after the date of this Order. Without limiting the foregoing, and subject to the consent of the Monitor, the Applicants shall be authorized to pay, any amounts owing by the Applicants under the Tobacco Tax Payment Plans (as described and defined in Bernie Affidavit No. 1) to pay down any arrears outstanding for unremitted Tobacco Taxes.

8. Any provincial or territorial authorities entitled to receive payments or collect monies from the Applicants in respect of Tobacco Taxes or Tobacco Tax Payment Plans are hereby stayed during the Stay Period from requiring that any amounts be paid or any security be posted by or on behalf of the Applicants (including from the Applicants' directors and officers) in connection with the Tobacco Taxes or from exercising any remedies, including license or permit suspensions, as a result of any non-payment of obligations outstanding as of the date of this Order.

9. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants 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 Applicants 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.

10. Except as specifically permitted in this Order, the Applicants are 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 Applicants to any of its creditors (including pursuant to guarantee or other contingent arrangements) as of the date of this Order, other than payments of principal, interest or amounts otherwise owing by the Applicants pursuant to the CIBC Credit Agreement, the Forbearance Agreement or the other Loan Documents (as defined in the CIBC Credit Agreement) (including, for greater certainty, payments of amounts owing in connection with the BCAP Loan, as defined in the CIBC Credit Agreement);

(b) to grant no security interests, trust, liens, charges, or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

11. Until and including July 1, 2023, 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 Applicants 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 Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

12. 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 Applicants 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 Applicants to carry on any business which the Applicants are 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 Applicants from compliance with statutory or regulatory provisions relating to health, safety, or the environment.

13. Nothing in this Order shall prevent any party from taking an action against the Applicants 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

14. 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 Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

15. 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 Applicants, including without limitation all supply arrangements pursuant to purchase orders and historical supply practices, computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

    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 Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their 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 Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

16. 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 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 Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

17. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 13 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants 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 Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

18. The Applicants shall indemnify their 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.

19. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on the Property, which charge shall not exceed an aggregate amount of $3,330,000, as security for the indemnity provided in paragraph 18 of this Order. The D&O Charge shall have the priority set out in paragraphs 39 and 41 herein.

20. 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 Applicants' 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, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 18 of this Order.

APPOINTMENT OF MONITOR

21. KSV Restructuring Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants 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.

22. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' 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 Applicants or any of them;

(c) assist the Applicants, to the extent required by the Applicants, in its dissemination to the Lender and its counsel in accordance with the Forbearance Agreement (as defined below) of financial and other information as agreed to between the Applicants and the Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Lender, which information shall be reviewed with

the Monitor and delivered to the Lender and its counsel in accordance with the Forbearance Agreement, or as otherwise agreed to by the Lender;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents and management, employees and advisors of the Applicants and to the extent that it is necessary to adequately assess the Property, Business and financial affairs of the Applicants or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(g) perform such other duties as are required by this Order or by this Court from time to time.

23. 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.

24. 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 the 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.

25. The Monitor shall provide any creditor of the Applicants and Lender with information provided by the Applicants 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 Applicants 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 Applicants may agree.

26. 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.

27. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to, the date of this Order by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Applicants on a monthly basis.

28. The Monitor and its legal counsel shall pass their accounts from time to time.

ADMINISTRATION CHARGE

29. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at their standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings.

30. The Administration Charge shall have the priority set out in paragraphs 39 and 41 hereof.

CASH MANAGEMENT SYSTEM AND LENDER PRIORITY CHARGE

31. The Applicants' execution and performance under the forbearance agreement dated as of June 22, 2023 between the Applicants and Canadian Imperial Bank of Commerce

("**CIBC**" or the "**Lender**") (among others), as may be amended from time to time (the "**Forbearance Agreement**") is hereby approved.

32. The Applicants shall be entitled to continue to utilize the credit facilities (the "**Cash Management System**") granted by CIBC under the CIBC Credit Agreement, as defined and described in Birnie Affidavit No. 1 (the **"CIBC Credit Agreement**"). For greater certainty, (i) the Applicants are authorized to borrow, repay and re-borrow such amounts from time to time as the Applicants may consider necessary or desirable under the CIBC Credit Agreement, subject to the terms and conditions of the Forbearance Agreement and the CIBC Credit Agreement; and (ii) the Lender is authorized to apply receipts and deposits made to the Applicants' bank accounts, whether directly or through blocked accounts, against the indebtedness owing to CIBC in accordance with the Forbearance Agreement, whether such indebtedness arose before or after the date of this Order.

33. The Cash Management System will be governed by the terms of the CIBC Credit Agreement and the Forbearance Agreement and such other documentation applicable to the Cash Management System, including any blocked account agreements. The Lender shall be an unaffected creditor in these proceedings and unaffected by any plan of arrangement or compromise filed by any of the Applicants or any proposal filed by any of the Applicants under the *Bankruptcy and Insolvency Act* (Canada) with respect to any obligations outstanding as of the date hereof or arising hereafter (including in connection with the BCAP Loan, as defined in the CIBC Credit Agreement), and the rights and remedies of the Lender shall be unaffected by paragraphs 11, 12, 14 and 15 of this Order or any other stay of proceedings that may be granted in these proceedings.

34. The Lender 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 $55,000,000 plus interest, fees and expenses, as security for any advances made under the CIBC Credit Agreement from and after the commencement of these CCAA proceedings.

35. The Lender Priority Charge shall have the priority set out in paragraphs 39 and 41 hereof.

36. The payments made by the Applicants pursuant to this Order, the CIBC 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 *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law. The rights of the Lender 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 CCAA of the Applicants or Property.

37. Upon the Termination Date (as defined in the Forbearance Agreement) the Lender may:

(a) immediately cease making advances to the Applicants;

(b) set off and/or consolidate any amounts owing by the Lender to the Applicants against any obligations of the Applicants to the Lender under the CIBC Credit Agreement or the Forbearance Agreement or any other Loan Documents (as defined in the CIBC Credit Agreement) and make demand, accelerate payment or give other notices; and

(c) exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the CIBC Credit Agreement, the Forbearance Agreement or the other Loan Documents.

TOBACCO TAX CHARGE

38. The provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicants in respect of the Tobacco Taxes shall be entitled to the benefit of and are hereby granted a charge (the "**Tobacco Tax Charge**") on the Property, which charge shall not exceed an aggregate amount of $18,000,000, as security for all amounts owing by the Applicants in respect of the Tobacco Taxes. The Tobacco Tax Charge shall have the priority set out in paragraphs 39 and 41.

VALIDITY AND PRIORITY OF CHARGES

39. The priorities of the Administration Charge, Lender Priority Charge, and the D&O Charge, as among them, shall be as follows:

(a) First – Administration Charge (to the maximum amount of $250,000);

(b) Second – Lender Priority Charge (to the maximum amount of $55,000,000 plus interest, fees, and expenses);

(c) Third – D&O Charge (to the maximum amount of $3,330,000);

(d) Fourth – the Encumbrances existing as of the date hereof in favour of the Lender securing the pre-filing obligations owing under the CIBC Credit Agreement including, for greater certainty, obligations in connection with the BCAP Loan; and

(e) Tobacco Tax Charge (to the maximum amount of $18,000,000).

40. The filing, registration or perfection of the Administration Charge, the Lender Priority Charge, and the D&O 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.

41. Each of the Charges shall constitute a charge on the Property and subject always to section 34(11) of the CCAA, except for the security registrations in relation to equipment leased from equipment lessors, the 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, provided the Tobacco Tax Charge shall rank behind the Encumbrances securing the pre-filing obligations owing under the CIBC Credit Agreement.

42. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor, CIBC, and the beneficiaries of the Charges, or further order of this Court.

43. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the 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 Applicants, 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 shall create or be deemed to constitute a new breach by the Applicants 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, or the execution, delivery or performance of the definitive documents associated with the Agreements; and

(iii) the payments made by the Applicants pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

44. 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 Lender's Priority Charge,

the D&O Charge, and the Tobacco Tax Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

45. The Monitor shall (i) without delay, publish in the Calgary Herald and the Globe and Mail 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 either of the Applicants 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.

46. The Monitor shall establish a case website in respect of the within proceedings at https://www.ksvadvisory.com/experience/case/wallace-and-carey.

COMEBACK HEARING

47. The comeback motion in these CCAA proceedings shall be heard on June 30, 2023 at 2:00 pm (the "**Comeback Hearing**").

GENERAL

48. The Applicants 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.

49. 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.

50. 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 Applicants, the Business, or the Property.

51. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to

this Order and to assist the Applicants, 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 Applicants 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 Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

52. The Applicants and the Monitor are 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 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.

53. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order at the Comeback Hearing 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.

54. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of King's Bench of Alberta

5

2015 ONSC 2010
Ontario Superior Court of Justice

Comark Inc., Re

2015 CarswellOnt 20810, 2015 ONSC 2010, 266 A.C.W.S. (3d) 541

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

In the Matter of a Proposed Plan of Compromise or Arrangement of Comark Inc.

G.B. Morawetz R.S.J.

Heard: March 26, 2015
Judgment: March 26, 2015
Docket: CV-15-10920-00CL

Counsel: Marc Wasserman, Caitlin Fell, for Applicant
Brian Empey, Ryan Baulke, for Proposed Monitor, Alvarez & Marsal Canada Inc.
Sam Babe, for Salus Capital Partners, LLC (DIP Lender)

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Applicant company operated 343 retail stores across Canada and had experienced declining financial results over past two years — Applicant had $112.3 million assets and $126.1 million liabilities and was financed through term loan and revolving credit facilities — Applicant was noted in default of credit agreement, so creditor made demand for repayment, which applicant was unable to make and was thus insolvent — Applicant sought initial order to provide it with breathing space to restructure and reorganize business and preserve enterprise of value — Creditor who provided revolving credit facilities had agreed to act as DIP lender, and applicant proposed $28 million draft initial order with restriction on borrowing $15 million prior to comeback hearing — Monitor stated applicant could not continue to operate without DIP facility and recommended court approve it — Company brought application for initial order under Companies' Creditors Arrangements Act — Application granted — Monitor's submissions, specifically its view the form of DIP financing did not contravene Act, were accepted — Company met definition of debtor company under Act, claims well exceeded $5 million and it was insolvent — Company was entitled to stay pursuant to s. 11.02 and DOP financing and key employee retention policy approved — Potential exposure of directors was $7.15 million, so $3 million directors' charge was necessary and appropriate — Pre-filing payments to supplier's authorized, and applicant entitled to pay donations from customers to charities for which they were intended, despite comingling with applicant's other funds.
Table of Authorities
Cases considered by *G.B. Morawetz R.S.J.*:
Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy*

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

Statutes considered:

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

Generally — referred to

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

Generally — referred to

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

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

s. 11.02 [en. 2005, c. 47, s. 128; am. 2007, c. 36, s. 62] — considered

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

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

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

APPLICATION by company for initial order under Companies' Creditors Arrangements Act.

***G.B. Morawetz R.S.J.*:**

1 The Applicant, Comark Inc. ("Comark"), brings this application for relief under the *Companies' Creditors Arrangement Act* ("CCAA").

2 Comark operates 343 retail stores across Canada under three distinct divisions: Ricki's, Bootlegger and Cleo (together, the "Banners"). Comark sells predominantly exclusive private label merchandise. Comark employs approximately 3,400 people.

