

Court File No.: CV-11-9283-00CL

**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 UNIQUE  
BROADBAND SYSTEMS, INC.

**Factum of 2064818 Ontario Inc.  
(Re: Motion for Interim Order Staying or Enjoining the Partial Take Over Bid)**

**February 13, 2012**

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## **PART I – THE FACTS**

1. UBS is a publically listed company the shares of which are traded on the TSX Venture Exchange. UBS shares have not been cease traded nor has it been delisted.

**Affidavit of Robert Ulicki sworn February 7, 2012 (“Ulicki Affidavit”), para. 1.**

**Affidavit of A. Dolgonos sworn February 13, 2012 (“Dolgonos Affidavit”), para. 41.**

2. UBS has been aware of the Partial-Bid by 206 Ontario since January 18, 2012. The Offer to Purchase and Bid Circular was mailed to shareholders on February 1, 2012.

**Dolgonos Affidavit, paras. 19 and 22.**

3. 206 Ontario cannot take up any shares tendered in the Partial-Bid until March 9, 2012. The only intervening matter of significance is the requirement of UBS to send the Directors’ Circular by February 16, 2012, unless the OSC gives UBS an exemption from that requirement. There is no other urgent matter.

**Dolgonos Affidavit, para. 52.**

4. On February 2, 2012, counsel to UBS wrote to counsel for 206 Ontario, Roy Elliott O’Connor LLP, and advised that “UBS does not, in principal (*sic*), object to a takeover bid or, to the price at which 206 Ontario is proposing to acquire UBS shares”.

**Dolgonos Affidavit Exhibit “J”.**

5. Between January 18, 2012 and February 7, 2012, there was no suggestion by UBS that the Initial Order of July 5, 2011 precluded the Partial-Bid.

6. On February 6, 2012 UBS wrote to the OSC urging the Commission to investigate the Partial-Bid and act on its own initiative to cease trade it. UBS did not apply to the OSC to have the bid cease traded.

**Dolgonos Affidavit, para. 42 and Exhibit "N".**

7. In this letter UBS stated that it was going to "be bringing a motion to the court supervising the CCAA proceedings seeking, inter alia, relief in connection with the Partial Bid."

**Dolgonos Affidavit , Exhibit "N" page 7.**

8. On or about February 9, 2012, counsel for UBS contacted the OSC seeking an exemption from the statutory requirement of the UBS board of directors to file a Directors' Circular in respect of the Partial-Bid, on or prior to February 16, 2012.
9. On February 10, 2012, Frederic Duguay, Corporate Finance Legal Counsel to the OSC, wrote to counsel for UBS by way of email, with a copy to Wildeboer, to provide guidance on the process regarding their proposed application for exemption for filing the Directors' Circular.
10. In his email Mr. Duguay states:

OSC staff will work towards providing a recommendation to the Commission on February 16<sup>th</sup>. However, there is no guarantee that Staff will recommend that exemptive relief sought or that the Commission would agree to grant the exemptive relief.

In addition, if counsel for UBS decides to bring a motion on February 14<sup>th</sup> seeking relief from its requirement to deliver its directors' circular on February 16<sup>th</sup> and requesting that its obligation to deliver its directors' circular be "suspended", we ask that OSC Staff be kept informed of this intention, as Staff may wish to participate in the motion.

**Dolgonos Affidavit Exhibit "P".**

11. Later on February 10, 2012, UBS filed an Application for the above noted relief with the OSC and submission have been made on behalf of UBS and 206 Ontario.

**Exhibit "Q" and "R" to the Affidavit of A. Dolgonos sworn February 7, 2012.**

12. The relief being sought before the OSC is precisely the relief that UBS is seeking before this Court as set out at paragraph 50 of their factum where UBS states:

UBS is not requesting that it be relieved of its responsibility to respond to and defend against the Dolgonos Partial Bid, if the bid is permitted to proceed, only that its obligation to respond be suspended until the Court determines whether the Dolgonos Partial Bid should proceed.

13. The application before the OSC is still outstanding. No decision has been made by the OSC as to whether UBS will be relieved from its obligation to send a Directors' Circular to the shareholders of UBS on or prior to February 16, 2012.

