

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF *COMPANIES' CREDITORS ARRANGMENT 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 UNIQUE BROADBAND SYSTEMS, INC.  
(Returnable 14 February 2012)**

Dated: 13 February 2012

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## PART I – OVERVIEW

1. Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") were commenced in respect of Unique Broadband Systems Inc. ("**UBS**") and a wholly owned subsidiary pursuant to an Order made on 5 July 2011 (the "**Initial Order**"). The Initial Order appointed Duff & Phelps Canada Restructuring Inc. (the "**Monitor**") as monitor.
2. The Initial Order includes a provision that stays and suspends persons from exercising any rights or remedies against UBS or that affect UBS's business, without the prior written consent of UBS and the Monitor or leave of the Court.
3. DOL Technologies Inc. ("**DOL**") has a approximately \$8 million disputed claim against UBS (the "**DOL Claim**"). The DOL Claim will be determined in the CCAA proceedings in accordance with an Order made on 4 August 2011 (the "**Claims Order**").
4. DOL is a company controlled by Mr. Alex Dolgonos. Mr. Dolgonos also controls the largest shareholder of UBS, 2064818 Ontario Inc. ("**206 Ontario**").
5. On 1 February 2012, 206 Ontario, after failing in multiple previous attempts to change the UBS board, including by way of a motion pursuant to s. 11.5 of the CCAA, launched a hostile partial takeover bid (the "**Dolgonos Partial Bid**") for the stated purpose of acquiring sufficient additional shares of UBS in order to control a meeting of UBS shareholders to replace the UBS board and changing the course of the UBS reorganization. 206 Ontario did not seek or obtain consent or leave as required by the Initial Order.
6. Under the *Securities Act*, RSO 1990, c S.5 (the "**Securities Act**"), UBS has until 16 February 2012 to respond to the Dolgonos Partial Bid by delivering a circular to the approximately 15,000 shareholders of UBS. UBS estimates that the cost of this exercise will be in excess of \$100,000. UBS's cash flow statements filed in the CCAA proceedings do not contemplate this expense. The UBS board, acting the best interests of

the company and all of its stakeholders may also be required to take steps to defend against the Dolgonos Partial Bid.

7. On 7 February 2012, after 206 Ontario refused to answer written inquiries by UBS with respect to how the Dolgonos Partial Bid would impact the CCAA proceedings, UBS served a motion (the "**UBS Motion**") seeking:
  - (a) a declaration that the Dolgonos Partial Bid is stayed or suspended by the Initial Order;
  - (b) if the Dolgonos Partial Bid is not stayed or suspended by the Initial Order, an Order staying or suspending the Dolgonos Partial Bid;
  - (c) suspending any meeting of UBS's shareholders to change the UBS board pending the determination of the DOL Claim and another approximately \$10 million disputed claim (the "**Jolian Claim**") being asserted by Jolian Investments Inc. ("**Jolian**"); and
  - (d) interim relief in respect of the Dolgonos Partial Bid.
8. 206 Ontario is opposing the UBS Motion and wishes to file materials and conduct cross-examinations. Pursuant to a Scheduling Order made on 10 February 2012, the UBS Motion is scheduled to be heard on 21 February 2012 – the earliest date that the UBS Motion could be scheduled.
9. To avoid having to seek interim relief from the Court and without prejudice to its argument that the Dolgonos Partial Bid is an "illegal" takeover bid to which UBS should not be required to respond to or defend against, UBS approached the OSC to obtain an extension of the time within which it is required by the Securities Act to respond to the Dolgonos Partial Bid until after the hearing of the UBS Motion.
10. 206 Ontario has opposed UBS's request that the OSC extend the time for UBS to respond to the Dolgonos Partial Bid. As a result, it is uncertain as to whether the OSC will be able to reach any decision with respect to UBS's request prior to 16 February 2012. This exposes UBS and its directors to risk.

11. UBS is now forced to seek an Order staying and enjoining the Dolgonos Partial Bid, and UBS's obligation to respond to or defend against the Dolgonos Partial Bid, pending the determination of the UBS Motion.

## PART II – THE FACTS

12. UBS is a insolvent company incorporated pursuant to the *Business Corporation Act*, R.S.O. 1990, c. B.16 ("OBCA"). UBS's shares are listed on the TSX Venture Exchange.

Affidavit of Robert Ulicki, sworn 7 February 2012 ("Ulicki Affidavit"), paras 6 and 19.