3 Comark is a privately held corporation that is a portfolio company of an investment fund managed by KarpReilly LLC ("KarpReilly"). Comark's corporate headquarters are in Mississauga, Ontario (the "Corporate Headquarters") and employ 83 full time employees. Comark operates an essential distribution centre in Laval, Quebec, which employs approximately 200 people and processes approximately 9.3 million and 2 million units of merchandise each year for stores and online sales, respectively.

4 Comark has over 300 product suppliers, primarily located in Asia and North America. Approximately 80% of Comark's unit purchases were sourced from foreign manufacturers and the remaining 20% were sourced in North America. Purchases are typically made in US dollars.

5 Comark transports all products to its stores through third party transportation companies. Purolator is Comark's primary third party transportation provider. The Applicant is of the view that Purolator's continued services are critical to the company's ongoing operations. Approximately 90% of Comark's products are transported using Purolator.

6 Comark has over 60 third party landlords from which it leases all of its retail and distribution locations. As part of its restructuring under these proceedings, Comark anticipates that it will disclaim certain leases in respect of Comark stores.

7 Comark participates in co-brand community events and cause marketing with charitable organizations. Comark customers have donated amounts intended for various charities, and these donated funds are currently comingled with Comark's other funds. As of March 17, 2015, Ricki's has (Cdn.) $40,057, Bootlegger has (Cdn.) $108 and Cleo has (Cdn.) $107,917 in funds received from customers in respect of donations to various charitable organizations.

8 Comark has experienced declining financial results over the past two years.

9 As of February 28, 2015, Comark had total assets of (Cdn.) $112.4 million and its total indebtedness was approximately (Cdn.) $126.1 million.

10 Comark is financed primarily through a term loan and revolving credit facilities under a credit agreement dated as of October 31, 2014 between Comark, as the lead borrower, and Salus, as administrative collateral agent and lender thereto (the "Salus Credit Agreement").

11 As of March 17, 2015, the Applicant reports that there was approximately U.S.$43.1 million outstanding under the term loan facility and (Cdn.) $24.8 million outstanding under the revolving credit facility (the "Revolving Credit Facility"). The Salus Credit Agreement has a maturity date of October 31, 2018. All of the obligations of Comark under the Salus Credit Agreement are secured by all of Comark's assets.

12 Comark has been noted in default of the Agreement and Salus has made a demand for repayment. Comark advises that it is not able to repay its debt obligations to Salus.

13 Comark reports that its adjusted EBITDA fell to approximately (Cdn.) $16.5 million for the year end February 28, 2015. Comark acknowledges that this constitutes an event of default under the Salus Credit Agreement. On the occurrence of an event of default, Salus has the right to terminate the Salus Credit Agreement and declare that all obligations under it are due and payable with presentment, demand, protest or other notice of any kind.

14 Salus delivered a Reservation of Rights Letter on March 5, 2015. On March 25, 2015, Salus made a demand for repayment for all amounts owing under the Salus Credit Agreement. Comark acknowledges that it is not able to pay the full amount owing under the Salus Credit Agreement, which has become immediately due and payable as a result of the event of default and the demand made by Salus. Comark acknowledges that it is insolvent.

15 The Applicant seeks the granting of an initial order. With the benefit of the protection of the stay of proceedings, Comark is of the view that it will be provided with the necessary "breathing space" in order to allow it to develop a plan to restructure and reorganize the business and preserve enterprise of value.

16 Comark is of the view that it requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA proceedings.

17 Salus has agreed to act as DIP lender (the "DIP Lender") and provide an interim financing facility (the "DIP Facility") under an amended and restated credit agreement with Salus (the "DIP Agreement"). It is a condition of the DIP Agreement that advances made to Comark be secured by a court ordered security interest, lien and charge over all of the assets and undertakings of Comark (the "DIP Lender's Charge").

18 The Applicant advises that under the draft initial order, the charges, including the DIP Lender's Charge, do not prime TD Bank and creditors with a purchase money security interest, which are Comark's only secured creditors. Further, the company advises that it is also an express term of the DIP Agreement that advances made thereunder may not be used to satisfy pre-filing obligations under the Salus Credit Agreement. Further, the company states that the DIP Lender's Charge will not secure any obligation that exists before the date of the initial order.

19 It is anticipated that the proceeds from Comark's operations will be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility in order to free-up availability under the DIP Facility. In accordance with the DIP Facility and the current cash management system in effect, Comark's cash from business operations will be deposited into the blocked account and swept by Salus in order to reduce amounts outstanding under the Salus Revolver Facility prior to the commencement of these proceedings.

20 In his supplementary affidavit, Mr. Bachynski states that Comark requires $15 million during the week ending April 11, 2015 and as such, Comark is proposing a maximum DIP Charge of (Cdn.) $28 in the draft initial order with a restriction on borrowing of (Cdn.) $15 million prior to the proposed comeback hearing scheduled for April 7, 2015.

21 Mr. Bachynski goes on to state that Comark will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP Facility.

22 In its pre-filing report, the Monitor reports at length on the debtor-in-possession financing. In its report, the Monitor states that Salus has exercised cash dominion pursuant to the Blocked Account Agreement and the Salus Credit Agreement and has made demand under the Salus Credit Agreement. As a consequence, the Monitor states that Comark does not have access to liquidity to discharge its financial obligations. Further, given the deterioration in the Applicant's financial position and its current liquidity crisis, the Monitor states that the Applicant cannot continue to operate without the DIP Facility.

23 The Monitor also advises that senior management and the Applicant's advisors believe that the DIP Facility is the only realistic source of funding available, given the urgency of the proposed filing, the position of the lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand.

24 At section 9.5 of this report, the Monitor summarizes the DIP Facility Terms. This chart is reproduced below.

Comark
Summary of DIP Facility Terms

Total Availability	• The lesser of: (a) the Maximum Amount of $32 million, (b) the Borrowing Base, or (c) extensions of credit required under and set out in the Budget, plus outstanding principal amount of pre-filing Revolving Credit Facility.
Effective Date	• Date of the Initial Order
Purpose/Permitted Payments	• Limited to amounts set out in the Restructuring Plan and the Budget approved by Salus.
Significant Terms	• Initial Order must be granted and issued and provide for a DIP Lender's Charge; • The establishment of a cash flow budget and a restructuring plan that is satisfactory to the DIP Lender; • The DIP Lender shall have received control agreements with respect to the deposit accounts of the Borrower which effectively provides for a sweeping of the Borrower's gross receipts, such collections are to be applied to reduce pre-filing Revolving Credit Facility; and • Other covenants which appear customary under the circumstances.
Fees and Interest	• Interest Rate per annum: LIBOR + 5.75 (as at March 24, 2015 LIBOR was approximately 0.25%; however, the DP Facility contains a LIBOR floor of 1.00%) • Exit fee of 4% of total outstanding borrowing at exit under the DIP, the pre-filing Revolving Credit Facility and the pre-filing Term Loan Facility • Collateral monitoring fee of US$7,000 per month
Security	• All assets and property of the Borrower and DIP Lender's Charge.
Maturity	• The earliest of: (i) completion of a transaction in compliance with the SISP; and (ii) a default.
DIP Lender's Charge	• DIP Lender's Charge to rank subordinate only to the Administration Charge and the Directors' Charge (all further defined herein). DIP Lender's Charge in amount of $32 million to ensure fees, costs and expenses are covered.

25 The DIP Facility contains various affirmative covenants, negative covenants, events of default and conditions that, in the proposed Monitor's view, are reasonable and customary for this type of financing.

26 The Monitor further comments that the DIP Facility is not a new facility layered on top of the pre-filing credit facilities, rather it is an amended version of the pre-filing Salus Credit Agreement pursuant to which Salus would be prepared to commence to provide liquidity, despite the prior default. Importantly, the Monitor comments that ultimately, the DIP Facility will not result in a greater level of secured debt than was contemplated under the pre-filing facilities (absent the default that occurred). Furthermore, the Monitor reports that as there is no indication of any deficiencies with Salus' security package, and the Applicant has advised that it does not intend that the DIP Lender's Charge prime any other secured party's purchase money security interests or statutory deemed trusts, the fact that the DIP Lender's Charge will increase while the pre-filing Revolving Credit Facility would be paid down, should have no negative impact on the other stakeholders.

27 The proposed Monitor recommends that the Court approve the DIP Facility. In arriving at this recommendation, the proposed Monitor considered:

(i) the facts and circumstances of the Applicant;

(ii) section 11.2(4) of the CCAA;

(iii) the financial terms of the DIP Facility relative to comparable facilities and the fact that it is the only realistic source of funding available given the urgency of the proposed filing, the prominent position of the Lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand;

(iv) the stability and flexibility of the DIP Facility will provide to ensure there is sufficient liquidity to facilitate the CCAA proceedings and a Sale and Investment Facilitation Process ("SISP"), to maximize realization; and

(v) the interests of the Applicant's stakeholders.

28 In providing its recommendation, the proposed Monitor specifically stated that it has considered the provisions of section 11.2(1) of the CCAA which prohibit the DIP Lender's Charge from securing an obligation that exists before the requested order is made. The Monitor reports that having consulted with its counsel, it is of the view that since the pre-filing Revolving Credit Facility is being reduced by the use of the Applicant's cash generated from its business, the DIP Lender's Charge is only securing advances made post-filing under the DIP Facility.

29 For the purposes of this application, I accept the foregoing submissions and recommendation of the Monitor and, specifically, its view that the form of DIP Facility being proposed, does not contravene the provisions of section 11.2(1) of the CCAA.

30 Comark proposes a key employee retention plan (the "KERP") for certain employees (the "Key Employees") which Comark considers critical to a successful proceeding under the CCAA. Key Employees include certain key senior management employees, both at the Corporate Headquarters and Banner level that possess unique professional skills and experience with Comark's business and operations.

31 The proposed Monitor agrees that the KERP is reasonable in the circumstances.

32 The Applicant has retained Houlihan Lokey Capital, Inc. as financial advisor (the "Financial Advisor") to advise on a possible restructuring, refinancing or sale for Comark.

33 The Applicant also reports that it has worked with the Financial Advisor, in consultation with the proposed Monitor and Salus, to develop the Sale and Investor Solicitation Process ("SISP"). The purpose of the SISP is to solicit and assess available opportunities for the acquisition of or investment in Comark's business and property.

34 In its factum, the Applicant submits that the application addresses the following issues:

(a) the Applicant's entitlement to seek protection under the CCAA;

(b) the Applicant's entitlement to a stay of proceedings;

(c) the granting of the DIP Lender's Charge on a priority basis over the property and approval of the DIP Facility;

(d) the approval of the KERP and KERP Charge;

(e) the sealing of the KERP Schedule;

(f) the granting of the Director's Charge on a priority basis over the property;

(g) the approval of pre-filing payments to "critical" suppliers and to certain charitable organizations to which Comark's customers donated funds; and

(h) the approval of the SISP.

35 I am satisfied that Comark meets the definition of "debtor company" under the CCAA. It is a corporation incorporated under the *Canada Business Corporations Act*.

36 I am also satisfied that the total claims against Comark far exceed $5 million and that Comark is insolvent.

37 In arriving at the conclusion that Comark is insolvent, I have taken into account that, as a result of the event of default and the acceleration of all amounts due under the Salus Credit Agreement, it is apparent that Comark does not have sufficient liquidity to satisfy its liabilities as they become due.