**Dolgonos Affidavit, para. 50.**

14. On February 10, 2012, the parties attended before Justice Spence at a 9:30 a.m. attendance wherein an urgent motion was booked by UBS. At that attendance UBS indicated that it was seeking an interim stay of the Partial-Bid pursuant to s. 11 of the CCAA. On February 10, 2012, Justice Spence issued a File Direction for the hearing of this interim motion on February 14, 2012 and the hearing of the main motion on February 21, 2012. Mr. Shea.
15. On February 10, 2012, Patrick Shea of Gowlings, counsel to UBS, forwarded the File Direction of Justice Spence to the counsel with an interest in the CCAA proceeding and confirmed that "we will be proceeding with a motion on Tuesday 14 February 2012 seeking

an Order under the CCAA staying the partial bid pending a determination as to whether: (a) the bid is stayed by the Initial Order; and, of (*sic*) not (b) whether it should be stayed.” Mr. Shea also stated “We will deliver any additional materials to be used on that motion on Monday. We also plan on delivering a (short) factum in support of our motion on Monday.

16. Early in the afternoon on Monday February 13, 2012, 206 Ontario was served with an amended notice of motion which requested “an interim order staying or enjoining the partial take-over bid” among other changes. The amendments to the notice of motion changed the interim relief being sought before this Court, and the basis for that relief. 206 Ontario was also served with a 26 page factum which substantially raised matters that are to be argued on February 21, 2012.
17. The substantive portion of this motion, on agreement, is scheduled to be heard by Justice Wilton-Siegel on February 21, 2012.

## **PART II – ISSUES**

18. The only matter of any urgency is a determination of whether, the Board of UBS should be relieved from having to send out a Directors’ Circular in response to the Partial-Bid on or prior to February 16, 2012, as required pursuant to s. 95 of the *Securities Act*; a live issue that is currently and properly before the OSC for determination.

## **PART III – LAW AND ARGUMENT**

19. UBS is asking this Court to make a determination on the very issue it has brought an application for at the OSC.
20. The relief being requested by UBS is within the specific statutory jurisdiction of the OSC.

21. The court's broad jurisdiction under s.11 should not be exercised where "another applicable statute confers jurisdiction with respect to a matter." As stated by the Court of Appeal in *Stelco* at paragraph 44:

...the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the Act and by the legal principles that govern corporate law issues.

***Stelco Inc. (Re)*, [2005] O.J. No. 1171 at paras. 44, 48-51**

22. The OSC is given specific authority to deal with UBS's request to defer having to file a Directors' Circular.

**Part XX of the *Securities Act* and section 104(2) of the *Securities Act*.**

23. UBS recognized the jurisdiction of the OSC when it brought its application to the Securities Commission February 10, 2012. The proper place for the determination of the relief being sought in this urgent motion is before the OSC.
24. UBS contends at paragraphs 45 to 48 of its factum that *Richtree Inc. (Re)* [2005] O.J. No. 251 O.S.C.J. ("*Richtree*") does not apply in these circumstances. Ontario disagrees with that assertion. *Richtree* is a full answer to the issues before this Court on this motion for interim relief. The amendments to section 11 of the CCAA in 2009 did not overturn *Richtree*.
25. Justice Lax states the following in relevant part at paragraphs 8 and 9 in *Richtree*:

... The relief that Richtree requests whether under the CCAA or the Securities Act is discretionary. The question that arises then is whether the statutory discretion granted to a court under the CCAA can be exercised in the face of s. 80 of the



Securities Act, which provides that it is the Commission that may grant or refuse the exemptions sought.

The answer is no. There is no provision of the CCAA that either addresses or contemplates an application to the court for exemption from the filing requirements of the Securities Act. The doctrine of paramountcy has been acknowledged to apply where the exercise of a court's discretion under the CCAA conflicts with the mandatory provisions of provincial legislation, see for example, [page178] *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 676, 12 C.B.R. (4th) 94 (C.A.), at p. 115 C.B.R.; *Re Loewen Group Inc.*, [2001] O.J. No. 5640, 32 C.B.R. (4th) 54 (S.C.J.), at p. 58 C.B.R. However, it is worth noting that in neither case was it necessary to invoke the paramountcy doctrine. Here, as in the cases referred to, there is no inconsistency between federal and provincial law. The doctrine of paramountcy does not apply.

***Richtree (Re)*, para 8 and 9 also see paras 10 to 12 and 17 and 18.**

26. At paragraph 36 of the Endorsement on the motion to remove directors in the within proceeding Justice Wilton-Siegel recognized the continuing application of specific legislation affecting shareholder rights, notwithstanding the fact that UBS is in CCAA where His Honour stated in relevant part:

The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation.

