Court / Estate No.: 31-2688719

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF
RGN BRITISH COLUMBIA XXIII LIMITED PARTNERSHIP

(Applicant)

FACTUM OF THE APPLICANT
(Re: Extension of Time to File a Proposal)

December 10, 2020

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PART I - OVERVIEW

1. RGN British Columbia XXIII Limited Partnership ("**RGN BC XXIII LP**" or the "**NOI Debtor**") is part of IWG's multinational corporate group that offers a network of on-demand office and co-working spaces, and ancillary services and support, to a variety of clients across numerous industries in over 1,000 locations in the United States and Canada.

2. Due to external factors caused by the COVID-19 pandemic, certain of the NOI Debtor's affiliates (the "**Chapter 11 Debtors**") in the United States and an affiliate in Luxembourg, Redox Plc (f/k/a Regus Plc S.A.), commenced insolvency proceedings.

3. Certain of the Chapter 11 Debtors (the "**Guarantor Debtors**") are guarantors of 85 Leases in Canada. Pursuant to approximately 38 of these guaranteed Leases, the commencement of the Chapter 11 Cases by a guarantor may be a technical event of default.

4. The NOI Debtor's guarantor, Regus Plc, is not a Guarantor Debtor, but like the Guarantor Debtors, its insolvency may be a technical event of default under several Leases in Canada, including the NOI Debtor's Lease.

5. Due to concerns that the NOI Debtor's Landlord may terminate its Lease, the NOI Debtor commenced proceedings under Part III of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") by filing a Notice of Intention to Make a Proposal (the "**NOI**") on November 13, 2020 (the "**NOI Proceedings**"). KSV Restructuring Inc. (f/k/a KSV

Kofman Inc.) was appointed as proposal trustee of the NOI Debtor (the "**Proposal Trustee**"). On December 13, 2020, the 30-day stay period triggered by the filing of the NOI expires.

6. This factum is filed in support of a motion by the NOI Debtor seeking an extension of the time to file a proposal pursuant to s. 50.4(9) of the BIA for a period of 45 days from December 13, 2020 to and including January 27, 2021.

7. Allowing the NOI Debtor to continue with the NOI Proceedings would provide the NOI Debtor with the opportunity to continue negotiations with its Landlord in an attempt to develop a proposal or resolution in the best interests of the NOI Debtor and its stakeholders.

PART II - THE FACTS

8. The facts with respect to this motion are more fully set out in the affidavit of Joshua Nicosia sworn December 8, 2020 (the "**Nicosia Affidavit**"). Capitalized terms used within this factum but not otherwise defined have the meanings ascribed to them in the Nicosia Affidavit.

9. The NOI Debtor is a special purpose limited partnership formed under the *Limited Partnerships Act* (Ontario) between RGN Limited Partner Holdings, Corp., as limited partner, and RGN British Columbia XXIII GP Inc., as general partner. The NOI Debtor was formed for the purpose of entering into a Lease with the Landlord to hold an individual Lease for a single Centre in Canada (the "**Leased Premises**").

Nicosia Affidavit at para 5, Applicant's Motion Record, Tab 2.

10. The Leased Premises are eight floors of a 24 floor building that the Landlord is currently constructing. The NOI Debtor entered into a Lease with the Landlord on August 31, 2018 on the expectation that the Landlord would complete the buildout of the Leased Premises by approximately April 2021.

Nicosia Affidavit at paras 6, 10, Applicant's Motion Record, Tab 2.

11. Construction of the Leased Premises has not begun yet and will not begin until sometime next year.

Nicosia Affidavit at paras 11, 24, Applicant's Motion Record, Tab 2.

12. The NOI Debtor has already arranged for most of the Leased Premises to be licensed to a major Occupant following the delivery date.

Nicosia Affidavit at para 7, Applicant's Motion Record, Tab 2.

13. The NOI Debtor's Lease is guaranteed by Regus Plc, a Bailiwick of Jersey entity that is managed and controlled in Luxembourg. On or around September 10, 2020, Regus Plc commenced insolvency proceedings.

Nicosia Affidavit at paras 9, 12, Applicant's Motion Record, Tab 2.

14. On September 28, 2020, counsel to the Landlord provided notice (the "**September 28 Notice**") to the NOI Debtor that the commencement of insolvency proceedings by Regus Plc is a default under the NOI Debtor's Lease unless the NOI Debtor posts a security deposit in cash or by letter of credit to the Landlord for $10 million.

Nicosia Affidavit at paras 12-13, Applicant's Motion Record, Tab 2.

15. Following receipt of the September 28 Notice, the NOI Debtor commenced discussions with the Landlord to develop a proposal on a restructured arrangement that would allow the Lease to continue and the Centre to open following the Landlord completing construction.

Nicosia Affidavit at para 13, Applicant's Motion Record, Tab 2.

16. After an initial impasse during the discussions, the NOI Debtor became concerned the Landlord may try to terminate the Lease and, as result, it filed a NOI on November 13, 2020.

Nicosia Affidavit at para 15, Applicant's Motion Record, Tab 2.

17. Notwithstanding the filing of the NOI, on November 19, 2020, the Landlord sent an email (the "**November 19 Email**") purporting to terminate the Lease due to the above-mentioned default event and attached to his email letters setting out the grounds for termination in more detail.

Nicosia Affidavit at para 16, Applicant's Motion Record, Tab 2.

18. On November 26, 2020 and December 7, 2020, counsel for the NOI Debtor sent letters to counsel for the Landlord disputing the validity of the purported termination given the stay of proceedings afforded to the NOI Debtor upon the filing of the NOI. The NOI Debtor has attempted to contact the Landlord to indicate the NOI Debtor remained committed to continuing discussions toward a mutually beneficial compromise that could include revising the terms of the Lease or replacing the security provided by Regus Plc.

Nicosia Affidavit at paras 17-19, Applicant's Motion Record, Tab 2.

19. The NOI Debtor, with the assistance of the Proposal Trustee, has worked diligently and in good faith to explore restructuring options. This is the first request for an extension of the time to file a proposal. The time to file a proposal currently expires on December 13, 2020. No proposal has been filed by the NOI Debtor in the NOI Proceedings.

Nicosia Affidavit at paras 21-22, 24, Applicant's Motion Record, Tab 2.

20. If this extension of time is granted, the NOI Debtor intends to use the NOI Proceedings to pursue discussions with its Landlord to find a mutually beneficial solution to the current default.

Nicosia Affidavit at paras 23-24, Applicant's Motion Record, Tab 2.

PART III - ISSUES

21. The issue before this Court, as addressed below, is whether the NOI Debtor should be granted an extension of time to file a proposal under s. 50.4(9) of the BIA.

PART IV - THE LAW

22. In determining whether to grant a debtor an extension under s. 50.4(9) the Court is required to examine three factors: whether (i) the debtor has acted in good faith and with due diligence; (ii) the debtor would likely be able to make a viable proposal; and (iii) any creditor will be materially prejudiced by the extension.