38 The required financial statements and cash-flow statements are included in the record.

39 I am also satisfied that the Applicant is entitled to a stay of proceedings pursuant to section 11.02 of the CCAA.

40 With respect to the request to approve the DIP Facility and to grant a DIP Financing Charge on a priority basis, the authority to approve same is found in section 11.2 of the CCAA. In its factum, the Applicant specifically references section 11.2(1) and submits that it is clear on the facts that the DIP Lender's Charge meets this requirement. Counsel submits that the DIP Facility expressly provides that Comark may not use any advances under the DIP Facility to repay pre-filing obligations. Counsel goes on to state that to the extent that Salus is repaid pre-filing amounts owing to it, this repayment will be made from operational receipts as a result of lending, security and enforcement arrangements in place prior to the CCAA filing. Further, the repayment is not made out of proceeds of the DIP Facility. Rather, the payments to Salus simply maintain the status quo as of the CCAA filing date under the existing Salus asset-based lending credit facility.

41 For the purposes of this application, I accept the submissions of the Applicant and recommendations of the Monitor and have concluded that the DIP Facility should be approved and the Court should grant the DIP Lender's Charge to a maximum DIP Charge of (Cdn.) $28 million with a restriction on borrowing of (Cdn.) $15 million up to April 7, 2015.

42 Counsel to the Applicant requests approval of the KERP and the KERP Charge. Submissions in support of this request are made at paragraphs 26 - 32 of the Amended Factum. I accept these submissions and approve the KERP and the granting of the KERP Charge.

43 Insofar as the KERP Schedule contains confidential personal information, the Applicant seeks a sealing of the KERP Schedule. The Applicant references *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), in support of its request to seal the Schedule.

44 I am satisfied, having considered the *Sierra Club* principles, that it is appropriate to seal the confidential KERP Schedule.

45 The Applicant also seeks a Directors Charge in the amount of up to (Cdn.) $3 million, to act as security for indemnification obligations for Comark's directors' potential liabilities. It is contemplated that the Directors Charge would stand in priority to the proposed DIP Charge, but subordinate to the proposed Administration Charge.

46 Pursuant to section 11.51 of the CCAA, the Court has authority to grant a "super priority" charge to the Directors and Officers as security for the indemnity. The factors to be considered on such a request were set out by Pepall J. (as she then was) in *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]).

47 Comark has estimated the potential exposure of the Directors and Officers for unpaid statutory amounts, including wages, unremitted source deductions, vacation pay, sales and service taxes, termination pay, employee health tax and unpaid workers' compensation to be approximately (Cdn.) $7.15 million.

48 I accept the submissions of the Applicant and have concluded that the Directors Charge is necessary and appropriate and is granted in the requested amount.

49 The Applicant also requests authorization to make certain pre-filing payments, specifically to critical suppliers.

50 The argument in support of the granting of this request is set out in the Amended Factum at paragraphs 44 - 52. I accept these submissions and concluded that it is appropriate to authorize Comark to make the pre-filing payments. 1 note that the Monitor will be involved in this process and that the consent of the Monitor to make such payments is required.

51 I have also been persuaded that it is appropriate for the Court to exercise its jurisdiction to authorize Comark to pay certain amounts that were donated by Comark's customers to the charitable organizations for which the amounts were intended. This authorization is made notwithstanding that the donated amounts are currently comingled with Comark's other funds.

52 The Applicant also requests approval of the SISP for the reasons set out at paragraphs 54 - 59 of the Amended Factum. I accept these submissions and authorize and approve the SISP.

53 This application was brought without notice to the creditors of Comark, with the exception of Salus. As such, I treat it as an *ex parte* application.

54 The requested relief is granted and the order has been signed to reflect the foregoing.

55 A come-back hearing has been scheduled for April 7, 2015. A further hearing has been scheduled for April 21, 2015.

56 The come-back hearing is to be neutral in all respects.

57 The stay of proceedings is in effect up to and including April 24, 2015, or such later date as the Court may order.

Application granted.

End of Document

6

CITATION: Re: Performance Sports Group Ltd., 2016 ONSC 6800
COURT FILE NO.: CV-16-11582-00CL
DATE: 20161101

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.

(Applicants)

BEFORE: Newbould J.

COUNSEL: *Peter Howard and Kathryn Esaw* , for the Applicants

Robert I. Thornton and Rachel Bengino, for the Proposed Monitor Ernst & Young Inc.

Bernard Boucher and John Tuzyk, for Sagard Capital Partners, L.P

David Bish and Adam Slavens, for Fairfax Financial Holdings Limited

Robert Staley, for the board of directors of Performance Sports Group Ltd.

Joseph Latham and Ryan Baulke, for the Ad Hoc Committee of certain term lenders

Tony Reyes and Evan Cobb, for Bank of America, the ABL DIP lender

HEARD: October 31, 2016

ENDORSEMENT

[1] On October 31, 2016 Performance Sports Group Ltd. ("PSG") and the other Applicants (collectively, the "Applicants" or the "PSG Entities") applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

[2] PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

[3] The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

[4] The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

[5] The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

Employees and benefits

[6] As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

[7] The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

[8] Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

[9] Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

[10] The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

[11] Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

Assets and liabilities

[12] As at September 30, 2016, the Applicants had assets with a book value of approximately $594 million and liabilities with a book value of approximately $608 million.

[13] The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

[14] The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately $330.5 million plus $1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term

Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately $159 million was outstanding under the ABL Facility.

Problems leading to the CCAA filing

[15] A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.

b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.

c. The PSG Entities' financial results have been negatively affected by currency fluctuations.

d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.

e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance

expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Anticipated stalking horse bid sales process

[16] The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

[17] As part of that process, the PSG Entities have entered into an asset purchase agreement (the "Stalking Horse Agreement") for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of $575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

Analysis

[18] I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of $5 million.

[19] There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

(a) A group comprised of members of the ABL Lenders ("ABL DIP Lenders"), will provide an operating loan facility of $200 million (the "ABL DIP Facility") pursuant to an ABL DIP Credit Agreement (the "ABL DIP Credit Agreement"). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of $160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional $25 million of liquidity as compared to what is currently provided under the ABL Facility.

(b) The Sagard Group (the "Term Loan DIP Lenders" and together with the ABL DIP Lenders, the "DIP Lenders"), will provide a term loan facility (the "Term Loan DIP Facility" and together with the ABL DIP Facility, the "DIP Facilities") in the amount of $361.3 million pursuant to a Term Loan DIP Credit Agreement (the "Term Loan DIP Credit Agreement" and together with the ABL DIP Credit Agreement, the "DIP Agreements"). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately $331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately $30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

[20] The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing

indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

[21] I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility. The Monitor[1] is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

[22] Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the

[1] Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst &Young in this decision as the Monitor.

ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[23] The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

(a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;

(b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;

(c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;

(d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 – all of whom are entitled to be paid for their services under U.S. bankruptcy law; and

(e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

[24] There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent

jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 at para. 43.

[25] I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of $10,000 will require Monitor approval.

[26] The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

[27] The PSG Entities seek an administrative charge in the amount of $7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor, U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and

counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

[28] I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

[29] Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[30] Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language "for the purpose of

proceedings under this Act" would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) "effective participation in proceedings under this Act".

[31] In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

[32] It appears clear, however, that an administration charge under section 52.11(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

[33] The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

[34] Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107 and *Fraser Papers Inc. (Re),* 2009 CanLII 32698.

[35] In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

[36] A standard directors' charge for $7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

Newbould J.

Date: November 1, 2016

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Clerk's Stamp:

	B301-276975
COURT/ESTATE FILE NUMBER	25-3276975
COURT	COURT OF KING'S BENCH OF ALBERTA MB
JUDICIAL CENTRE	CALGARY

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

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BLUE SKY RESOURCES LTD.

DOCUMENT **ORDER (STAY EXTENSION)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

DLA Piper (Canada) LLP
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File No. 101988-00025

DATE ON WHICH ORDER WAS PRONOUNCED	December 17, 2025
LOCATION OF HEARING OR TRIAL	Edmonton, Alberta (Via Webex)
NAME OF JUDGE WHO MADE THIS ORDER	Justice G. S. Dunlop

UPON THE APPLICATION of the Applicant, Blue Sky Resources Ltd. ("**Blue Sky**"); **AND UPON** having reviewed the Affidavit of Mike Bouvier, sworn December 10, 2025 (the "**Bouvier Affidavit**") the Third Report of the KSV Restructuring Inc., in its capacity as proposal trustee of the Applicant (the "**Proposal Trustee**"), and the Affidavit of Service of Emily Nakogee, sworn December 17, 2025; **AND UPON** noting that the Applicant filed a Notice of Intention to Make a Proposal under subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") on September 24, 2025; **AND UPON** hearing the submissions of counsel for the Applicant, and the other parties present.

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Capitalized terms otherwise used but not defined herein shall have the meanings ascribed to them in the Bouvier Affidavit.

SERVICE

2. Service of the Notice of Application for this Order is hereby validated and deemed good and sufficient, this application is properly returnable today, and no person other than those persons served is entitled to service of the Notice of Application.

EXTENSION OF TIME TO FILE PROPOSAL

3. The time within which Blue Sky is required to file a proposal to its creditors with the Official Receiver, under section 50.4 of the BIA is hereby extended to February 7, 2026.

KERP AND KERP CHARGE

4. The key employee retention plan ("**KERP**") attached as Confidential Exhibit "A" to the Bouvier Affidavit (the "**Confidential Exhibit**") is hereby approved and Blue Sky is authorized and directed to make payments in accordance with the terms thereof to a maximum aggregate amount of $75,000.

5. Blue Sky and any other person that may be appointed to act on behalf of Blue Sky, including, without limitation, a trustee, liquidator, receiver, interim receiver, receiver and manager or any other person acting on behalf of Blue Sky, is hereby authorized and directed to implement and perform its obligations under the KERP in accordance with the terms of the KERP and as may be amended or modified by further Order of this Court.

6. Blue Sky is hereby authorized and directed to execute and deliver such additional documents as may be necessary to give effect to the KERP, subject to the prior approval of the Proposal Trustee, or as may be order by this Court.

7. The KERP Employees (as defined in the KERP) shall be entitled to the benefit and are hereby granted a charge (the "**KERP Charge**") on all of the present and after-acquired assets, property and undertaking of Blue Sky (collectively, the "**Property**"), which shall not exceed the aggregate amount of $75,000, to secure amounts payable to the KERP Employees pursuant to paragraph 4 of this Order.

PRIORITY OF COURT-ORDERED CHARGES

8. The respective ranking of the charges shall be as follows:

   First, the Administration Charge.

   Second, the Interim Lender's Charge.

   Third, the KERP Charge.

9. The filing, registration or perfection of the KERP Charge shall not be required, and the KERP Charge shall be enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the KERP Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

10. The KERP Charge shall constitute a charge on the Property, such shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person (collectively, the "**Encumbrances**").

11. Except as otherwise provided herein, or as may be approved by this Honourable Court, Blue Sky shall not grant any Encumbrances over the Property that rank in priority to, or *pari passu* with, the KERP Charge, unless the Applicant obtains the prior written consent of the beneficiaries of the KERP Charge (the "**Chargees**") or further order of this Court.

12. The KERP Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

    (a) the pendency of these proceedings and the declarations of insolvency made in this Order;

    (b) any application(s) for bankruptcy order(s) issued pursuant to the 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 Blue Sky, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the KERP Charge nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, shall create or be deemed to constitute a new breach by Blue Sky 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 KERP Charge; and

(iii) the payments made by Blue Sky pursuant to this Order and the granting of the KERP Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

SEALING

13. The Confidential Exhibit shall be sealed in the Court file and shall not form part of the public record, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*.