13. The current members of the UBS board were appointed over Mr. Dolgonos' objection at a special meeting of UBS shareholders called in July of 2010 pursuant to s. 122 of the OBCA. Despite Mr. Dolgonos' objection, the UBS board was removed and the current board was appointed. As described further below, Mr. Dolgonos has made numerous attempts to remove the UBS board and return the management of UBS to individuals who will take a second look at the steps taken by UBS *vis-à-vis* Mr. Dolgonos and DOL.

Ulicki Affidavit, paras 69 and 68 - 73.

14. The removal of Mr. Dolgonos' preferred directors in 2010 has resulted in litigation between UBS and DOL and UBS and Jolian, a company controlled by Mr. Gerald McGoe. Mr. McGoe was a former director and the chief executive officer of UBS and has supported Mr. Dolgonos in his efforts to remove the UBS board. The proceedings were commenced by DOL and Jolian and are being defended by UBS. UBS also commenced a counterclaim that names Mr. Dolgonos and Mr. McGoe personally<sup>1</sup>.

Ulicki Affidavit, paras 32 – 35 and 36 – 45.

15. The DOL Claim and the Jolian Claim are based on the litigation commenced against by DOL and Jolian prior to the commencement of the CCAA proceedings. In accordance

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<sup>1</sup> The proceeding has been stayed and UBS has taken no steps in the CCAA proceedings to pursue the counter-claim.

with the Claims Order, the DOL Claim and the Jolian Claim have been disallowed by the Monitor. DOL and Jolian are disputing the disallowance of their claims and the validity of the claims will be determined in accordance with the Claims Order and the CCAA. There is a significant dispute as to the process to be employed to determine the claims.

Ulicki Affidavit, paras 28 – 31 and 36 – 42 and Exhibit K. Supplemental Affidavit of Robert Ulicki sworn 10 February 2012 (“Ulicki Supplemental Affidavit”), Exhibit A.

16. The DOL Claim and the Jolian Claim have a material impact on the UBS reorganization. The amount being claimed by DOL and Jolian is, in aggregate, greater than the total value of UBS’s assets. There are good grounds to doubt the validity of the DOL Claim and the Jolian Claim and the determination of those claims on their merits is fundamentally important for UBS’s stakeholders.

Ulicki Affidavit, para 7.

17. UBS holds a thirty-nine (39) per cent economic interest in LOOK Communications Inc. (“LOOK”) and plays a key role in the management of LOOK. Pursuant to a 2004 agreement between UBS and LOOK, UBS is responsible for providing LOOK with its chief executive officer.

Ulicki Affidavit, paras 7 and 17.

18. LOOK has commenced proceedings (the “**LOOK Proceedings**”) against, *inter alia*, Mr. Dolgonos and DOL, seeking the return of approximately \$20 million that LOOK asserts was improperly paid to, *inter alia*, DOL by LOOK. Mr. Dolgonos and DOL are defending the LOOK Proceedings.

Ulicki Affidavit, para 16.

19. On 1 February 2012, 206 Ontario launched the Dolgonos Partial Bid<sup>2</sup> by delivering a bid circular (the “**Bid Circular**”) to UBS’s approximately 15,000 shareholders and issuing a press release announcing the Dolgonos Partial Bid.

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<sup>2</sup> In June of 2011, 206 Ontario has announced it would launch a partial takeover bid, but did not proceed with that bid. 206 Ontario issued a press release on 18 January 2012 indicating it would be making a partial takeover bid

**Ulicki Affidavit, para 51.**

20. 206 Ontario did not obtain the consent of UBS or the Monitor to launch the Dolgonos Partial Bid and did not seek leave from the Court to launch the Dolgonos Partial Bid.
21. In the press release dated 1 February 2012 issued in connection with the Dolgonos Partial Bid, Mr. Dolgonos expressed his concern that UBS "is on the wrong course" and at page 24 of the Dolgonos Bid Circular, shareholders were told that the ultimate purpose of the Dolgonos Partial Bid is intended to replace the UBS board to preserve the remaining value of UBS, including its cash resources and investment in LOOK.

**Ulicki Affidavit, para 55.**

22. UBS is required by the *Securities Act* to respond to the Dolgonos Partial Bid by preparing and delivering a circular to UBS's 15,000 shareholders. The cost of that exercise is estimated to be in excess of \$100,000. The UBS board, acting in the best interest of UBS and its stakeholders, may also be required to take steps to defend against the Dolgonos Partial Bid.