> BIA, s. 50.4(9).
>
> *Enirgi Group Corp. v. Andover Mining Corp.,* 2013 BCSC 1833 at para 63 (CanLII) [***Enirgi***].

23. When assessing whether the NOI Debtor meets each component, it is important to keep in mind that the objective of the BIA favours proposals instead of assignments into bankruptcy. The Court should facilitate that objective by interpreting the test liberally and granting an extension of time whenever it can properly do so.

> *Raymor Industries Inc., Re*, 2009 QCCA 680 at para 39 (CanLII).

24. This first extension is only for a 45-day period but it is crucial to providing the NOI Debtor with the opportunity to continue negotiations with the Landlord to reach a mutually beneficial compromise. All stakeholders benefit by granting the NOI Debtor an extension of time to attempt a solution to the issue.

1. The NOI Debtor has acted in good faith and with due diligence

25. The NOI Debtor has at all times acted and continues to act in good faith and with due diligence. The NOI Debtor is part of a global restructuring effort that has expended considerable

time and resources for the benefit of all its stakeholders. The NOI Debtor's corporate group has acted honestly and diligently in all its proceedings, and this one is no different.

26. The NOI Debtor has been proactive and also responded promptly to all communications from the Landlord, bearing in mind that the key personnel of the NOI Debtor have many competing demands due to the global restructuring effort.

27. Following receipt of the September 28 Notice (the default notice), the NOI Debtor commenced discussions with the Landlord regarding potential arrangements with the Landlord, including restructuring the guarantee and restructuring the NOI Debtor's underlying Lease. Shortly after the NOI Debtor received the November 19 Email (the termination notice), it contacted the Landlord to let it know that the NOI Debtor disputed the purported termination. In the weeks that followed, the NOI Debtor exchanged letters and had telephone conversations with the Landlord regarding the purported termination. These communications were undertaken in good faith and took place in a timely fashion.

28. Discussions with the Landlord are still developing and the extension of time will provide the NOI Debtor with the crucial time necessary to continue communicating with the Landlord to reach a resolution.

2. The NOI Debtor would likely be able to make a viable proposal

29. A viable proposal is one "that would be reasonable on its face to a reasonable creditor; 'this ignores the possible idiosyncrasies of any specific creditor'". The NOI Debtor believes that, despite the lack of success in the negotiations to date, it will still be able to make a reasonable proposal.

> *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. S.C.J.) [Commercial List] at para 4, Tab A [***Baldwin***].

30. An assertion by the Landlord that it will not accept any proposal or that it no longer has faith in a negotiated resolution does not mean it is unlikely the NOI Debtor will be able to make a viable proposal. Where a proposal has not yet been formulated, such opposition is premature and not determinative of whether a viable proposal could be generated. Courts have often recognized that creditors can and do change their minds over the course of restructuring proceedings.

> *Baldwin* at paras 3-4.
>
> Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada, (4th ed) (Toronto: Carswell, 2005)] at E§4, Tab B.
>
> *Cantrail Coach Lines Ltd., Re* (2005), 2005 BCSC 351 at paras 13-18 (CanLII).

31. In this situation, the NOI Debtor is part of a multinational corporate group with sufficient working capital to be able to put up a reasonably sized replacement guarantee as part of a proposal or develop another arrangement that would obtain creditor approval. The NOI Debtor has attempted to present options to the Landlord prior to the NOI and wishes to continue with negotiations to allow for the Lease and Centre to continue as previously planned. The proposal need not be a certainty, and "likely" in this context means "such as might well happen". That the NOI Debtor and the Landlord may reach a compromise is clearly something that "might well happen". Therefore, the NOI Debtor submits it has established that it meets this component of the test.

> *Baldwin* at paras 3-4.
>
> *Enirgi* at para 66.
>
> *Kocken Energy Systems Inc., Re*, 2017 NSSC 80 at paras 22-23 (CanLII).

32. The BIA also provides that any interested person in any proceedings under the BIA shall act in good faith during those proceedings:

> 4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> BIA, s. 4.2.

33. To date, during the NOI Proceedings, the Landlord has refused to continue discussions with the NOI Debtor on the basis that the Lease has been terminated. The NOI Debtor also has concerns that the Landlord may be using the filing of Regus Plc as an opportunity to approach the major Occupant of the NOI Debtor.

34. Terminating the NOI Proceedings now to allow the Landlord to potentially attempt to take a customer of the NOI Debtor would be inconsistent with the new requirements imposed on the BIA. Good faith discussions between the parties on a proposal or negotiated resolution should be required by this Court and should be given an opportunity to succeed.

3. No creditor would be materially prejudiced by the extension

35. The NOI Debtor submits that the Landlord will not be materially prejudiced by the extension. The Landlord has not completed construction of the building where the Leased Premises are located and will not begin constructing the Leased Premises portion of the building until sometime next year.

36. The Landlord has already sent notices delaying the completion of the Leased Premises, on two occasions. This mere 45 day extension will not cause the Landlord to suffer material prejudice.

37. In *Fiorito*, the Ontario Court of Appeal clarified that prejudice refers to prejudice suffered vis-à-vis the indebtedness and the attendant security. It does not refer to prejudice which subjectively affects the creditor. Where a creditor opposes an extension of time under s. 50.4(9) on the ground that it will suffer material prejudice by the extension, it must quantify its losses

and give particulars. If it fails to do so, the court will reject the submission that there is material prejudice.

> *Fiorito v. Wiggins*, 2017 ONCA 765 at para 31 (CanLII) [***Fiorito***].
>
> *Nortec Colour Graphics Inc., Re* (2000), 18 C.B.R. (4th) 84 at para. 16 (Ont. S.C.J.), Tab C.

38. There is no risk in this case that the Landlord's expected loss will grow in a material way within the next 45 days. Therefore, the NOI Debtor does not believe the Landlord will suffer material prejudice if the extension is granted.

PART V - ORDER SOUGHT

39. RGN British Columbia XXIII Limited Partnership respectfully requests that this Court grant the requested Order substantially in the form of the draft order attached at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of December, 2020.

Stikeman Elliott LLP
Lawyers for RGN British Columbia XXIII Limited Partnership

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. S.C.J.) [Commercial List]

2. *Cantrail Coach Lines Ltd., Re* (2005), 2005 BCSC 351 (CanLII)

3. *Enirgi Group Corp. v. Andover Mining Corp.,* 2013 BCSC 1833 at para 63 (CanLII)

4. *Fiorito v. Wiggins,* 2017 ONCA 765 (CanLII)

5. *Kocken Energy Systems Inc., Re,* 2017 NSSC 80 (CanLII)

6. *Nortec Colour Graphics Inc., Re* (2000), 18 C.B.R. (4th) 84 (Ont. S.C.J.)

7. *Raymor Industries Inc., Re,* 2009 QCCA 680 (CanLII)

Secondary Sources

1. Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada, (4th ed) (Toronto: Carswell, 2005)

SCHEDULE "B"
RELEVANT STATUTE

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Good faith

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

…

Notice of intention

50.4

[…]

Where assignment deemed to have been made

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

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

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

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

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

Extension of time for filing proposal

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

(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.