14. The Clerk of this Honourable Court shall file the Confidential Exhibit in a sealed envelope

> THIS ENVELOPE CONTAINS A CONFIDENTIAL EXHIBIT TO THE AFFIDAVIT OF MIKE BOUVIER SWORN DECEMBER 10, 2025
>
> CONFIDENTIAL EXHIBIT IS SEALED PURSUANT TO AN ORDER ISSUED BY THE HONOURABLE JUSTICE G.S. DUNLOP ON DECEMBER 17, 2025.

15. Any interested party may apply to this Court to vary or amend the provisions relating to the sealing of the Confidential Exhibit on not less than 7 days' notice to Blue Sky, the Proposal Trustee and to any other party likely to be affected by the order sought or upon such other notice as this Court may order.

GENERAL

16. Blue Sky and the Proposal Trustee may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

17. Any interested party (including Blue Sky and the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

18. 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.

J.C.K.B.A.

8

CITATION: Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980
COURT FILE NO.: CV-18-603054-00CL
DATE: 20181121

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 ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC., Applicants

BEFORE: S.F. Dunphy J.

COUNSEL: *Maria Konyukhova and Kathryn Esaw* for Applicants

Jeffrey Levine, for the Official Committee of Unsecured Creditors

David Bish, for Richter Advisory Group, Monitor

Danish Afroz, for Deerfield Management Company, L.P.

HEARD at Toronto: November 16, 2018

REASONS FOR DECISION

[1] This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

[2] For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

[3] The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the

same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

[4] As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

[5] In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors – Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. – possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

[6] These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a "floor" under sale proceeds of approximately $240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately $275 million.

[7] I understand that a motion may be brought in the United States to challenge some aspects of Deerfield's security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield's input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield's pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield's benefit.

[8] Stated differently – Deerfield has significant "skin in the game" when it comes to a KERP or KEIP.

[9] Deerfield's interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield's secured claims.

Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

[10] This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

[11] The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

[12] While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

[13] The Canadian KERP impacts three employee of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be $256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

[14] The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

[15] The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the "super-stretch" targets could rise to as much as $4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of $240 million.

[16] Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

[17] The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company's Board was involved as was the debtor's counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

[18] The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

[19] With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

[20] The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim – and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

[21] In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

[22] Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

[23] KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

[24] The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. “Key” is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out “key” in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise “key” employees;
- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;
- it is easy to overstate the risk of loss of key employees if a “bunker mentality” causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and
- “business as usual” is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

[25] While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;

- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;

- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and

- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more – sometimes covering for colleagues who have being laid off or who have left for greener pastures - while earning a fraction of their former income.

[26] What is wanting to sort out these competing interests is one thing that the court – on its own at least – is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial “eyes and ears of the court” comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

[27] What the court is unable to supply on its own can be summed up in the phrase “business judgment”. Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company’s business judgment. In my view, the court’s role in assessing a request to approve a KERP or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

[28] Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

[29] My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc. (Re),* 2012 ONSC 3767 (CanLII),

relying on the earlier decision of Newbould J. in *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ON SC)[1]. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
d. the employees' history with and knowledge of the debtor;
e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
h. whether the payments under the KERP are payable upon the completion of the restructuring process.

[30] I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

(a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process – from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly

[1] See also Pepall J. (as she then was) in *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para. 49-52.

benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

(b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

[31] In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

[32] The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

[33] The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed

incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

[34] The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

[35] Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

[36] The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

[37] In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

[38] The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

[39] Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

[40] In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of

the debtor companies or completion of the sales process and – for the KERP program at least – the perceived level of retention risk. The Monitor's input was sought at each level of the design and finalization of the programs.

[41] The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees – critical to the Canadian business being sold – would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

[42] The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

[43] At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

[44] I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

[45] The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is $256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of $62.5 million. Payment is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

[46] The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

[47] The KEIP program provides for incentive payments to participants based on the debtors' performance relative to target established for cash flow targets during the

bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold[2], Target, Stretch and Super Stretch).

[48] The real controversy on the motion was in respect of the KEIP.

[49] It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest "super-stretch" level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the "target" level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

[50] They also object to the level of incentives relative to salary as being unacceptably high.

[51] The answer to both of these objections lies in the peculiar facts of this case.

[52] The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight – and the past efforts of the employees – that has made the targets appear to be such an easy goal.

[53] Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

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[2] The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

[54] I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

[55] The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

[56] I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

[57] In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

[58] Order accordingly.

_____

S.F. Dunphy J.

Date: November 21, 2018

9

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

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

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

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

(4) Is there a better viable alternative?

Re Brainhunter, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para 24; *Re Indalex Ltd.*, [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

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

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

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

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

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

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

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp.*, [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Re Sino-Forest Corp., 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.*,*supra*.

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a 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 NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang, supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Re Grant Forest Products Inc., [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc*. involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

10

CITATION: *Just Energy Group Inc. et al.*, 2021 ONSC 7630
COURT FILE NO.: CV-21-00658423-00CL
DATE: 2021-11-18

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERICAL LIST)

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

AND:

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

BEFORE: Koehnen J.

COUNSEL: *Jeremy Dacks, Marc Wasserman, Michael De Lellis, Shawn Irving and Emily Paplawski*, for the Just Energy Group

Neil Herman and Allyson Smith, U.S. Counsel to the Just Energy Group

Jonah Davids and Michael Carter, for the Just Energy Group

Ryan Jacobs, Jane Dietrich and Alan Merskey, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders

David Botter, Sarah Schultz and Anthony Loring, U.S. Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their

capacity as the DIP Lenders

Heather Meredith and James D. Gage, Canadian Counsel to the Agent and the Credit Facility Lenders

Howard Gorman, Ryan Manns and Travis Torrence, for Shell Energy North America (Canada) Inc. and Shell Energy North America (US)

Robert Kennedy and David Mann, Canadian Counsel to BP Canada Energy Marketing Corp., for BP Energy Company, BP Corporation North America Inc., and BP Canada Energy Group ULC

Tyler Planeta, for the Plaintiff, Stephen Gilchrist (in proposed securities class proceeding in SCJ at Toronto, File No. CV-19-627174-00CP)

Steven Wittels and Susan Russell, U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al.

Bevan Brooksbank, for Chubb Insurance Company of Canada and Zurich Insurance Company of Canada

Robert Thornton, Rebecca Kennedy, Rachel Bengino and Puya Fesharaki, for FTI Consulting Canada Inc., as Monitor

Paul Bishop and Jim Robinson, for FTI Consulting Canada Inc., as Monitor

John F. Higgins, U.S. Counsel to FTI Consulting Canada Inc., as Monitor

HEARD: November 10, 2021

ENDORSEMENT

[1] The applicants Just Energy Group Inc. and its affiliates bring two motions. The first is for an order extending the stay under the *Companies' Creditors Arrangement Act*,[1] amending its Debtor in Possession Financing Term Sheet, approving a transaction for the wind up of Just Energy Finance into Just Energy and approving a second key employee retention plan (the "Second KERP"). On the second motion, Just Energy and its relevant affiliates seek leave to sell shares in a private company. As part of that transaction one of the Just Energy affiliates would be wound up and dissolved. Doing so would allow Just Energy to capture over $6 million in tax benefits. Strictly speaking, however, the affiliate does not meet the solvency requirements that corporate law imposes before a corporation can be wound up.

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36

At the end of the hearing I approved orders granting the relief requested in respect of both motions with reasons to follow. These are those reasons.

The First Motion

I. The Second KERP

[2] The only contentious element of the first motion is Just Energy's proposal for a second KERP in the amount of $4,381,934.

(a) The Request for an Adjournment

[3] Ian Wittels appeared as US counsel for a group of class action plaintiffs who have commenced a complaint in the United States. The complaint alleges that one or more of the applicants has fraudulently overcharged American consumers for their energy needs. He sought an adjournment to consider his position on the KERP and indicated that he may be objecting to it because it removes assets from the CCAA estate which could otherwise be used for the benefit of his clients. I declined the adjournment.

[4] The class action claim was filed in the US courts approximately 2 ½ years ago. This was long before the CCAA proceeding began in early March 2021. The class-action plaintiffs have therefore had the possibility to investigate matters and seek Canadian legal advice for some time. They did not object to the first KERP that was approved in March 2021 and which provided for total payments of $6,679,625.

[5] The motion materials for the second KERP were served seven days before the hearing. The class action plaintiffs raised no objections until the hearing before me on November 10. This is a large CCAA proceeding with a significant number of stakeholders who have appeared throughout, including at the hearing on November 10.

[6] I was not given any satisfactory reason for which the class action plaintiffs were unable to raise concerns with the applicants or the Monitor before the hearing on November 10. After declining the adjournment, I invited Mr. Wittels to make submissions opposing the Second KERP.

(b) Objections to the Second KERP

[7] The factors to consider in determining whether to approve a KERP include (i) the approval of the Monitor; (ii) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP is not approved; (iii) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (iv) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (v) the business judgment of the board

of directors of the debtor. These factors were found to support the first KERP. They are equally relevant in determining whether to approve the second KERP.

(i) Approval of the Monitor:

[8] The Monitor supports the Second KERP. Indeed, it was developed with input and feedback from the Monitor.

(ii) Likelihood of Employee Departures

[9] The class action plaintiffs submit that the applicants have introduced no evidence that employees would actually leave without a Second KERP, and that any evidence in that regard is speculative.

[10] The applicants have described the increased hardship that key employees have suffered since the commencement of the CCAA proceeding. In addition to carrying on their regular duties as Just Energy employees, key employees have assumed the considerable burden of administering the CCAA proceedings and advancing the prospects of a plan. This has been no easy task. Just Energy is a highly regulated business. The company is subject to separate regulatory regimes in each state or province in which it operates. It has complex commercial arrangements with suppliers and a number of secured and unsecured lenders. The integrity of those arrangements in turn depends on Just Energy's compliance with regulatory requirements. Developing a plan in these circumstances involves complex, detailed discussions with regulators, suppliers, and creditors. These discussions have become even more cumbersome and time-consuming than they would ordinarily be because of the Covid 19 pandemic. This has led Just Energy management to have serious concerns about employee burnout.

[11] As a practical matter, it would be extremely difficult, if not impossible, to introduce hard evidence that employees will leave without a KERP. As an equally practical matter, however, CCAA proceedings put employees into a highly vulnerable position. They have no idea what will become of their employment at the end of the CCAA proceeding. They do not know whether they will retain their positions or whether the enterprise will be merged with another entity which will rationalize its human resources requirements resulting in the termination of a significant number of key employees. They do not know whether the Just Energy entity that emerges from the plan will have the same manpower needs as it currently has or whether it will also materially reassess its human resources requirements. In those circumstances, it is very tempting for an employee to accept a position with another employer that seems to offer more job stability than an entity in CCAA proceedings can. That creates a material risk of employee departures.

(iii) Are Beneficiaries of KERP Critical to a Successful Restructuring

[12] Both the applicants and the Monitor believe the beneficiaries of the KERP are critical to the success of the restructuring.

[13] The first KERP was approved in March. Since then no one has taken issue with the identity of the beneficiaries or their importance to a successful restructuring.

(iv) Ease of Replacing Departing Employees

[14] While employees can always be replaced, finding a replacement with equal skill and knowledge of Just Energy's business and operations is very difficult in the time pressured atmosphere of a CCAA proceeding.

[15] This is particularly so with Just Energy. As noted in paragraph 10 above, it is a complex, highly regulated business. That makes bringing new employees up to speed a more time-consuming process. Time in a CCAA proceeding translates into cost and potential prejudice to a plan.