**Ulicki Affidavit, para 52.**

23. The Dolgonos Partial Bid is the latest in a series of unsuccessful attempts by Mr. Dolgonos to gain control of UBS in an attempt to impact the determination of the claims that DOL has made against UBS and, more recently, the LOOK Proceedings following the replacement of the UBS board by shareholders in 2010. Mr. Dolgonos:
  - (a) proposed an alternative slate of directors at UBS's annual general meeting on 25 February 2011, which slate was defeated by UBS's shareholders;
  - (b) on 22 December 2010, commenced oppression proceedings under the OBCA seeking to have the UBS board removed, which proceedings have been stayed by the Initial Order;

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"on or after 27 January 2011" (sic), but UBS had no reason to believe that 206 Ontario would follow through with its threat in the face of the Initial Order without obtaining consent or leave.

- (c) on 6 June 2011, indicated his intention to make a partial take-over bid for UBS through 206 Ontario, which partial bid did not materialize<sup>3</sup>;
- (d) on 21 November 2011, purported to requisition a special meeting of UBS shareholders to approve an rights offering of an undefined nature to increase his shareholdings in UBS<sup>4</sup>;
- (e) on 20 December 2011, brought a motion (the "**Director Removal Motion**") pursuant to s. 11.5 of the CCAA seeking to have the majority of the UBS board replaced with partners of a law firm that acted as counsel to 206 Ontario<sup>5</sup>; and
- (f) beginning on or about 23 December of 2011 – after the Director Removal Motion was heard – initiated a "creeping" take-over of UBS by purchasing UBS shares on the TSX Venture Exchange<sup>6</sup>.

Ulicki Affidavit, paras 68 – 73. Ulicki Supplemental Affidavit, Exhibit B.

24. The key objectives of UBS in commencing the CCAA proceedings included: (a) preserving value for UBS's stakeholders; and (b) determining the claim against UBS asserted by DOL. UBS has undertaken a great deal of work vis-à-vis the reorganization of UBS and: (a) given a great deal of consideration to the claims being asserted against UBS by DOL and Jolian, and (b) the steps being taken by LOOK to investigate and pursue amounts that were improperly paid by LOOK. The UBS board has determined that it is in the best interests of UBS's stakeholders that: (a) UBS initiate proceedings under the CCAA; (b) UBS dispute, *inter alia*, the DOL Claim in the CCAA proceedings; and (c) the LOOK Proceedings continue. UBS's business consists of maximizing value for stakeholders through the process to determine the disputed claims against UBS and the LOOK Proceedings.

<sup>3</sup> Mr. Dolgonos has, through counsel, advised the OSC that this threatened bid is not part of the same transaction as the Dolgonos Partial Bid and that the Initial Order had the commercial effect of stopping the June 2011 bid from going forward.

<sup>4</sup> Mr. Dolgonos has characterized the rights offering as being intended to address UBS's insolvency. However, the rights offering proposed to raise at most \$1 to \$2 million and would have done nothing to address UBS's insolvency, given the quantum, of the claims being asserted against UBS by DOL and Jolian Investments Inc.

<sup>5</sup> The motion was served on 20 September 2011, but was not scheduled until 20 December 2011

<sup>6</sup> UBS has identified a number of issues with Mr. Dolgonos's "creeping" take over of UBS.

**Ulicki Affidavit, paras 60, 62 and 76.**

25. The Dolgonos Partial Bid is clearly and specifically linked to UBS's business and the CCAA proceedings. Aside from the fact that Mr. Dolgonos has indicated his intention to use the Dolgonos Partial Bid to acquire shares of UBS so that he can replace the UBS board with a view to moving UBS off its current course, in a letter to the OSC dated 9 February 2012, 206 Ontario's securities counsel indicated:
- (a) Mr. Dolgonos' position is that UBS has "consciously acted against" Mr. Dolgonos, presumably by, *inter alia*, opposing the DOL Claim, supporting the LOOK Proceedings, etc.;
  - (b) Mr. Dolgonos regards the Dolgonos Partial Bid as his "only available means to protect his investment in UBS"; and
  - (c) if the Director Removal Motion had been successful, Mr. Dolgonos would not have "had to commit to spending \$800,000 to purchase" shares of UBS by way of the Dolgonos Partial Bid to remove the UBS board.