TAB A

1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Farley J.

Judgment: February 3, 1994 *
Docket: Doc. 32-65038

Counsel: *Frank Bennett* , for debtor companies.
Larry Crozier , for secured creditor, Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.
Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.
The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act* .
The companies appealed.
Held:
The appeal was dismissed.
The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).
Table of Authorities
Cases considered:
Cumberland Trading Inc., Re (1994), 23 C.B.R. (2d) 225 (Ont. Gen. Div. [Commercial List]) — *referred to*
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 50.4(9)

s. 50.4(11)

Appeal from decision of Registrar in Bankruptcy [reported at 23 C.B.R. (3d) 219 at 223] dismissing second application for extension of time to file proposal under *Bankruptcy and Insolvency Act* .

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof 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 may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned 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.

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

> (11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question.
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period expired.

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

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 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "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* ".

5 While one may well fault the Bank for its approach to this situation, one has to recognize that the onus is on the debtor companies to show that they have acted in good faith and with due diligence. I am satisfied that the Registrar correctly assessed the situation in that regard that the debtor companies could have and should have proceeded with laying the foundation for their proposal and in fact building on that foundation rather than relying on anything that may be forthcoming from the Bank. In particular, see Cohn, *Good Faith and the Single Asset Debtor* (1988) 62 Am. Bankr. L.J. 131 on which it appears the Registrar relied. However, it is noted that there was no examination of the jurisprudential principles therein.

6 I discussed the question of material prejudice in *Cumberland, supra* , at pp. 11-13 [pp. 231-232]. The debtor companies have provided no information in that regard for the 45 day extension period from February 28, 1994. The only information close to this is the cash-flow statement of the previous extension granted December 16, 1993. However, for this extension there was no information. It appears therefore, that the debtor companies did not even attempt to meet this condition.

7 I am therefore, of the view that on all three tests (one failure of a test being sufficient to disqualify a debtor company from being able to ask for an extension) the debtor companies have failed to overcome the onus on them. The Registrar was correct in the result on all counts, although I feel that he inadvertently used the wrong test in s. 50.4(9)(*b*), a quite understandable situation given the terminology used in the legislation.

8 I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(*c*).

9 The appeal is dismissed. Costs were agreed at $2,500 and are payable by the debtor companies jointly and severally to the Bank forthwith.

Appeal dismissed.

Footnotes

* This judgment is an appeal from the decision reported at 23 C.B.R. (3d) 219 at 223 .

TAB B

HMANALY E§4
Houlden & Morawetz Analysis E§4

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Proposals (ss. 50-66)
L.W. Houlden and Geoffrey B. Morawetz

E§4 — Extension of Time to Make a Proposal

E§4 — Extension of Time to Make a Proposal

See ss. 50, 50.1, 50.2, 50.3, 50.4, 50.5, 50.6, 51, 52, 53, 54, 54.1, 55, 56, 57, 57.1, 58, 59, 60, 61, 62, 62.1, 63, 64, 64.1, 64.2, 65, 65.1, 65.11, 65.12, 65.13, 65.2, 65.21, 65.22, 65.3, 66

A proposal must be filed within 30 days after filing the notice of intention: s. 50.4(8). The court can extend the period for 45 days at a time, but the total period of the extension cannot exceed five months after the expiration of the 30-day period: s. 50.4(9). Section 187(11), which gives the court power to extend time limits prescribed by the Act, does not apply to the time limits in s. 50.4(9): s. 50.4(10). Under s. 50.4(9), the burden of proof is on the debtor to show that it complied with all the three tests set out in that subsection. The debtor must prove on the balance of probabilities than an extension is justified, that it has acted in good faith and with due diligence, would likely be able to make a viable proposal, and that no creditor will be materially prejudiced by the extension: *Re Air Atlantic Ltd.* (1994), 27 C.B.R. (3d) 225, 1994 CarswellNfld 21 (Nfld. T.D.); *Benfor Inc. c. Restaurants Mikes* (1996), 44 C.B.R. (3d) 149, 1996 CarswellQue 831 (Nfld. T.D.); *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.* (1997), 46 C.B.R. (3d) 280, 1997 CarswellOnt 1524 (Ont. Gen. Div.); *Re Heritage Flooring Ltd.* (2004), 2004 CarswellNB 358, 3 C.B.R. (5th) 60, 2004 NBQB 168 (N.B. Q.B.), the failure of one of the tests in s. 50.4(9) is sufficient to disqualify the debtor company from being able to ask for an extension. Where the debtor company, apart from the cash-flow statement, did not provide any further information as to why an extension should be granted, the application of the debtor for an extension was refused: *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. [Commercial List]).

An extension of time for filing a proposal under s. 50.4(9) of the *BIA* should be granted, despite the opposition of the debtor's primary secured creditor that intended to vote against any proposal, where: (a) the proposal has not yet been formulated such that the secured creditor's opposition is premature and not determinative of whether a viable proposal could be generated; (b) there is no evidence of bad faith; and (c) there is no evidence that any creditor of the debtor would be materially prejudiced if the extension is granted. In considering applications under s. 50.4(9) of the *BIA,* an objective standard must be applied and matters considered under such provisions should be judged on a rehabilitation basis rather than on a liquidation basis: *Re Cantrail Coach Lines Ltd.* (2005), 2005 CarswellBC 581, 2005 BCSC 351, 10 C.B.R. (5th) 164 (B.C. Master).

A motion to extend time to develop a proposal was dismissed and an order for the receiver to enter into a liquidation agreement was granted where the court found that the receiver had acted properly and responsibly, followed the court-sanctioned marketing process and acted in good faith and with fairness and where the passage of time had eroded the bank's realization on its security: *Bank of Montreal v. Trent Rubber Corp.* (2005), 13 C.B.R. (5th) 31, 2005 CarswellOnt 3126 (Ont. S.C.J. [Commercial List]).

Where a creditor opposes an extension of time under s. 50.4(9) for filing a proposal on the ground that it will be materially prejudiced by the extension and will suffer losses as a result of granting it, it should quantify its losses and give particulars of prospective purchasers for its equipment, and if it fails to do so, the court will reject the submission that there is material prejudice: *Re Nortec Colour Graphics Inc., supra.* Where a bank holding security over the debtor's property unilaterally swept

the debtor's operating account and capped its revolving line of credit, it was held that the bank had acted contrary to the stay provisions under s. 69. Given that debtor had satisfied the court that it had acted in good faith and with due diligence, would likely be able to make a viable proposal, and that no creditor would be materially prejudiced, the extension was granted: *Heritage Flooring Ltd., supra.* (See also E§43 "Stay of Proceedings" and E§66 "Provision for Termination Because of Proposal".)

Where two large creditors, holding decisive voting powers, stated that they would not accept a proposal and, in addition, the debtor lacked the financial resources to make a viable proposal, the court refused an extension of time under s. 50.4(9); *Benfor Inc. c. Restaurants Mikes* (1996), 44 C.B.R. (3d) 149, 1996 CarswellQue 831 (Nfld. T.D.).