(v) Business Judgment of the Board

[16] The Board of Just Energy has concluded that the Second KERP is required to promote a plan. The KERP extends well beyond senior management. This is not a situation of the Board keeping its friends in management happy. Rather, the KERP appears to be a considered plan to identify employees throughout the enterprise whose retention is important for the plan.

[17] In addition to the business judgment of the Board, I would add the business judgment of the creditors. The principal lenders and suppliers to Just Energy are highly sophisticated entities. They have no interest in having Just Energy dissipate its assets on wasteful employee bonus schemes. They do have an interest in recovering on their debt. They have concluded that the best way to do that at the moment is to proceed with the Second KERP. This includes unsecured lenders with loans of approximately (US) $300 million. Those are creditors with hard claims for monies already advanced. The class action plaintiffs, on the other hand have an unliquidated claim for damages in a class action that has not yet been certified, let alone tried.

[18] Mr. Wittels submits that there are millions of American consumers who have been disadvantaged by the allegedly fraudulent conduct of the applicants. In those circumstances, he submits that the court "should be putting the brakes" on payments to employees. He further submits that the plaintiffs' ability to recover on their $2 billion claim will be reduced if corporate funds are siphoned off by payments to employees under the Second KERP.

[19] The principle behind the KERP is not to deprive creditors of recovery but to improve creditor recovery by maintaining the applicant's ongoing business by retaining key employees.

[20] A KERP can be seen as an investment in the ongoing enterprise. If the investment is successful, there will be much more to distribute to creditors as a result of a plan than there would be without the KERP. Whether a plan might have been possible without a KERP can only be assessed after the fact. Entities in CCAA protection do not, however, have that

luxury. They may equally find out after the fact that employees have fled leaving them incapable of advancing a plan. At that point it is too late to implement a KERP.

[21] Like any other investment, KERPs have risk. There is a risk that the KERP will not result in larger creditor recovery at the end of the day. The applicants served their motion on 400 parties including secured and unsecured creditors. All but the class action plaintiffs appear to agree that the best way forward is to continue the CCAA proceeding with a Second KERP.

[22] The First KERP was developed based on the expectation that the restructuring would be largely concluded but for regulatory approvals by the end of 2021. It was therefore structured to provide employees with payments in September and December 2021. The size and complexity of the proceeding have not allowed the plan to advance as much as Just Energy would have liked to. Approximately 80% of the payments on the first KERP have already been paid out. The balance will be paid out in December 2021 and March 2022.

[23] Just Energy estimates that it requires employees to remain until at least June 2022. There is significant concern that the balance of the First KERP does not provide sufficient incentive for key employees to remain until June 2022.

[24] The Second KERP is designed to incentivize employees to remain. It envisages paying retention bonuses to nonexecutive employees in March and September 2022. If a successful restructuring occurs before September, the final KERP would be paid at that time. Executive KERP recipients will receive one instalment in March 2022 and a second success-based payment on completion of a successful restructuring.

[25] In light of the foregoing considerations, I am satisfied that the Second KERP should be approved.

(c) The Sealing Order

[26] As part of the approval of the Second KERP, the applicants also seek an order sealing details of the amounts paid to individual employees.

[27] In *Sherman Estate v. Donovan*,[2] the Supreme Court of Canada held at para. 38 that an applicant for a sealing order must establish that:

(i) court openness poses a serious risk to an important public interest;

(ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

[2] 2021 SCC 25

(iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[28] All 3 factors are satisfied here. The documents the applicants seek to seal contain the names of the KERP recipients and the amounts each will receive. Publicly disclosing employee compensation violates the privacy interest of those employees. The employees themselves have not initiated any court proceeding that would require production of that information. Broad publication of confidential income data could create risks for employee retention in this and other CCAA proceedings.

[29] In *Ontario Securities Commission v. Bridging Finance Inc.*[3] Chief Justice Morawetz recently granted a sealing order over the details of a KERP in similar circumstances. I am satisfied that it is equally appropriate to make that order here. The limitation on the open courts principle is minimal. The order is proportional. It benefits in protecting privacy interests of non-party employees outweigh the very limited impact on the open courts principle.

II. The Stay Extension

[30] There is no opposition to the request to extend the CCAA stay from December 17, 2021 to February 17, 2022. The court has discretion to extend the stay if circumstances exist that make doing so appropriate and if the applicant continues to act in good faith and with due diligence towards a plan.[4] I am satisfied from my review of the Fourth Report of the Monitor that the applicant is doing so. In addition, the Just Energy cash flows produced on the motion demonstrate that the applicants have sufficient funds to continue operations until February 17, 2022. As a result, I extend the stay until February 17, 2022.

III. The Amended DIP Term Sheet

[31] The applicants seek to extend the term of their DIP loan from December 31, 2021 to September 30, 2022. They do not seek to increase the amount of the loan. The extension involves payment of a 1% financing fee which amounts to a payment of approximately (US) $1,250,000.

[32] No one opposed the DIP extension. That said, the payment of the extension fee raises the same issues about potentially reducing the size of the estate available to the class action plaintiffs as does the Second KERP. I will therefore proceed on the basis that the class action plaintiffs oppose the DIP extension even though Mr. Wittels did not expressly raise that argument. I take this approach because it struck me that the class action plaintiffs may have become alive to the issues that the CCAA poses for them fairly late in the day.

[33] To the extent that a CCAA proceeding ultimately fails, there is always the risk that the cost of the financing fee associated with the extension will further diminish the pool of assets available for creditors. As with the KERP, however, the ultimate goal is to have more

[3] 2021 ONSC 4347 at paras. 25-27.
[4] CCAA, ss. 11.02(2) -11.02(3)

money available for creditors in a CCAA proceeding than would be available in a bankruptcy.

[34] Section 11.2 (4) provides that the court should consider, among other things, the following factors when considering interim financing:

> (a) the period during which the company is expected to be subject to proceedings under the CCAA;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the view of the monitor.

[35] Those factors are also appropriate to consider when considering amendments to DIP financing.[5]

[36] Applying those factors here, I am satisfied that the DIP extension should be approved.

[37] The applicants expect to finalize a plan some time between June and September of 2022. The applicants have the support of their creditors. To date, no creditor has spoken against the DIP extension or any other issue involving management of the Just Energy group. The expiry of the DIP facility on December 31, 2021 would put an end to Just Energy's ability to arrive at a plan. The extension of the DIP facility would considerably enhance the prospects of a viable plan. The monitor supports the extension of the DIP facility. The monitor specifically references the extension fee in its report and believes it to be reasonable. Just Energy continues to be a significant enterprise with hundreds of employees. The company has been moving in good faith towards a plan, but the business is of such a complexity that it has taken longer than initially anticipated. This is not surprising. The company is subject to a myriad of regulatory regimes across the United States and Canada. It has complex commercial arrangements with suppliers and a number

[5] *Re Laurentian University of Sudbury*, 2021 ONSC 3545, at para. 39

of secured and unsecured lenders, the integrity of which in turn depends on Just Energy's compliance with regulatory requirements.

[38] In the foregoing circumstances, I am satisfied that the DIP loan should be extended.

IV. The Just Energy Finance Transaction

[39] The applicants seek court approval to undertake a transaction that would wind up JE Finance into Just Energy and subsequently file articles of dissolution in respect of JE Finance. The applicants seek approval of the transaction because JE Finance and Just Energy are applicants in this proceeding and because paragraph 13 (c) of the Second Amended and Restated Initial Order dated May 26, 2021 prevents the applicants from reorganizing a material portion of their business without court approval.

[40] The ultimate objective of the Finance dissolution is to realize tax losses in Just Energy Hungary (a wholly owned subsidiary of JE Finance). As part of the proposed transaction certain intercompany loans will be set off against each other and all remaining assets and liabilities of JE Finance will be rolled into Just Energy. No creditors will be prejudiced by that transaction and no creditors oppose it. The Monitor supports the transaction.

[41] The transaction is consistent with the objectives of the CCAA, principally because it maximizes the value of the debtor's assets for the benefit of all stakeholders. In those circumstances, I am satisfied that the JE Finance transaction and its subsequent dissolution should be approved.

The Second Motion: The ecobee Transaction

[42] Just Management Corp. ("JMC") is a wholly owned subsidiary of Just Energy. JMC owns shares in ecobee Limited ("ecobee"). ecobee has entered into a proposed transaction with Generac Power Systems Inc. which it proposes to conclude by way of a plan of arrangement. JMC would like to support that transaction and seeks an order authorizing it to enter into a Support Agreement pursuant to which it would agree to be bound by the arrangement and would dispose of its ecobee shares pursuant to the arrangement.

[43] The notice of motion seeking approval of the ecobee transaction was delivered only the day before the hearing. The relief it seeks was, however, set out in an affidavit that was served a week earlier. Given the nature of the transaction which is described below and the description of it in the earlier affidavit, I was prepared to consider it on November 10 despite the short notice.

[44] Court approval is required because the Initial and subsequent Orders require court approval for any refinancing, restructuring, sale, or reorganization of the Just Energy entities' businesses. A further issue arises because the *Canada Business Corporations Act*[6] (the

[6] *Canada Business Corporations Act*, RSC 1985, c C-44

"CBCA"), pursuant to which JMC is incorporated, makes dissolution available only to solvent corporations. Given that JMC is an applicant in this proceeding and given that it will have transferred its only valuable asset, the ecobee shares, to Just Energy before dissolution, it fails to meet the solvency requirement for a dissolution.

[45] In deciding whether to grant authorization under subsection 36(1) of the CCAA for a sale of assets outside the ordinary course of business, the CCAA court will consider the following non- exhaustive factors:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[45]

[46] I am satisfied that those factors have been met.

[47] Just Energy acquired the ecobee shares in 2012 for approximately $6.4 million. Just Energy has been trying to sell its ecobee shares for several years without success. As a result of the arrangement, Just Energy anticipates receiving approximately $61,000,000. Of that, approximately $18,000,000 will be received in cash on completion of the Arrangement. The remaining $43,000,000 will be received in publicly traded shares of Generac. Just Energy will be free to dispose of those shares immediately. They are not subject to any hold provision. In addition, if certain performance targets are met, Just Energy has the potential to receive an additional $10,000,000 of Generac shares in 2022 and 2023.

[48] Ecobee has also been looking for a strategic transaction for quite some time. The Generac transaction is the best opportunity that has presented itself.

[49] The Monitor approves the sale of the shares and has filed a report stating that, in its view, the sale of the shares would be more beneficial to creditors than any other transaction. No creditors oppose the transaction. The effect of the proposed sale is highly beneficial to creditors because it will inject significant amounts of cash into the CCAA estate.

[50] Moreover, to some extent the question of approval of the sale of the shares is academic because they are subject to a drag along right which would compel Just Energy to sell the ecobee shares pursuant to any transaction that is approved by the ecobee board and a majority of the votes cast by each class of ecobee shareholders. The majority of each class has already committed to support the proposed Arrangement.

[51] This brings me to the proposed wind up and dissolution transaction that is proposed as part of the sale of the ecobee shares.

[52] The court has jurisdiction to approve the wind up and dissolution transactions pursuant to its general power to make appropriate orders under section 11 of the CCAA. As noted, however, certain aspects of the wind up and dissolution transaction raise further complications. Those include the following:

(i) The stated capital of JMC will be reduced to zero. Although permitted by corporate law, it is potentially subject to a solvency test under section 38 (3) of the CBCA.