**Ulicki Supplemental Affidavit, Exhibit B.**

26. UBS is concerned that Mr. Dolgonos intends to have 206 Ontario acquire sufficient additional shares of UBS so that Mr. Dolgonos can control a meeting of shareholders to permit him to replace the UBS board with a view to putting in place directors that he believes will: (a) attempt to admit the DOL Claim or accept a settlement of the DOL Claim that is favourable to DOL; (b) attempt to terminate the CCAA proceedings in respect of UBS; and/or (c) attempt to replace the board of LOOK in order to influence the progress or settlement of the LOOK Proceedings. Any one, or all, of these steps would represent an interference in the business of UBS and would likely have an adverse impact on the interest of UBS and LOOK, to the personal benefit of Mr. Dolgonos.

**Ulicki Affidavit, para 59.**

27. In an attempt to understand the Dolgonos Partial Bid, on 3 February 2012, UBS, through counsel, wrote to 206 Ontario and asked that 206 Ontario advise UBS of



- (a) the specific issues that Mr. Dolgonos has with respect to the course being taken by UBS, and what Mr. Dolgonos proposes by way of an alternative course for UBS to address those concerns; and
- (b) how, in the context of the CCAA proceedings and the on-going claims process in the CCAA proceedings or otherwise, Mr. Dolgonos intends to preserve value for UBS's stakeholders while still having the issues with the DOL Claim and the Julian Claim determined on their merits.

Ulicki Affidavit, para 58 and Exhibit N.

28. UBS also: (a) advised 206 Ontario that UBS believed that the Dolgonos Partial Bid was an interference with UBS's business and will alter the *status quo* in the CCAA proceedings for the benefit of Mr. Dolgonos, DOL and 206 Ontario at the expense of the other UBS stakeholders; and (b) invited Mr. Dolgonos to meet with UBS or the Monitor to discuss his concerns.

Ulicki Affidavit, para 58 and Exhibit N.

29. On 6 February 2012, 206 Ontario's counsel, responded to UBS with a one line letter that said simply:

*Our clients are aware of their legal obligations and will conduct themselves in accordance with the law.*

Ulicki Affidavit, para 58 and Exhibit O.

30. Mr. Dolgonos, as an indirect shareholder of UBS, has an interest in the value of UBS's assets, including the shares of LOOK, but Mr. Dolgonos also has, through DOL, a significant disputed claim against UBS – the DOL Claim – and is, personally and through DOL, a defendant/respondent in the LOOK Proceedings. As a result, certain matters that will benefit UBS stakeholders generally – the disallowance of the DOL Claim and the success of the LOOK Proceedings – will have negative financial implications for Mr. Dolgonos personally that are more significant to him than the value of the UBS shares he holds through 206 Ontario. This is of concern to UBS. *Qua* shareholder, Mr. Dolgonos

should be opposing the DOL Claim, yet he appears to be intent on using his interest as a shareholder to further his objectives as alleged creditor of UBS and a defendant/respondent in the LOOK Proceedings. This distorts the CCAA proceedings and has a negative impact on the interests of other stakeholders.

**Ulicki Affidavit, para 61.**

31. Aside from the expense that will be incurred by UBS in responding to and defending against the Dolgonos Partial Bid and, if the Dolgonos Partial Bid goes forward and is successful, in dealing with the attempt by Mr. Dolgonos to change the UBS board, a change in the UBS board at this stage will result in a disruption and further delays in the CCAA proceedings and increased costs as the UBS directors appointed by Mr. Dolgonos to familiarize themselves with the facts.

**Ulicki Affidavit, para 67.**

32. UBS has until 16 February 2012 to prepare and send to a circular with respect to the Dolgonos Partial Bid. UBS has approximately 15,000 individual shareholders and believes, based on estimates provided by service providers, that it will cost in excess of \$100,000 to prepare, translate, print and send a director's circular with respect to the Dolgonos Partial Bid. This is a significant amount of money for UBS and will represent a material change in UBS's cash flow – UBS's cash flow prepared for the purposes of the CCAA does not anticipate the company having to respond to a take-over bid in the CCAA.

**Ulicki Affidavit, para 52.**

33. Pursuant to a Scheduling Order made on 10 February 2012, the UBS Motion is returnable on 21 February 2012.

**Endorsement dated 10 February 2012.**

34. UBS applied to the OSC seeking an extension of the date by which UBS must respond to the Dolgonos Partial Bid to the earlier of: (a) five (5) days after the Court determines the UBS Motion; and (b) 29 February 2012.
35. On 10 February 2012, 206 Ontario indicated that it would oppose any extension by the OSC of the time by which UBS is required to respond to the Dolgonos Partial Bid. 206 Ontario did not deliver its formal opposition to UBS's request for an extension until 13 February 2012.
36. It is uncertain as to whether, in the face of opposition by 206 Ontario, a decision can be made by the OSC as to whether it will grant UBS an extension before 16 February 2012. This exposes UBS to risk.
37. On 10 February 2012, the Court scheduled this Motion by UBS seeking an Order staying the Dolgonos Bid and UBS's obligation to respond to the Dolgonos Partial Bid pending the hearing of the UBS Motion for 14 February 2012.