The Supreme Court of Nova Scotia, in allowing a motion for an extension of time for the filing of a proposal, emphasized that the onus was on the debtor to satisfy the court on a balance of probabilities that each of the three prerequisites of s. 50.4(9) of the *BIA* had been established, namely: (a) the debtor is acting in good faith and with due diligence; (b) the debtor is likely to make a viable proposal if the extension is granted; and (c) none of the creditors would be materially prejudiced if the extension is granted: *Re H & H Fisheries Ltd.* (2005), 2005 CarswellNS 541, 18 C.B.R. (5th) 293, 2005 NSSC 346 (N.S.S.C.).

If an extension is granted under s. 50.4(9), an order for a further extension must be made before the prior extension expires, and if it is not, the debtor will be automatically in bankruptcy: *Re Air Atlantic Ltd., supra.*

In granting an extension under s. 50.4(9), the court may impose terms: *Re Air Atlantic Ltd., supra.* In *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114, 2000 CarswellNS 216 (N.S. S.C.), the Court, on the request of a secured creditor and as a term of granting an extension, ordered that an interim receiver should be permitted to market and seek purchasers for the assets covered by the security of the secured creditor.

If a proposal is not filed, then the debtor is deemed to have made an assignment: s. 50.4(8)(a).

The 30-day period or any extension of it can be shortened by the court and the time period for filing a proposal terminated. An application for this purpose may be made by the trustee, the interim receiver, if any, or a creditor: s. 50.4(11). The court will make such a declaration if it is satisfied that:

• the debtor has not acted or is not acting in good faith and with due diligence;

• the debtor will likely be unable before the expiration of the time period to make a viable proposal;

• the debtor will likely be unable before the expiration of the time period to make a proposal acceptable to creditors; or

• the creditors as a whole would be materially prejudiced if the application to terminate the time period was refused.

If a declaration is made under s. 50.4(11), the court may, if it is satisfied that it would be in the best interests of creditors to do so, appoint a trustee in lieu of the trustee named in the notice of intention: s. 57.1.

In order to have the 30-day period terminated, an applicant must satisfy the court that one of the four paragraphs in s. 50.4(11) applies: *Re Magasin Coop Dégelis* (1993), 24 C.B.R. (3d) 49, 1993 CarswellQue 42 (Que. S.C.); *Benfor Inc. c. Restaurants Mikes* (1996), 44 C.B.R. (3d) 149, 1996 CarswellQue 831 (Nfld. T.D.). The word "likely" in para, (c) requires proof on the balance of probabilities that the debtor will not be likely to make a viable proposal that will be accepted by creditors, but it does not require proof beyond a reasonable doubt: *Re Magasin Coop Dégelis, supra.* An application for termination of the original 30-day period should only be granted in exceptional cases; if the 30-day period has been extended, the court may be more receptive to an application for termination: *Re Magasin Coop Dégelis, supra.*

In *National Bank of Canada v. Dutch Industries Ltd.* (1996), 45 C.B.R. (3d) 103, 1996 CarswellSask 631, 149 Sask. R. 317, Kyle J. of the Saskatchewan Court of Queen's Bench was the opinion that there is a strong preference on the part of courts to permit at least the initial 30-day period to expire before depriving an insolvent company of the protection of the Act. See case comment on this case 45 C.B.R. (3d) 108.

If the time period is terminated, the debtor is deemed to have made an assignment: s. 50.4(11), and the provisions of s. 50.4(8) apply.

An application under s. 50.4(8) of the *BIA* to extend the time for the filing of a proposal must be heard within 30 days after the notice of intention (NOI) was filed and the registrar held that it was not sufficient to make the application within the 30 days after the NOI was filed. The registrar contrasted the wording of s. 50.4(8) with s. 135(4) of the *BIA* and concluded that s. 135(4) contemplates the extension being granted after the expiry of the 30 days, provided that the application for the extension was made within the 30 days whereas s. 50.4(8) does not have the same saving language. Thus, the registrar was not empowered to extend the time past 30 days to allow for the filing of the proposal or the obtaining of an extension of that 30 days. In the absence of an extension, the applicant was deemed to have made an assignment in bankruptcy: *Re Royalton Banquet & Convention Centre Ltd.* (2007), 2007 CarswellOnt 3796, 33 C.B.R. (5th) 278 (Ont. S.C.J.).

The Québec Court of Appeal allowed an appeal by debtors for an extension of time to file a proposal. The first instance judge had previously granted a seven-day extension of the time limit to file a proposal, conditional on rent and electricity fees being paid. They were not paid and the judge held that since the debtors had failed to satisfy the requirements of the earlier order, there should be no extension of time, refusing to hear new evidence. On appeal, the debtors submitted that subject to agreements in principle with investors, the secured lender and landlord, they were in a position to submit a proposal to creditors. The issue before the Court of Appeal concerned the status of the companies. If the effect of the impugned judgment was suspended by the appeal, should the companies' proposal be considered to have been made following a notice of intention by debtors still in possession of the property, or, since the time period in which to present a proposal had expired, should the proposal be considered as emanating from bankrupt debtors? Justice Dalphond noted that there was no existing bankruptcy order, nor any declaration that the companies were bankrupt. The court held that pending appeal, the companies were not bankrupt, remained in possession of their property and continued to exercise their commercial and financial activities, all under the supervision of the designated trustee. The court held that the judge should have permitted the companies to submit evidence regarding their efforts and recent developments, because in refusing, the criteria for extension of the time period referenced at s. 50.4(9) were not considered, contrary to the objective of the *BIA* to favour proposals instead of assignments of property. In the result, the Court of Appeal permitted the submission of evidence regarding the latest developments, allowed the appeal, and granted the companies an extension of time to place a proposal before a meeting of creditors: *Re Raymor Industries inc.* (2009), 2009 CarswellQue 3207, 2009 CarswellQue 3787, 2009 QCCA 677, 2009 QCCA 678, 2009 QCCA 679, 2009 QCCA 680 (Que. C.A.).

The debtor brought a motion for an order pursuant to s. 50.4(9) of the *BIA* for an extension of 45 days to file a proposal, which was opposed by the single largest creditor. The Prince Edward Island Supreme Court held that it must be satisfied that: the insolvent person has acted, and is acting, in good faith and with due diligence; the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and no creditor would be materially prejudiced if the extension were granted. The court held that the debtor was attempting to address the creditor's demand, using funds from projects as well as its own funds to maintain the company while it moved on an overall plan to extricate itself from its difficulties; that the debtor was trying to act with due diligence during this time to develop a detailed proposal, even though, at the same time, it was distracted by the actions of the creditor. The court was satisfied that the debtor would likely be able to make a viable proposal if the extension were granted. The prejudice to the creditor was not material prejudice. In the result, a 45-day extension was granted: *Re Entegrity Wind Systems Inc.* (2009), 2009 CarswellPEI 47, 56 C.B.R. (5th) 1 (P.E.I. S.C.).