(ii) JMC will purchase for cancellation preferred shares that Just Energy Ontario LP holds in JMC. Share repurchases are also subject to corporate solvency tests in subsection 34 (2) of the CBCA. In light of the fact that JMC is a co-guarantor of certain Just Energy indebtedness and is an applicant in this proceeding, the solvency test is most likely not satisfied.

(iii) JMC will be voluntarily dissolved. Section 208 (1) of the CBCA prohibits a corporation that is insolvent from dissolving.

[53] Counsel have not been able to direct me to any caselaw or commentary about the policy rationale behind the CBCA's restrictions on insolvent corporations engaging in certain transactions. It would appear that the purpose of those restrictions is to protect creditors or other stakeholders from transactions that would deprive them of assets or other rights that would ordinarily be available to them under insolvency legislation.

[54] Those concerns do not arise here. The purpose of the winding up and dissolution transaction is to achieve approximately $6.6 million of tax savings that would otherwise not be available. The only assets of JMC are the ecobee shares and an interest in a dormant partnership that has no value. Those assets will be wound up into Just Energy. At the same time, Just Energy will assume any liabilities owed by JMC.

[55] In this case, blind application of the CBCA's solvency requirements would in fact undermine the purpose of those requirements. Oversight by the Monitor and the Court provides additional assurance that the interests of creditors in the dissolution will be protected.

[56] In that context, any solvency requirements contained in the CBCA are breached only if they are viewed in isolation and are divorced from the transactions as a whole. The end

result generates a net benefit to the Just Energy estate by making more assets available than would otherwise be the case.

[57] Gascon J. (as he then was) came to a similar conclusion in *AbitibiBowater*[7] albeit without discussing the point. In that case, the Monitor's 22nd report dated November 19, 2009, noted that certain aspects of the proposed transaction violated the solvency provisions of the CBCA and the Quebec Company's Act. Gascon J. nevertheless issued an order which allowed the transaction to proceed "notwithstanding the provisions of any federal or provincial statute."[8]

[58] Section 11 of the CCAA provides the court with broad remedial jurisdiction. It provides:

> **Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act**, if an application is made under this Act in respect of a debtor company, **the court**, on the application of any person interested in the matter, **may**, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, **make any order that it considers appropriate in the circumstances.**

[59] The section gives the court express power to override the *Bankruptcy and Insolvency Act*[9] and the *Winding up and Restructuring Act*.[10] That power was also used to override the priority schemes in provincial statutes by according super priority to DIP lenders before super priority was enshrined in the CCAA.[11]

[60] In *Century Services Inc. v. Canada (Attorney General)*[12] the Supreme Court of Canada observed that that judicial discretion has allowed the CCAA to adapt and evolve to meet contemporary business and social needs and that it has called on courts to innovate as restructurings become increasingly complex.

[61] In *Rescue! The Companies' Creditors Arrangement Act*[13] Professor Janis Sarra noted that in determining whether and how to exercise its discretion the court should ask itself whether the order will

> "usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs."[14]

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[7] Order in (*Re) AbitibiBowater Inc*. (23 November 2009), Montreal, 500-11-036133-094 (Que. S.C.).
[8] *Ibid*. at para 12.
[9] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
[10] *Winding-up and Restructuring Act*, RSC 1985, c W-11
[11] *Skydome Corp., Re*, 1998 CarswellOnt 5922; 16 C.B.R. (4th) 118 at paras. 8-9, 13-14.
[12] 2010 SCC 60, [2010] 3 S.C.R. 379 at para 58, 61.
[13] 2d edition, Toronto: Carswell, 2013. The
[14] *Rescue!* at page 120

[62] That exercise requires the court to balance the interests of and prejudice to various stakeholders. Here, the only stakeholder who is potentially prejudiced is the CRA. It did not appear on the motion. It also has other means of protecting its interests by way of tax reassessments.

[63] In circumstances where the proposed transaction would add value to the estate, would not prejudice any stakeholder of the CCAA and does not offend the interests that the CBCA seeks to protect by imposing insolvency requirements, I am satisfied that the winding up and dissolution transaction furthers the effort to avoid social and economic losses that would result from liquidation and should be allowed to proceed.

Disposition

[64] For the reasons set out above I signed orders on November 10, 2021 extending the stay under the CCAA, extending the DIP facility, approving the wind up of Just Energy Finance, approving the Second KERP, approving the sale of ecobee shares in proposed plan of arrangement and permitting the ancillary transactions set out in paragraph 52 above to occur, notwithstanding the insolvency of the corporations involved.

Koehnen J.

Date: 2021-11-18

11

CITATION: Re Essar Steel Algoma Inc. et al, 2015 ONSC 7656
COURT FILE NO.: CV-15-11169-00CL
DATE: 20151207

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC.,
ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC,
CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Applicants

BEFORE: Newbould J.

COUNSEL: *Ashley Taylor*, for the Applicants

Derrick Tay and Clifton P. Prophet, for the Monitor Ernst & Young, Inc.

Marc Wasserman and Andrea Lockhart, for Deutsche Bank

Massimo Starnino and Debra McKenna, for USW and Local 2724

Lou Brzezinski, for USW Local 2251

Karen Ensslen, representative counsel for the Applicants' retirees

L. Joseph Latham, for the Ad Hoc Committee of Essar Algoma Noteholders

Shayne Kukulowicz and Ryan C. Jacobs, for the Ad Hoc Committee of Junior Secured Noteholders

Sara-Ann Van Allen and John J. Salmas, for Wilmington Trust, National Association

HEARD: December 3, 2015

KERP ENDORSEMENT

[1] The applicants were granted protection under the CCAA in an Initial Order on November 9, 2015. On November 16, 2015 a DIP loan was approved, with the order settled on November 19, 2015, which provided tight timelines for the entire process, including strict timelines for a SISP process.

[2] The applicants have now moved for the approval of a a key employee retention plan ("KERP") offered to certain management employees of Essar Steel Algoma Inc. ("Algoma") said to be deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the applicants to secure the obligations under the KERP. The KERP is supported by all those who appeared at the hearing save for the unions who opposed it.

The KERP

[3] The KERP covers 23 management personnel. The maximum aggregate amount which may become payable under the KERP is $3,468,027. This includes a $250,000 reserve for additional cash retention payments in the discretion of the board of directors, subject to approval of the Monitor.

[4] Under the KERP, a cash retention payment will be paid to the KERP participants upon the earliest of the following events: (a) implementation of a plan of compromise or arrangement sanctioned by the Court; (b) completion of a sale (or liquidation) of all or substantially all of the assets and operations of Algoma approved by the Court; (c) termination of a KERP participant's employment by Algoma without cause; and (d) December 31, 2016.

[5] In order to receive payments under the KERP, a KERP participant cannot have resigned, been terminated with cause or failed to perform his or her duties and responsibilities diligently, faithfully and honestly in the opinion of his or her direct supervisor and the special committee of the board of directors.

[6] The cash retention payment will be an amount equal to a percentage of the KERP participant's annual salary. The KERP participants are categorized in four tiers, with the retention payment corresponding to 100%, 75%, 50% or 25% of annual salary respectively for each of the four tiers.

[7] The list of KERP participants and the amounts of the cash retention payments offered to them were formulated by Algoma's management with the assistance of the applicants' legal counsel and other professional advisors, and with the assistance of a report prepared by a third party human resources firm, and in consultation with the Monitor. The KERP has been recommended by the special committee of the board of directors and approved by the board of directors of Algoma.

Analysis

[8] At the outset, the unions appearing requested an adjournment of the motion to further consider the requested relief. I declined the adjournment. The motion was served on November 26, 2015 and the confidential information regarding the persons and the amounts to be promised to them under the KERP was provided to counsel for the unions on November 30 after a confidentiality agreement was signed. That information is straightforward and easily understood.

[9] I understand the anxiety in Sault Ste. Marie caused by the difficulties being experienced by Algoma and the importance to the employees of the survival of Algoma. It would be preferable to have the luxury of considering all of the many issues in this CCAA proceeding in a relaxed atmosphere without time pressures. However that is not possible. The difficulty in this case is that the timelines are tight and the risk of senior management leaving the applicants,

which I will discuss further, requires a quick decision on the KERP. Notice that the KERP would be sought was disclosed at the outset but deferred, and to delay this matter any further increases the risks that the KERP is intended to address. Moreover, taking into account the process that was followed by the applicants, it is questionable whether more that is relevant could be said on behalf of the unions than has been said on their behalf in their affidavit and factum filed at the hearing of the motion.

[10] There is no express statutory jurisdiction in the CCAA for a court to approve a KERP. However, the courts have routinely held that the general power under section 11 of the CCAA gives jurisdiction to authorize a KERP and grant a charge to secure the applicants' obligations under the KERP. In *Grant Forest Products Inc., (Re)*, (2009), 57 C.B.R. (5th) 128, I considered the factors to be considered in determining whether a KERP should be approved. These were summarized by Morawetz J. (as he then was) in *Cinram International Inc., (Re)*, 2012 ONSC 3767 at para. 91 as follows:

> 91….The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:
>
> a. whether the Monitor supports the KERP agreement and charge;
>
> b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
>
> c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
>
> d. the employees' history with and knowledge of the debtor;
>
> e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

[11] In my view, the KERP should be approved for the following reasons:

(i) The evidence is that the KERP participants are critical to a successful restructuring of the applicants. Their institutional knowledge and experience would be very difficult, if not impossible, to be replaced during the relative short time in which the restructuring is contemplated. Without the KERP and the security provided by the KERP charge, there is concern that the KERP participants are likely to consider other employment options prior to the completion of the applicants' restructuring proceedings.

(ii) The unions contend that there is no evidence that any of the KERP participants have been approached by any other potential employers. Regardless of whether that is the case, it is no reason not to approve a KERP. The issue is whether there is a sufficient risk that persons may leave their employ, not whether there has been an approach by some other employer. See *Grant*, *supra*, at para. 14.

(iii) In this case, many of the management covered by the KERP are not from Sault Ste. Marie. They are obviously mobile and understandably would be concerned about their future in that city with a steel company that is under CCAA protection and not for the first time. The risk of their leaving for some other more certain future cannot be ignored, and it would be in no one's interest for them to leave Algoma at this critical time in which efforts are being made to restructure the business.

(iv) Management of Algoma took into account the difficulty of replacing the KERP participants during the stay period, taking into account the remoteness of Sault Ste. Marie. Algoma has been trying to recruit for some of these positions for the past year without success.

(v) The process to establish the KERP and those who should be covered by it was a thorough process. Outside HR personnel were consulted, legal counsel provided advice and the special committee of the board of directors as well as the board itself considered and approved the KERP. The Monitor provided input to Algoma in formulating the KERP and was invited to the meetings of the special committee and the board when the KERP was considered in detail, including whether the entitlements of certain participants should be changed from what management had proposed.

(vi) The business acumen of the board of directors, including the special committee of the board, should not be ignored unless there is good reason in the record to disregard it. See *Grant, supra*, at para. 18.

(vii) The KERP is not opposed by the various classes of noteholders, who will become junior to the KERP charge. They have worked with the applicants and have agreed to certain terms that will give them protection from their main concerns. While their concerns have not been completely answered, they are satisfied that it is in the best interests of Algoma that the KERP be approved.

(viii) The KERP is not opposed by the DIP lenders who are satisfied with the settled terms.

(ix) The Monitor supports the KERP.