***Unique Broadband Systems (Re)*, 2011 ONSC 224.**

27. Contrary to the assertion of UBS at paragraph 63 of its factum, Justice Wilton-Siegel did not limit the foregoing to "other shareholders". His Honour expressed the view that in determining whether to exercise the discretion to remove directors under s. 11.5 of the CCAA the Court could take into consideration "the absence of any such action by other shareholders." In fact submissions were made to Justice Wilton-Siegel at that hearing by counsel for UBS that 206 Ontario could exercise its rights under the OBCA and applicable securities legislation, the same as any other shareholder of UBS could.

28. With respect to the assertion that UBS will suffer financial harm if this interim order is not granted and UBS is required to issue the Directors' Circular, it is appropriate to observe that in order for UBS to meet the February 16, 2012 deadline to mail the circular to its shareholders, the Directors' Circular must be substantively complete by now, and in the process of final translation into French and approval by UBS's board, which presumably has already reviewed a draft of the circular. Time required for printing and mailing must also be factored into the schedule.
29. In these circumstances UBS is either in a position to comply with section 95(1) of the *Securities Act* or it is seeking an injunction to relieve UBS from an obligation with which it never intended to comply. The only cost that UBS should be facing at this stage is the cost of mailing the Directors' Circular to shareholders, which is inconsequential.
30. It appears that UBS is quite prepared to spend its resources to avoid its statutory obligations when those same resources could have been used to satisfy those obligations.
31. It has generally been recognized that the Court is not the appropriate forum to seek an injunction to enjoin a bid and that those applications should be brought before the OSC.

*Forefront Consolidated Explorations Ltd. v. Lumsden Building Corp.*, [1978] O.J. No. 1431.

*Royal Trustco Ltd. et al. v. Campeau Corp. et al.* [1980] O.J. No. 3837 at para 67-69.

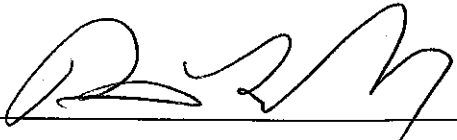
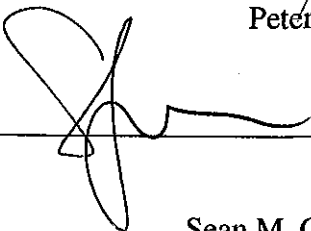
32. UBS has not provided an undertaking as to damages and therefore this interim injunction should be refused.

**Rule 40.03 Rules of Civil Procedure.**

**PART IV – ORDER REQUESTED**

33. 206 Ontario requests an Order dismissing this motion for an interim order staying or enjoining the partial take-over bid together with the costs of the motion plus applicable taxes.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of February, 2011.

  
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Peter L. Roy  
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Sean M. Grayson

### **Schedule "A": Authorities**

1. *Forefront Consolidated Explorations Ltd. v. Lumsden Building Corp.*, [1978] O.J. No. 1431 (S.C.J.).
2. *Richtree Inc. (Re)* [2005] O.J. No. 251 (S.C.J.).
3. *Royal Trustco Ltd. et al. v. Campeau Corp. et al.* [1980] O.J. No. 3837 (S.C.J.).
4. *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (Ont.CA).
5. *Unique Broadband Systems (Re)*, 2011 ONSC 224 (S.C.J.).

## **Schedule “B”: Statutes**

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

**11.** 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.

### **Stays, etc. — initial application**

**11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

### **Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

### **Burden of proof on application**

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

### **Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

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

### **UNDERTAKING**

**40.03** On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

3. *Securities Act*, R.S.O. 1990, c. 10.

### **Exemptions**

**104 (2)** On application by an interested person and subject to such terms and conditions as the Commission may impose, if the Commission is satisfied that it would not be prejudicial to the public interest, the Commission may,

(a) decide for the purposes of section 97.1 that an agreement, commitment or understanding with a selling security holder is made for reasons other than to increase the value of the consideration paid to the selling security holder for the securities of the selling security holder and that the agreement, commitment or understanding may be entered into despite that section;

(b) vary any time period set out in this Part or the regulations related to this Part; and

(c) exempt a person or company from any of the requirements of this Part or the regulations related to this Part. 2007, c. 7, Sched. 38, s. 8.

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Proceeding commenced at Toronto

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