The Prince Edward Island Supreme Court declined to exercise its discretion to grant the debtor a second extension under s. 50.4(9) of the *BIA*. The court held that the debtor had not acted in good faith and with due diligence and on that basis alone, its motion for an extension of time ought to be dismissed. The court also observed that the debtor did not have a draft proposal to consider; it had drastically reduced its workforce making it impossible to meet its cash flow projections; there were no new investors prepared to commit any infusion of capital; the debtor was continuing to suffer substantial financial losses; there was no evidence that its key suppliers and customers were prepared to support its efforts during the restructuring; and thus, it was unlikely that the debtor would be able to advance a viable proposal. The court also held that a further extension of the stay period would materially prejudice a significant creditor: *Re Entegrity Wind Systems Inc.* (2009), 2009 CarswellPEI 63, 2009 PESC 33 (P.E.I. S.C.).

The registrar of the New Brunswick Court of Queen's Bench held that the time limitations imposed on a debtor by s. 50.4(9) of the *BIA* in relation to an extension to file a proposal did not require the extension to be granted within the time limitation. It only required the debtor to apply for such an extension within the time limitation. A debtor farming enterprise applied for a 45-day extension to file a proposal pursuant to s. 50.4(9). Evidence was filed by a representative of the trustee who attested that the bank and other creditors had security over sufficient real property and chattels to avoid their being prejudiced by an extension. A representative of the receiver deposed that the bank was not fully secured and to his belief there was no certainty of the date of completion of the proposed plant. Registrar Bray held that the considerations set out in s. 50.4(9) in paragraphs (a), (b) and (c) are conjunctive so that the applicant must prove all three. Although the evidence was not fulsome, the registrar was satisfied the applicant was acting in good faith and with sufficient diligence; however, the application for a 45-day extension was denied as the registrar was not persuaded of the debtor's ability to devise a proposal. The registrar did, however, grant a three-week extension to file a proposal, observing that no request for any further extension would be considered unless the applicant filed a draft proposal, a clear cash-flow projection, a complete appraisal of its assets, a business plan, a detailed indication of funding available and the sources thereof, and the contingency arrangements should the bank not release its security on the land: *Re Kids' Farm Inc.*, 2011 CarswellNB 441, 84 C.B.R. (5th) 91, 2011 NBQB 240 (N.B. Q.B.).

The New Brunswick Court of Queen's Bench considered the provisions of s. 50.4(9) of the *BIA* on a motion to extend the stay period for a proposal. McLellan J. granted a limited stay for three days to allow the principals a short period of time to contribute $150,000, which the court would take as an indication of good faith and the likelihood that the debtor would be able to make a viable proposal. Justice McLellan issued a second endorsement three days later. The court noted that s. 50.4 (9) of the *BIA* was prospective in nature; s. 50.4(9)(c) speaks of, "no creditor would be materially prejudiced with the extension being applied for or granted." The two principals failed to arrange for the additional $150,000. In the circumstances, McLellan J. was not persuaded that the bank would not be materially prejudiced. The court concluded that because of the legal requirements of the *BIA* and the equitable considerations that applied, it was necessary and appropriate to dismiss the debtor's application for an extension of time to make or file a proposal pursuant to the *BIA*: *Re SWP Industries Inc.*, 2012 CarswellNB 769, 5 C.B.R. (6th) 160, 2012 NBQB 397, additional reasons 2012 CarswellNB 770, 5 C.B.R. (6th) 165, 2012 NBQB 400 (N.B. Q.B.).

A creditor held three promissory notes against a debtor with a total value of $6.5 million; one note $2.5 million not been paid ten months after due. The debtor filed a notice of intention to file a proposal, and then brought an application for extension of the time for filing a proposal for 45 days. The creditor brought an application to terminate the proposal proceeding and a declaration that the debtor was bankrupt, or in the alternative, the appointment of a receiver. The creditor argued that it had a veto over any proposal by the debtor because it was the largest creditor and had lost faith in the debtor's ability to manage its assets and it was concerned that the debtor was restructuring to dissipate its assets. The parties disputed which application should prevail. The application by the debtor was allowed, the court finding that the debtor had significant assets; it was likely that it would be able to present a viable proposal; the debtor had acted in good faith in attempting to construct a proposal; and there was no material prejudice to the creditor if the extension was granted. If the debtor presented a proposal, the creditor would have the opportunity to decide its position as a business decision: *Enirgi Group Corp. v. Andover Mining Corp.*, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32, 2013 BCSC 1833 (B.C. S.C.).

The Ontario Superior Court of Justice dismissed the motion of the debtor to extend the 30-day stay under s. 50.4(9) of the *BIA* and allowed the motion of the judgment creditor for an order terminating the 30-day stay under s. 50.4(11) of the *BIA*. The debtor had filed a notice of intention ("NOI") to make a proposal under the *BIA*; and applied for an extension of the 30-day stay. The debtor had a woodchip business that had a five-year shipping contract with the creditor; there was a dispute that resulted in an arbitral award against the debtor for $15.3 million, which award was confirmed by the District Court for the Southern District of New York. The day after the release of the confirming judgment, the debtor filed its NOI, on the basis of its belief that the judgment creditor would "expeditiously seek to record the judgment and proceed with collection actions." Justice Penny stated that s. 50.4(9) of the *BIA* sets out a three-part, conjunctive test for the grant of an extension of the 30-day stay: (i) the insolvent person has acted, and is acting, in good faith and with due diligence; (ii) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and (iii) no creditor would be materially prejudiced if the extension being applied for were granted. Justice Penny was not satisfied that the debtor had acted and was acting in good

faith and with due diligence; and was not satisfied that the debtor would be able to make a viable proposal if the extension being applied for were granted. There was no active business, no complex financial arrangements and no assets. It was this failure to give the court even a hint of what a proposal might look like, or to provide any content for the bald and conclusory statement that more time was needed, which led Penny J. to the conclusion that the debtor had not met its onus of proving, on a balance of probabilities, that it had acted in good faith and with due diligence and it was likely to be able to make a viable proposal if given more time. Penny J. found proven on a balance of probabilities that it was not likely that the debtor would be able to make a viable proposal and, even if that were likely, the proposal would not likely be accepted by the requisite level of creditor support. The judgment creditor's motion to terminate the 30-day stay was granted: *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315, 2015 ONSC 5139 (Ont. S.C.J.).

The New Brunswick Court of Appeal dismissed a debtor's appeal from the application judge's decision to refuse an extension of time to file a proposal. The Court of Appeal held that in order for the appellate court to interfere with decisions where the alleged errors are of mixed fact and law, the court must determine that the judge made a palpable and overriding error. Absent express statutory instruction, adjudicative facts presented only in affidavit form are owed the same deference as other kinds of evidence. Where the impugned order is the product of an exercise of judicial discretion, it may be interfered with on appeal only if it is founded upon an error of law, an error in the application of the governing principles, or palpable and overriding error in the assessment of the evidence. Here, the judge took into consideration all of the evidence available by affidavit before applying it to the legal test prescribed by s. 50.4(9) of the *BIA*. The judge made findings of fact from which the judge concluded the appellants did not meet the three statutory criteria. As the motion judge had made no palpable and overriding error, and had applied the correct legal principles, the Court of Appeal saw no basis for intervention: *Re Dynamic Transport Inc.*, 2016 CarswellNB 595, 2016 CarswellNB 596, 45 C.B.R. (6th) 45, 2016 NBCA 70 (N.B. C.A.).