[12] Counsel for the USW contends that the terms of the individual contracts of employment of each of the KERP participants should be disclosed to them as there may be non-competition provisions that would prevent the executives from leaving Algoma. Disclosure of all of the terms of employment is not required to deal with this issue. Of the 23 employees covered by the KERP, only eight have an employment agreement. The template for this agreement has been provided in confidence. There is a non-competition clause but it is questionable whether it would be enforceable and it clearly does not prevent all possible jobs that might be available elsewhere. Six of the eight employees in question are not from Sault Ste. Marie. To run the risk that the eight management employees in question would not leave Algoma because of this clause and to ignore the business judgment of the board and the special committee to the board because of this clause would be foolhardy.

[13] It is also said that the terms of the employment agreements should be reviewed to determine whether these employees would be entitled in any event to the amounts provided for in the KERP. This is completely answered by the terms to be agreed by the KERP participants that any amounts paid under the KERP will result in a corresponding reduction in any non-KERP claim that the participants may be entitled to.

[14] It is contended by the USW that the KERP was planned and approved without any input from the unions. I would not on that basis refuse to approve the KERP. Whether a particular person in a management role is important enough to be covered by a KERP agreement in an insolvency, or what the size of the KERP payment should be, is something that is the purview of management and the board of directors of a company. What useful input could be provided by the unionized employees is not apparent on the record, and no case provided to me suggested that the unionized employees should be consulted on such a decision.

[15] It was contended on behalf of local 2251 that the collective agreement provides for a steering committee on which the union has an important role and that the steering committee will work with the President and CEO and senior management towards achievement of the company's business goals and in particular how they relate to the facilities, manning objectives

including attrition and other matters which impact the company's employees. It is contended that this is broad enough to require the steering committee to have been involved in the implementation of the KERP for the senior executives of the company.

[16] I doubt that this provision of the collective agreement goes so far as contended to require union input into the terms of employment of the company's executives, which is what the contention of the union amounts to. However, if it is thought that the collective agreement was breached by the process leading to the KERP, a grievance could presumably be taken under the collective agreement. That is independent of the considerations to be given by a CCAA court in deciding whether to approve a KERP. A CCAA proceeding is not the place for grievances under collective agreements.

[17] It was also contended by the USW that the total amount of the KERP, being $3.4 million was excessive, taking into account the amount of the special pension shortfall payments that were deferred for the month of November. Counsel declined to say what a reasonable amount would be, saying it was a matter of discretion for the Court. In my view, the tying together these two separate issues is not appropriate. Whether the special pension payments should be deferred is a different issue and one that will be dealt with at a future date. The judgment of the board of directors and the special committee of the board should not be disregarded because of this issue.

[18] It was contended on behalf of the retirees the that the terms of the KERP provide for payment when there has been a completion of a sale or liquidation of the assets of Algoma and that the KERP should not pay out in the event of a liquidation as it is in the interests of all stakeholders that the company or its business be reorganized rather than liquidated. I would not change this provision. The management to be protected by the KERP are being incentivized to stay in Sault Ste. Marie to assist in the SISP and it would only be after that process that a liquidation might take place if a SISP were not successful. It is in the interests of the KERP participants, along with all stakeholders, that Algoma survive and not be liquidated, and to deny them their KERP payment after they stayed to attempt to save Algoma from liquidation would not be appropriate.

[19] In accordance with terms worked out by the applicant with the secured lenders, the applicants will not make or distribute any payments in respect of any claim of a KERP participant against the applicants (including any claims for termination, severance and change of control entitlements, but not including claims for payment pursuant to the KERP, claims for wages and vacation pay, or claims in respect of pension plans administered by the applicants) without first obtaining court approval of such payments on notice to the Service List. The KERP letters will have complimentary provisions worked out by the parties.

Sealing order requested.

[20] The applicants requested that the list of KERP participants and the information regarding their income and amounts of their proposed KERP payments be sealed. This information was contained in a confidential supplement to the third report of the Monitor. This request is supported by the Monitor. The unions oppose the request.

[21] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, Justice Iacobucci adopted the following test to determine when a sealing order should be made

> A confidentiality order … should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[22] Sealing orders are routinely granted in KERP cases, and found to meet the *Sierra Club* tests. In *Canwest Global Communications Corp., (Re)*, (2009), 59 C.B.R. (5th) 72, Pepall J. (as she then was) stated the following, which is entirely apt to this case of Algoma:

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

[23] See also *Canwest Publishing Inc., (Re),* (2012), 63 C.B.R. (5th) 115.

[24] In this case, it is contended by the union that under Ontario law, disclosure is made of salary information for public servants who make in excess of $100,000 per annum. Thus as this is a very public restructuring process and there is significant public interest in the outcome of these proceedings, the salary information for individual KERP participants should be disclosed. I do not agree. Persons who choose to work as public servants understand the rules of disclosure relating to their employment. Persons who work in the private sector take employment with the expectation that their income is private information. There are exceptions under securities legislation requiring disclosure of the income of the top earning executives of companies whose shares are publicly traded. I would not extend these statutory requirements to the KERP participants.

[25] The union also contends that they may wish to test the necessity of including individuals in the list of KERP participants and need the particular financial information of each for that purpose. I agree with the Monitor that it would not be appropriate to consider each individual person. The process of selecting the participants and the amounts to be paid to them as incentives to stay and assist the restructuring was a robust process as discussed, and it is not in these circumstances helpful for public discussion about whether any particular person should be included. The impact of such disclosure in the workplace would not be helpful. I agree with Justice Pepall in *Canwest* that individual personal information adds nothing when the aggregate is disclosed.

[26] The sealing order requested by the applicants is granted.

Newbould J.

Date: December 7, 2015

12

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

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

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

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

[3] No one appearing opposed the relief requested.

Backround Facts

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

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

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

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

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

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

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

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

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

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

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

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

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

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

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

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

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual “pre-packaged” recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

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

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

Proposed Monitor

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

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

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

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

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

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

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

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

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

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

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

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

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

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

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

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

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

(d) Administration Charge

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

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

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

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

(e) Critical Suppliers

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

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

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

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

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

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

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

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

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

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

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

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

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

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

Annual Meeting

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

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[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

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

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

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

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

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

Conclusion

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

_____

Pepall J.

Released: October 13, 2009

13

Clerk's Stamp:

CLERK OF THE COURT
JAN 19 2011
CALGARY, ALBERTA

COURT FILE NUMBER	1001-18567
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
ACTION	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9 AND IN THE MATTER OF ALTUS ENERGY SERVICES LTD. and NUSCO NORTHERN MANUFACTURING LTD.
DOCUMENT	**ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Burnet, Duckworth & Palmer LLP
1400, 350 – 7th Avenue SW
Calgary, Alberta T2P 3N9
Lawyer: Trevor Batty
Phone Number: (403) 260-0263
Fax Number: (403) 260-0332
Email Address: tbatty@bdplaw.com
File No. 62233-20

DATE ON WHICH ORDER WAS PRONOUNCED: **January 18, 2011**

NAME OF JUSTICE WHO MADE THIS ORDER: **B.E.C. Romaine**

ORDER

UPON the application of Altus Energy Services Ltd. and Nusco Northern Manufacturing Ltd. (collectively, "Altus" or the "Applicants"); **AND UPON** having read the Application, the Affidavit of Chris Haslam, sworn January 17, 2011 (the "Haslam Affidavit"), and the First Report of the Monitor of Altus; **AND UPON** hearing counsel for Altus, counsel for the Monitor and counsel for other interested parties; **IT IS HEREBY ORDERED AND DECLARED THAT:**

1. Service of notice of this application for this Order is hereby abridged and service thereof is deemed good and sufficient.

2. Capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Initial Order granted herein on December 21, 2010, (the "Initial Order").

3. The Stay Period, as defined in Paragraph 13 of the Initial Order, is hereby extended to March 18, 2011.

4. In accordance with Paragraph 31 of the Initial Order, Altus is hereby entitled to borrow a further $1,500,000 from the DIP Lender under the DIP Lender's credit facility with Altus.

KEY EMPLOYEE RETENTION PLAN ("KERP")

5. The Key Employee Retention Plan ("KERP"), as that term is defined and described in the Haslam Affidavit, and the amounts of the KERP payments under the KERP as described in Exhibit "D" to the Haslam Affidavit, is hereby approved and ratified. Altus is hereby authorized and directed to implement and perform its obligations under the KERP in accordance with the terms of the KERP as may be modified by this Order, and to execute and deliver such additional or auxiliary documents as may be necessary to give effect to the KERP.

6. The KERP retention payments shall be paid to the participating employees either upon the successful completion of a Plan of Arrangement in these proceedings or otherwise upon the termination of these proceedings. Payment will only be made if the participating employee has not had his or her employment with Altus terminated for cause prior to the KERP retention payments becoming payable in accordance with this provision.

7. The employees of Altus who are eligible for and agree to participate in the KERP shall be entitled to the benefit of and are hereby granted a charge on the Property, which charge shall not exceed $275,000, as security for the payment of the amounts that such employees may become entitled to under the KERP (the "KERP Charge"). The KERP Charge shall be added to and form part of the definition of "Charges", as defined at

paragraph 38 of the Initial Order, and the terms of the Initial Order that apply to all of the other Charges collectively, specifically paragraphs 38-42, shall apply *mutatis mutandis* to the KERP Charge.

8. The KERP Charge shall come after the other Charges, such that the relative priorities of the Charges set out at paragraph 37 of the Initial Order shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – DIP Lender's Charge;

Third – Directors' Charge (to the maximum amount of $500,000); and

Fourth – KERP Charge (to the maximum amount of $275,000)

9. Exhibit "D" referred to in the Haslam Affidavit contains confidential information and shall be sealed on the court file in these proceedings and segregated from, and not form part of, the public record.

10. The Clerk of the Court shall file Exhibit "D" of the Haslam Affidavit in a sealed envelope attached to a notice that sets out the style of cause in these proceedings, the aforementioned description of the documents contained therein and a statement that the envelope's contents are sealed pursuant to the Order.

11. This Order is made notwithstanding the restricted court access application requirements contained in Part 6, Division 4 of the Alberta *Rules of Court*.

J.C.Q.B.A.

14

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2021 ONSC 4347
COURT FILE NO.: CV-21-00661458-00CL
DATE: 2021-06-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ONTARIO SECURITIES COMMISSION

Applicant

AND:

BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND

Respondents

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *John Finnigan, Grant Moffat and Adam Driedger*, for the Receiver

Carlo Rossi and Adam Gotfried, for the Ontario Securities Commission

Lawrence Thacker, for Natasha Sharpe

David Bish, for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco

Marc Wasserman and Justine Erickson, for BlackRock Financial Management, Inc.

Kyla Mahar, for RC Morris Capital Management Ltd. and RCM NGB Holdings Limited

Alex MacFarlane, James MacLellan and Charlotte Chien, for Zurich Insurance Company Ltd

Natasha MacParland, for Willoughby Asset Management Inc.

Steven Weisz and Shaun Parsons, for the University of Minnesota Foundation

Steve Graff, for Investors in various Bridging Funds

Melissa MacKewn, for David Sharpe

Fraser Dickson, for a former employee of Bridging Finance Inc.

Caitlin Fell, Sharon Kour, Pat Corney and Andy Kent, for the Ad-Hoc Group of Retail Investors

David Ullmann, for the Respondents, Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas, and 2190330 Ontario Ltd.