**Endorsement dated 10 February 2012.**

### **PART III – ISSUES**

38. The issue to be determined by the Court is whether the Court should make an Order staying or suspending the Dolgonos Partial Bid, including UBS's obligation to respond to the Dolgonos Partial Bid, pending the determination of the UBS Motion.

### **PART IV – LAW AND ARGUMENT**

#### **A. Jurisdiction to Make the Order being Requested**

39. The Court has jurisdiction to make the Order being requested by UBS pursuant to:

- (a) the broad jurisdiction provided by s. 11 of the CCAA to make any Order the Court considers appropriate in the circumstances; and

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), s. 11.

- (b) s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101; *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), leave to appeal ref'd, [2009] O.J. No. 1442 (S.C.J.); *Certicom Corp. v. Research In Motion Ltd.*, [2009] O.J. No. 252 (S.C.J.).

**B. Section 11 of the CCAA**

40. Section 11 of the CCAA provides the Court with broad jurisdiction to make any Order that it considers appropriate in the circumstances:

*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.*

CCAA, s. 11.

41. While there appear to be no reported cases where the Court has exercised jurisdiction under the CCAA to suspend a take-over bid<sup>7</sup>, the Court has exercised jurisdiction under the CCAA to, *inter alia*:

- (a) suspend a hearing by the Toronto Stock Exchange (the "TSE") with respect to the continued listing of the debtor company on the TSE;

*Toronto Stock Exchange Inc. v. United Keno Hill Mines Limited*, [2000] O.J. No. 1814 (S.C.J.); *Versatech Group Inc. (Re)*, [2000] O.J. No. 3785 (S.C.J.).

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<sup>7</sup> There do not appear to be any reported cases where a takeover bid has been launched in respect of a company subject to proceedings under the CCAA.

- (b) suspend a certification application under Federal labour relations legislation with the effect that the debtor company would not be required to respond to the application in accordance with the applicable legislation;

*Hawkair Aviation Services Ltd. (Re)*, [2006] B.C.J. No. 938 (S.C.).

- (c) suspend the statutory requirement that the debtor company convene a meeting of its shareholders; and

*Nortel Networks Corp. (Re)*, [2009] O.J. No. 614 (S.C.J.); *Laidlaw Inc. (Re)*, [2002] O.J. No. 947 (S.C.J.); *Air Canada (Re)*, [2003] O.J. No. 1558 (S.C.J.); *Planet Organic Health Corp. (Re)*, Reasons for Decision dated 26 May 2010 (S.C.J.).

- (d) extend the date for a debtor company may exercise a contractual option to acquire property.

*Cansugar Inc. (Re)*, [2005] N.B.J. No. 227 (Q.B.).

42. Section 11 provides the Court supervising a CCAA proceeding with broad jurisdiction to make any Order it determines is appropriate. The “appropriateness” of an Order under s. 11 is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. Where the order that is sought realistically advances the purposes of the CCAA or furthers efforts to achieve the remedial purpose of the CCAA, the ability to make it is within the discretion of the Court under s. 11.

*Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60 (S.C.C.), para 70 and 71. See also *Planet Organic Health Corp. (Re)*, Reasons for Decision dated 26 May 2010 (S.C.J.).

43. An Order enjoining or suspending the Dolgonos Partial Bid and UBS’s obligation to respond to the Dolgonos Partial Bid pending the hearing and determination of the UBS Motion is entirely consistent with the purpose of the CCAA and advance the objectives of the CCAA in preserving the *status quo* and protecting the interest of all stakeholders..
44. One of the objectives – and one of the objectives of UBS in commencing these proceedings – of the CCAA is to preserve the status quo while attempts are made to find

common ground amongst stakeholders for a reorganization that is fair to all of the stakeholders.

See *Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60 (S.C.C.), para 77. See also *Clothing for Modern Times Ltd. (Re)*, [2011] O.J. No. 5803 (S.C.J.).