The Nova Scotia Supreme Court extended the deadline for filing a proposal under the *BIA*. The extension request had been opposed by the major secured creditor. Section 50.4(9) provides that the insolvent person must prove (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. Moir J. held that statements by a secured creditor with a veto are not determinative; they are forecasts rather than evidence of present fact. Justice Moir held that the statutory requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". Justice Moir found that terms for a proposal were being discussed and needed more development, and was satisfied that there was a better than even chance of a viable proposal being developed. Terms were imposed to limit prejudice to the secured creditor: *Re Kocken Energy Systems Inc.*, 2017 CarswellNS 187, 50 C.B.R. (6th) 168, 2017 NSSC 80 (N.S. S.C.). In the same proceeding, the Nova Scotia Supreme Court granted a motion to approve a proposal, and took the opportunity to issue additional reasons to address a misinterpretation of reasons issued previously concerning a motion to extend the time to file a proposal. The misinterpretation had cast doubt on the debtor's business efficacy. Justice Moir stated that this case was an example of something seldom written about, but relevant in early challenges to a reorganization effort. A secured creditor who is able to veto a proposal or plan of arrangement vehemently opposes the effort from the beginning and says it is doomed because the creditor will exercise its veto when the time comes. Moir J. observed that such forecast does not always come true. In Moir J.'s earlier decision, published as 2017 CarswellNS 187, 50 C.B.R. (6th) 168, 2017 NSSC 80 (N.S. S.C.), the court summarized the bank's concerns and its expressed intention to veto, and expressed a reservation. The court did not make any findings in this respect. At an earlier hearing, Moir J. had found that the debtor had acted in good faith and that there was a good chance a viable proposal would be developed. Ultimately, when the proposal was considered by the creditors, the creditors voted unanimously to accept the proposal, including the bank. Justice Moir observed that the outcome bore out the debtor's submission that a threat to veto a developing proposal is always subject to assessment. Moir J. regretted that the earlier decision was misinterpreted by some to cast doubt on the debtor's business efficacy. He granted the requested order: *Re Kocken Energy Systems Inc.*, 2017 CarswellNS 598, 51 C.B.R. (6th) 339, 2017 NSSC 215 (N.S. S.C.).

The Ontario Superior Court of Justice held that it has jurisdiction to stay bankruptcy proceedings in respect of a debtor notwithstanding s. 50.4(8)(a) of the *BIA*, which provides that if no proposal is filed by the insolvent person by the end of the last *BIA* stay period, the insolvent person is deemed to have made an assignment. Section 187(11) of the *BIA* permits the court to extend the time for doing anything on such terms as the court thinks fit to impose. Dunphy J. held that this language was

sufficiently broad to provide the court with authority to extend the time being deemed to make an assignment in bankruptcy pursuant to s. 50.4(8)(a) of the *BIA*. The Court further held that s. 11 of the *CCAA* provides the court with broad authority to make any order it thinks fit in connection with a *CCAA* application, and that jurisdiction under the *CCAA* can be exercised harmoniously with s. 187(11) of the *BIA*, having regard to the objects of the *CCAA* and *BIA*. He concluded that there was sufficient jurisdiction to be found in the combination of s. 187(11) of the *BIA*, s. 11 and s. 11.6 of the *CCAA* to enable the court to harmonize the operation of these two statutes to better achieve the common objectives of both: *Re Dundee Oil and Gas Limited*, 2018 CarswellOnt 2174, 2018 ONSC 1070 (Ont. S.C.J.).

The Ontario Superior Court of Justice granted an order extending the time to make a proposal. Due to constraints arising from the COVID-19 pandemic, the hearing was a `virtual hearing'. Justice MacLeod was satisfied that notice was appropriately given to all parties, along with the necessary instructions for joining the call, but under the circumstances, nothing was done to address the general principle that evidence and argument are to be presented in open court as contemplated by r. 1.08(5)(a) of the *Rules of Civil Procedure*. Important considerations in conducting hearings in this manner are to ensure that all parties who might have an interest are on notice and able to participate. The `open court principle' means that members of the public who wish to view the proceeding have an opportunity to do so. Justice MacLeod stated that it is important to consider the open court principle for the future. The only nod to public access at the moment is a notice on the Ontario Court's website. Assuming the request is processed in time, arrangements can be made for public monitoring of a virtual hearing. Justice MacLeod stressed that any hearing that would normally be open to the public should be listed on the daily court list and publicized sufficiently far in advance that a request to monitor the proceeding can be granted. In the long term, he suggested that more robust solutions are required. A virtual court hearing should be striving to give at least the level of public access that would exist if the proceeding took place at the courthouse. There should be a practical method for a virtual hearing to be viewed or heard by anyone who is interested, while simultaneously avoiding the risks that, to date, have influenced restrictions on televising or streaming live court proceedings. With respect to the merits of the motion, the applicant and the proposal trustee requested an extension of time under s. 50.4(9) of the *BIA*. MacLeod J. noted that the lack of opposition is important, but the court must still be satisfied that this further extension satisfies the criteria of good faith, diligence, lack of prejudice, and the potential viability of the proposal set out in the subsection. Here, the outlook for the applicant had improved since the original motion, including the potential for a viable proposal: *Re Eureka 93 Inc. et. al.*, 2020 CarswellOnt 5662, 78 C.B.R. (6th) 275, 2020 ONSC 2532 (Ont. S.C.J.).

The Prince Edward Island Supreme Court granted an order for administrative consolidation of proceedings and extended the time to file proposals. An administrative charge was also granted, but the Court declined to approve an interim financing loan: *Nautican v. Dumont*, 2020 CarswellPEI 30, 79 C.B.R. (6th) 243, 2020 PESC 15 (P.E.I. S.C.). For a discussion of this judgment, see I§6 "Power to Consolidate Bankrupt Estates".

The Registrar of the Nova Scotia Supreme Court granted an extension of time to file a proposal. The matter was heard by teleconference, the Registrar finding that the `urgent or essential threshold' was met. The debtor was acting in good faith, there were employees and contracts that were essential, no creditor objected, and there was no evidence of any material prejudice to any creditor: *Re Scotian Distribution Services Limited*, 2020 CarswellNS 256, 78 C.B.R. (6th) 258, 2020 NSSC 131 (N.S. S.C.). See also *Re Eureka 93 Inc. et al*, 2020 CarswellOnt 5662, 78 C.B.R. (6th) 275, 2020 ONSC 2532 (Ont. S.C.J.).