HEARD: June 16, 2021

AMENDED ENDORSEMENT

[1] This endorsement addresses the motion brought by PricewaterhouseCoopers Inc. ("PwC"), receiver of each of the Respondents (the "Receiver") for an order requesting, among other things, approval of the Key Employee Retention Plan ("KERP") and the KERP Charge; approving the formation, composition, and mandate of the Limited Partner Advisory Committees; tolling the applicable limitation periods in respect of any Misrepresentation Rights until the Tolling Termination Date; approving the Receiver's recommended course of action in connection with partial repayment of amounts owing under a credit facility made available by certain of the Respondents as described in Confidential Appendix "B" to the Third Report of the Receiver, dated June 9, 2021 (the "Third Report"); sealing Confidential Appendix "A" and Confidential Appendix "B" to the Third Report until further Order of the Court; and approval of the Third Report.

[2] This endorsement also addresses the motion brought by a group of retail investors in the Bridging Funds (the "Ad Hoc Group of Retail Investors") for an order appointing Weisz, Fell, Kour LLP ("WFK") as representative counsel ("Representative Counsel") for all retail investors holding units of the Bridging Funds, excluding investment advisors and institutional investors (the "Retail Investors").

[3] Capitalized terms not expressly defined herein are as defined in the Third Report.

[4] The factual background is set out in the Third Report.

[5] The Receiver is in the process of developing and implementing a strategy to maximize value for all stakeholders. This strategy will include a review of the consolidated portfolio of loans held by all of the Bridging Funds. There will also have to be a reconciliation of inter-fund accounts and review of inter-fund cash allocations.

[6] The objective of all stakeholders should be aligned with respect to the development and implementation of a strategy to maximize the value of the loan portfolio.

[7] However, the alignment of interests may very well be different when it comes to the reconciliation of inter-fund accounts and the review of inter-fund cash allocations. The Third

Report indicates that investors participated through the purchase of units of the Bridging Funds. The Bridging Funds marketed to investors include five limited partnership fund offerings, three RSP fund offerings and two investment trust fund offerings.

[8] It is premature to comment on how the assets realized from the loan portfolio will be divided among the funds, but it is conceivable that there will be disputes between the various funds with respect to asset allocation.

[9] It is against this background that the motions have to be considered.

[10] Certain relief sought by the Receiver was not opposed.

[11] The Receiver is of the view that in order to incentivize certain eligible employees to remain as employees of Bridging Finance Inc. ("BFI") during the course of these proceedings, a KERP should be approved, together with a related charge on the property of the Respondents in the maximum amount of $366,000 (the "KERP Charge") as security for payments under the KERP, which will ranks subordinate to the Receiver's Charge, the Receiver's Borrowing Charge and each Intercompany Charge, but in priority to all other security interests.

[12] As set out in Confidential Appendix "A" to the Third Report, the Receiver has allocated among Eligible Employees approximately $266,000 of the requested KERP Payments. The remaining $100,000 may be allocated among Eligible Employees or additional key Employees provided they meet certain criteria set out in the Bridging KERP.

[13] Courts have frequently recognized the utility and importance of KERPs in restructuring proceedings and have approved KERPs in numerous debtor-in-possession proceedings under both the *Companies' Creditors Arrangement Act* (the "CCAA") and receivership proceedings pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") and the *Courts of Justice Act* (the "CJA").

[14] The CCAA, the BIA and the CJA, as well as the *Securities Act* are silent with respect to the approval of KERPs and the granting of a charge to secure a KERP. Counsel to the Receiver submits that as such, the approval of a KERP and a KERP Charge are matters within the discretion of the court, grounded in the court's inherent and/or statutory jurisdiction to make any orders it sees fit. (See, for example: *Aralez Pharmaceuticals Inc., (Re),* 2018 ONSC 6980; *Cinram International Inc., (Re),* 2012 ONSC 3767 and *Grant Forest Products Inc., (Re),* [2009] O.J. No. 3344.)

[15] The factual and legal basis for the granting of the KERP is set out in the Receiver's factum at paragraphs 5 – 14.

[16] The Receiver recommends that the court exercise its discretion to approve the Bridging KERP and grant the KERP Charge.

[17] I accept this recommendation. The KERP and the KERP Charge are approved.

[18] The Receiver also seeks an order tolling the statutory limitation periods applicable to any "Misrepresentation Rights", as defined at paragraph 16 of the factum, until the stay of proceedings imposed against the Respondents and the Property pursuant to the Appointment Orders is terminated.

[19] The factual and legal basis for granting such relief is set out at paragraphs 16 – 22 of the factum.

[20] The Receiver recommends that the proposed Tolling Order be granted.

[21] I accept this recommendation. The Tolling Order is granted.

[22] The Receiver also recommends that its proposed course of action, as described in Confidential Appendix "B" to the Third Report in connection with a partial repayment of amounts owing under a Credit Facility made available to a borrower by certain of the Respondents should be approved. Having reviewed Confidential Appendix "B" to the Third Report, I am satisfied that the Receiver's recommended course of action should be approved.

[23] The considerations involved in the granting of a sealing order must take into account the recent Supreme Court decision in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38, where Kasirer J. wrote that:

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding

> the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[24] Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects. As such, the Sealing Order should be granted, pending further order of the court.

[25] Confidential Appendix "A" contains the Bridging KERP, which contains confidential and personal information with respect to the compensation of each Eligible Employee.

[26] Confidential Appendix "B" contains the Receiver's recommended course of action in connection with the proposed transaction. The terms of the proposed transactions are confidential and the Receiver submits the disclosure of such confidential commercially sensitive information at this time would undermine its efforts to maximize value for stakeholders.

[27] I am satisfied that no stakeholders will be materially prejudiced by sealing the Confidential Appendices and that the salutary effects of granting the Sealing Order outweigh any deleterious effects. As such, I am satisfied that the sealing order should be granted, pending further order of the court.

[28] In its Notice of Motion, the Receiver requested approval of payments to RC Morris. The request for such approval was deferred.

[29] The Receiver also requested approval of its activities as set out in the draft order. There was no opposition to this request which is granted.

[30] The balance of this endorsement addresses the Receiver's request for approval of limited partner advisory committees and the motion of the Ad Hoc Group of Retail Investors.

[31] The Receiver seeks court approval of the following two Limited Partner Advisory Committees:

> (a) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Funds generally (the "LPAC"); and
>
> (b) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Indigenous Impact Fund (the "BIIF LPAC").

(the LPAC and the BIIF LPAC are referred to as the "Committees").

[32] The Receiver states that the primary functions of the Committees, will be to, among other things:

(a) provide the Receiver with a confidential forum to obtain input and feedback on behalf of Unitholders in the Bridging Funds regarding actions or decisions of the Receiver, as considered appropriate by the Receiver; and

(b) provide such other input and assistance to the Receiver regarding matters involving Bridging as the Receiver may reasonably request from time to time.

[33] The Receiver contends that the Committees will provide an efficient and cost-effective means for Unitholders to provide direct input to the Receiver but will not have any decision-making authority with respect to any of the Respondents or the Property. The proposed Committee Members represent a diverse cross-section of both retail and institutional Unitholders and each Committee Member will be bound by a confidentiality agreement satisfactory to the Receiver.

[34] Mr. Graff states that he represents 15 different investors in various Bridging Funds with over $400MM of claims, and he does not oppose the relief requested by the Receiver. He points out that his clients have received regular and effective communications from the Receiver.

[35] The appointment of the Committees is challenged by the Ad Hoc Group of Retail Investors. The Ad Hoc Group of Retail Investors are of the view that it is more appropriate to appoint WFK as Representative Counsel for all Retail Investors holding units of the Bridging Funds, excluding investment advisors and institutional investors.

[36] In its factum, counsel points out that the Retail Investors are concerned about recovery of their investments and the protection of their rights and are most concerned about fairness. There are over 25,000 Retail Investors who will bear the brunt of any shortfall. Counsel submits that this receivership was not commenced with the Retail Investors in mind and makes reference to an OSC publicly made statement that, “as a regulatory body, we do not normally recover money for investors.”

[37] Counsel submits that the receivership proceeding lacks meaningful input from the Retail Investors. Counsel also submits that it is not clear from the materials filed by the Receiver as to what role the Committees will perform, since the Receiver has not described what matters it proposes to consult with the Committees. Further, counsel raises concerns that the Committees will be dominated by investment advisors and institutional or professional investors, and this presents the appearance of conflicts.

[38] The gist of the submissions put forward by counsel is that the Retail Investors require representation by counsel whose sole focus and loyalty is to them. The appointment of Representative Counsel will also generally improve the efficiency of the receivership; communication with Retail Investors will be streamlined and a multiplicity of legal retainers avoided.

[39] I have concluded that the relief requested by the Receiver for the appointment of the LPACs should be granted – albeit with certain time limitations.

[40] As noted above, the Receiver is currently involved in the development and implementation of a strategy to maximize value for all stakeholders. A strategic review of the portfolio is in process and the Receiver is not in a position to confirm valuations for certain funds.

[41] It seems to me that the Committees will be in a position to provide the Receiver with meaningful input and feedback on behalf of Unitholders regarding actions or decisions of the Receiver. At this time the focus is on maximizing realizations for the benefit of Unitholders and the Committees may very well be in a position to provide meaningful assistance to the Receiver.

[42] I also note that although the OSC may have made a statement to the effect that "as a regulatory body, we do not normally recover money for investors", it is necessary to take into account that the Receiver was appointed pursuant to the provisions of section 129 of the *Securities Act* in a particular section 129(2) which provides:

> 129 [2] No order shall be made under subsection (1) unless the court is satisfied that,
>
> (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company **is in the best interests of the creditors** of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of our subscribers to the person or company; or
>
> (b) it is appropriate for the due administration of Ontario securities law.
>
> (Emphasis added)

[43] I am also satisfied that the Receiver will take into account the best interests of all Unitholders.

[44] Counsel to the Ad Hoc Group of Retail Investors also questioned the proposed mandate of the Committees. At this point in time, the focus of the Committees is to provide input to the Receiver in connection with a strategic review of the portfolio in an effort to maximize value for all stakeholders. This review take some time but should not be extended for an unlimited time. For this reason, it seems to me that the appointment of the Committees should be time-limited to 60 days, subject to extension by court order. It is my expectation that at the end of 60 days, the Receiver should be in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of inter-fund accounts.

[45] Accordingly, I am satisfied that it is appropriate to approve the Committees as requested by the Receiver, on the terms set out in the proposed order, with the proviso that the appointment of the Committees is time-limited to 60 days, subject to extension by court order.

[46] With respect to the appointment of Representative Counsel, I am satisfied that the court has jurisdiction to appoint representative counsel under section 101 of the CJA, together with Rules 10.01 and 12.07 of the *Rules of Civil Procedure*.

[47] The issue is whether the appointment of Representative Counsel should be entertained at this time, or whether it is more appropriate to defer consideration of this issue until such time as the Receiver is in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of interfund accounts. I have concluded that it is appropriate to defer consideration of this issue for the following reasons.

[48] First, the focus at the present time should be on the portfolio review and developing a strategy to maximize value for all stakeholders.

[49] Second, when the Receiver reports on this issue and provides information with respect to the reconciliation of interfund accounts, it may become clearer as to the role that Representative Counsel can play. It could very well be that the entitlement or potential entitlement of Unitholders in the various funds will differ, which could in turn require the appointment of different Representative Counsel for different funds. In my view, the potential role of Representative Counsel should focus on allocation issues as opposed to realization issues.

[50] The relief requested by the Ad Hoc Group of Retina Investors is dismissed, with leave to reassess the requested relief in 60 days.

[51] The appointment of Representative Counsel can be revisited at the time that the Receiver makes its report in 60 days.

[52] An order shall issue to reflect the foregoing.

Chief Justice G.B. Morawetz

Date: June 22, 2021