In two applications before the British Columbia Supreme Court, the debtor was unsuccessful in obtaining an extension of time to file a proposal and the secured creditor successfully applied for the appointment of a receiver. Justice Sewell stated that the test for granting an extension set out in the *BIA* requires that the insolvent person satisfy the court that it has acted and is acting in good faith and with due diligence with respect to the proposal, that the insolvent person would likely be able to make a viable proposal if the extension is granted, and that no creditor would be materially prejudiced if the extension is granted. The Court was not satisfied that the debtor and its principal had acted in good faith. The principal's conduct with respect to the handling and mixing of funds provided to him fell far below an acceptable standard of commercial probity and may very well amount to more serious misconduct. Sewell J. was of the view that it was speculative to assume that any material progress could be made by the insolvent companies with respect to producing a viable sale process. The state of the property on which construction had commenced indicated the complete abandonment of that enterprise. The receivership order was appropriate

in the circumstances: *Romspen Investment Corporation v. Conian Developments (La Voda) Inc.*, 2020 CarswellBC 2014, 2020 BCSC 1222 (B.C. S.C.).

End of Document

TAB C

2000 CarswellOnt 2797
Ontario Court of Justice, General Division (In Bankruptcy)

Nortec Colour Graphics Inc., Re

2000 CarswellOnt 2797, 18 C.B.R. (4th) 84, 98 A.C.W.S. (3d) 977

In the Matter of the Proposal of Nortec Colour Graphics Inc.

Deputy Registrar Sproat

Heard: July 24, 2000
Judgment: August 2, 2000
Docket: Estate No. 31-375711

Counsel: *B. Cohen Q.C.*, and *J. Simpson*, for Nortec Colour Graphics Inc.
A. MacFarlane, for creditor, Heidelberg Canada Graphic Equipment Limited.
J. Carhart, for CIT Group (formerly Newcourt Financial).

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.10 Practice and procedure
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings
Headnote
Bankruptcy --- Proposal — Practice and procedure
Debtor defaulted on lease of printing equipment owned by creditor H — Debtor negotiated with G Co to establish partnership — Debtor was aware of necessity to obtain approval of proposal of key creditors and negotiated with key creditors, including creditor H — Creditor H agreed to amend terms of lease — Debtor filed notice of intention to file proposal — Debtor brought motion to extend time for filing proposal — Motion granted — Debtor exercised due diligence by attending to issue of leases well in advance of filing notice of intention, which permitted debtor to continue negotiations with G Co and with creditors — Evidence suggested debtor moved forward with formulation of proposal — No creditors came forward to say they would not support any proposal and evidence did not show debtor would not make viable proposal — Facts operated against finding of material prejudice to any creditor — To balance interests of debtor and creditors, debtor granted 15 additional days, not 45 requested.
Bankruptcy --- Practice and procedure in courts — Stay of proceedings
Creditor H owned highly specialized printing equipment, valued at $9.5 million, which it leased to debtor — Creditor H assigned leases to C on "with recourse" basis, so that in event of default creditor H was liable to C — C put creditor H on notice of default and creditor H commenced process of having leases reassigned — Debtor negotiated with G Co to establish partnership and negotiated with key creditors for approval of proposal, including creditor H — Creditor H agreed to amend terms of lease — Debtor's motion to extend time for filing proposal were granted — Creditor H brought cross-motion for order that stay of proceedings did not apply to creditor H — Cross-motion dismissed — Debtor exercised due diligence, by attending to issue of leases well in advance of filing notice of intention to file proposal, and evidence did not show debtor would not make viable proposal — Creditor H failed to establish material prejudice and failed to identify prospective purchasers of printing equipment — Creditor H failed to demonstrate that it was largest single creditor — Debtor's business would certainly fail if cross-motion were granted.

2000 CarswellOnt 2797, 18 C.B.R. (4th) 84, 98 A.C.W.S. (3d) 977

Table of Authorities

Cases considered by *Deputy Registrar Sproat*:

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

Statutes considered:

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

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 69(1) [rep. & sub. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

MOTION for order extending time to file proposal; CROSS-MOTION for order that stay of proceedings against bankrupt not apply to one creditor.

***Deputy Registrar Sproat*:**

1 This is a motion by Nortec Colour Graphics Inc. ("Nortec") pursuant to s.50.4(9) of the BIA for an order extending the time for the filing of a proposal. Nortec filed a notice of intention to make a proposal on May 25, 2000. On June 23, 2000, prior to the expiry of the initial thirty day period within which to file the proposal, Nortec brought a motion for an order extending the proposal period by a further thirty day period. I granted that motion and ordered that, in the event that a further extension was required, the motion be brought on notice to the creditors.

2 This motion is opposed by Heidelberg Canada Graphic Equipment Limited ("Heidelberg"). Heidelberg is the owner of certain highly specialized printing equipment valued at about $9.5 million. Pursuant to three leases, Heidelberg leased the equipment to Nortec and, thereafter, assigned the leases to CIT Group Inc. ("CIT"), formerly Newcourt Financial. Heidelberg did so on a "with recourse" basis and, hence, in the event of Nortec's default, Heidelberg will be liable to CIT. CIT has already put Heidelberg on notice of the default. In the circumstances, Heidelberg is in the process of having the leases reassigned to it, such that Heidelberg, and not CIT, will be the creditor of Nortec.

3 It may, on first impression, appear that Heidelberg is not a creditor of Nortec. However, CIT did appear on the motion and supported Heidelberg's opposition to the motion as well as Heidelberg's cross-motion. For the purposes of the motion and cross-motion, I accept Heidelberg's status as a creditor (in view of its arrangements with CIT) and, certainly, Nortec took no issue with Heidelberg's status.

4 At the commencement of argument of Nortec's motion to extend the proposal period, Heidelberg sought leave to file a cross-motion and affidavit in support thereof. The affidavit had been previously served upon Nortec's counsel and no issue was taken with respect to the filing of cross-motion. Accordingly, I permitted the cross-motion to be filed.

5 The cross-motion by Heidelberg seeks an order under s. 50.4(11) of the BIA terminating the proposal or, alternatively, an order under s. 69.4 of the BIA that the stay of proceedings does not apply to Heidelberg. Effectively, Heidelberg seeks to enforce its security in respect of the equipment to permit it to lease or sell the printing equipment.

The Motion to Extend the Proposal Period

6 Section 50.4(9) of the BIA provides for the jurisdiction of this court to extend the proposal period where the court is satisfied of the following factors:

1. the insolvent person has acted and is acting in good faith and with due diligence;

2. the insolvent person would likely be able to make a viable proposal; and

3. no creditor would be materially prejudiced if the extension were granted.

1. Has Nortec acted in good faith and with due diligence.

7 Nortec states that it has acted in good faith and has exercised due diligence. Nortec has had extensive negotiations with Grenville Printing ("Grenville") relative to Grenville's purchase of or investment in Nortec. At the time of the first motion to extend, Nortec had not finalized the structure of the transaction, although I accept that it was then expected that Nortec would be restructured by way of a newly established corporate entity. It later turned out that this structure would not be used. Instead, Nortec and Grenville determined to establish a partnership, which would provide certain tax benefits. This change in structure necessitated negotiation with the shareholders of Nortec (of which there are two principal shareholders) and their counsel, in addition to certain of Nortec's creditors.

8 Nortec has been aware from the outset of the necessity to obtain the approval of a number of its key creditors and, in this regard, Nortec and Grenville have been negotiating with Royal Bank of Canada ("RBC"), Canada Customs and Revenue Agency ("CCRA"), Nortec's landlord and Heidelberg. Insofar as Heidelberg is concerned, it appears that by May 2, 2000, well before the notice of intention was filed, Heidelberg was onside. Heidelberg had already agreed to amended terms of the leases relating to the equipment and was waiting to finalize the documentation in that regard.

9 Heidelberg suggests that because the documentation amending the terms of the leases for the printing equipment has not been finalized, this amounts to lack of due diligence. I do not find that this alone is sufficient for me to find that Nortec has failed to satisfy this aspect of the test. On the contrary, it seems to me that Nortec exercised due diligence by attending to the issue of the printing equipment leases well in advance of filing the notice of intention, which in turn has permitted Nortec to continue its negotiations with Grenville and other ceditors.

10 Although there have been a few obstacles along the way in terms of Nortec making a proposal, it seems to me that it, has taken steps to further the proposal process along. Grenville has taken an active role, with Nortec's consent, in negotiating with Nortec's creditors.

11 Heidelberg also claims that Nortec has not acted in good faith and has not exercised due diligence since negotiations with Grenville have stalled and are no further ahead today than one month ago. While it may be so, it does not mean there has been a lack of good faith or lack of due diligence. In my view, there is sufficient evidence to suggest that Nortec has been moving forward with the formulation of the proposal.

2. Will Nortec likely to make a viable proposal

12 Nortec suggests that it will likely make a viable proposal although it has not put forward a proposal yet. It appears that Nortec's major creditors, RBC, CCRA and the landlord are prepared to wait and to consider the proposal, once filed. "Viable proposal" as used in s. 50.4(9) of the BIA should be seen as one reasonable on its face to the reasonable creditor (*Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) at p. 221). None of Nortec's creditors have come forward to say that it will not support any proposal and the fact that Nortec continues to discuss the structure of Grenville's proposed purchase/investment in Nortec is indicative of Nortec's efforts to lay the foundation of its proposal.

13 Heidelberg argued that it is not likely that Nortec will make a viable proposal. There is no evidence in support of this position. At best, Heidelberg's evidence is that it is *reluctant* to lend further support to the process in view of the fact that Grenville withdrew from the process (emphasis added). Heidelberg does not go so far as to say it will refuse to approve any proposal. In any event, although Grenville withdrew from the process, it was only for one day and Grenville, by its solicitors, agreed to continue discussions with Nortec and its principals relating to a new, proposed transaction. Thus, I do not see this argument, at this time, having merit.

3. Will any creditor be materially prejudiced?

14 Nortec submits that no creditor will be materially prejudiced, particularly since RBC and CCRA are content to take a "wait and see" approach and its landlord has consented to the extension. On the other hand, Heidelberg suggests that it is materially prejudiced since it is owed about $1 million on account of the leases of the printing equipment and since it has received inquiries relative to the purchase of the printing equipment now used by Nortec in its business. Heidelberg suggests that it should be permitted to lease or sell the printing equipment and that now would be an opportune time to do so. In support of this contention, Heidelberg suggests that there are few prospective purchasers in the market for the specialized printing equipment in question, these prospective purchasers would have to wait upwards of 8 months if the equipment were to be ordered today and that prospective purchasers require some lead time in which to plan for the integration of the printing equipment into its operations.

15 In my view, these facts operate against a finding of material prejudice. It seems to me that any prospective purchaser would need some time to integrate the new equipment into its operations and I see no reason why a transaction for the lease or sale of the printing equipment needs to be completed immediately.

16 In addition, I agree with submissions of counsel for Nortec that Heidelberg has failed to establish material prejudice. Of particular note, Heidelberg has not identified the prospective purchasers who have made inquiries (which would have permitted Nortec to test the allegation of material prejudice) and have not quantified the extent of the losses it will suffer as a result of Nortec's financial circumstances and the extension sought by Nortec.

17 Lastly, I wish to deal with the issue of Nortec's indebtedness to Heidelberg. Heidelberg claims that it is the largest single creditor of Nortec since it is owed about $1 million. It has filed one of the three leases covering the printing equipment as a sample lease. This lease calls for monthly payments of about $10,000. The other two leases were not filed and there was no evidence as to the total monthly obligation of Nortec. There was also no evidence of when default occurred.

18 On the other hand, Nortec claims that it owes about $382,000 to Heidelberg according to the notice of intention filed. This is in contrast to RBC total indebtedness of $890,000 (of which $350,000 is secured) and CCRA indebtedness of $300,000. There are also 6 debenture holders with total indebtedness of $385,000. Thus, I cannot say with certainty that Heidelberg is the largest single creditor as RBC, CCRA and the debenture holders (who have not opposed the extension) are collectively owed about $1,575,000.

4. Disposition of Nortec's motion

19 Nortec's business will most certainly fail if I refuse to grant Nortec's motion or alternatively, grant Heidelberg's cross-motion. Since I do not see any material prejudice to Heidelberg (or any other creditor for that matter), I am inclined to give Nortec some additional time to put forward a proposal. I am mindful of the need to balance the interests of Nortec and recognize the rights of creditors. That is to say, Nortec should not be permitted to carry on its business without regard to its creditors. While Nortec should be commended for acknowledging its financial predicament early on (as early as May 2, 2000), it should not be at the expense of Heidelberg or its other creditors. Heidelberg is, understandably, frustrated by the delays, now that almost 3 months since it initially agreed to revise the leases with Nortec. Thus, I am of the view that, while Nortec be given some additional time, it should not be the 45 days it requests. I am therefore granting Nortec's motion but extend the time for filing the proposal for 15 days. Thus, the deadline for the filing of the proposal is August 8, 2000.

The Cross-Motion to Terminate the Proposal Period

20 Given my determination of Nortec's motion, I need not consider Heidelberg's cross-motion under s. 50.4(11) of the *BIA*. I do note however that the arguments in response to Nortec's motion were the same arguments advanced by Heidelberg on its cross-motion. I have addressed these arguments above.

The Cross-Motion to Lift the Stay of Proceedings

21 The court has jurisdiction to lift the stay of proceedings imposed by s. 69(1) of the BIA if the creditor is materially prejudiced by the operation of the stay or if there are other equitable grounds upon which the stay should be lifted. In this case, neither of these factors are found. In the result, I have also dismissed Heidelberg's cross-motion

Costs

22 Nortec does not seek costs of its motion but seeks costs of Heidelberg's cross-motion fixed at $1,000. I agree with counsel for Heidelberg that its cross-motion was essentially a response to Nortec's motion and no additional time or materials were required in arguing the cross-motion. In the circumstances, I order no costs of the cross-motion.

Motion granted; cross-motion dismissed.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF RGN BRITISH COLUMBIA XXIII LIMITED PARTNERSHIP

Court / Estate No.: 31-2688719

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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(RETURNABLE DECEMBER 14, 2020)

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