45. In *Richtree Inc. (Re)*, [2005] O.J. No. 251 (S.C.J.), the Court considered whether it had jurisdiction under the CCAA to exempt a debtor company from the requirement to file audited financial statements and other continuous disclosure documents. The Court found that there were (at the time) no provisions in the CCAA that either addressed or contemplated an application to the Court for exemption from the filing requirements of the *Securities Act* (Ontario).
46. *Richtree Inc. (Re)* pre-dates the 2009 enactment of s. 11 of the CCAA.
47. In *Richtree Inc. (Re)* the Court was asked to exempt the debtor from a statutory obligations, not extend the time for the debtor to comply with its obligations pending a determination by the Court as to whether the statutory obligation is applicable.
48. The Court's decision in *Richtree Inc. (Re)* was also based on the express finding that the failure of the debtor company to comply with its obligations would have no adverse consequences for the company or its stakeholders:

*The sole consequence of Richtree's failure to meet the filing requirements is that the company will be placed on the OSC's Default List. ... there is no evidence that this has caused any harm to Richtree ....*

49. In *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (S.C.J.) the Court limited that application of the *ratio* in *Richtree Inc. (Re)* to situations where the exemption being sought had nothing to do with the restructuring process. The went on to find that the Court has jurisdiction under the CCAA that "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the stay provisions of the CCAA.

*Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (S.C.J.).

50. 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.
51. Requiring UBS to respond to the Dolgonos Partial Bid prior to the hearing and determination of the UBS Motion would likely represent a waste of UBS's limited resources.
52. If the Court determines that the Dolgonos Partial Bid is stayed or suspended or ought to be stayed or suspended, UBS will not be required to respond to the Dolgonos Partial Bid and any resources expended now in responding to the Dolgonos Partial Bid will have been wasted.
53. If UBS's obligation to respond is delayed, it will, if the Dolgonos Partial Bid is permitted to proceed, be required to prepare only one circular for shareholders that contains all of the relevant information. If UBS is required to respond to the Dolgonos Partial Bid prior to the hearing of the UBS Motion and the Court determines that the Dolgonos Partial Bid can proceed, UBS may, in accordance with its obligations under the *Securities Act*, have to prepare, translate and send to shareholders further documentation after the UBS Motion is heard setting out information that is gathered during the process leading up to the hearing of the UBS Motion that UBS reasonably expects would affect the decision of shareholders with respect to the Dolgonos Partial Bid.

*Securities Act*, s. 95.1. UBS anticipates that information with respect to Mr. Dolgonos' intentions with respect to the determination of the DOL Claim, the continuation of the CCAA proceedings and the LOOK Proceedings, and which are not disclosed in the Bid Circular, will be gathered in the course of preparing for the UBS Motion. This information should affect the decision of UBS shareholders to tender to the Dolgonos Partial Bid.

54. The Order being requested by UBS will, in the event that the Dolgonos Partial Bid is permitted to proceed, allow UBS to prepare a single document responding to the Dolgonos Partial Bid. This documents will be able to address issues such as Mr. Dolgonos' intentions *vis-à-vis* the CCAA proceedings, DOL Claim, the Jolian Claim and

the LOOK Proceedings, information that is important for shareholders attempted to assess whether they will tender to the Dolgonos Partial Bid.

**C. Injunctive Relief**

55. UBS must establish that:

- (a) there is a serious issue to be determined with respect to whether the Dolgonos Partial Bid is stayed or suspended by the Initial Order or ought to be stayed or suspended pursuant to s. 11 of the CCAA;
- (b) there will be irreparable harm if the requested injunction is not granted, and
- (c) the balance of convenience favours granting an injunction – the irreparable harm is not outweighed by any irreparable harm that will be caused to 206 Ontario by the injunction being granted.

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*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.); *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), leave to appeal ref'd, [2009] O.J. No. 1442 (S.C.J.).

**i. Serious Issue to be Determined on the UBS Motion**

56. There are serious issues to be determined with respect to whether:

- (a) the Dolgonos Partial Bid is stayed or suspended by paragraph 13 of the Initial Order; and
- (b) if the Dolgonos Partial Bid is not subject to paragraph 13 of the Initial Order, it should be stayed or suspended pursuant to s. 11 of the CCAA pending the determination of the DOL Claim and the Jolian Claim.



a. Paragraph 13 of the Initial Order

57. Paragraph 13 of the Initial Order provides:

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

58. Paragraph 13 of the Initial Order is from model Initial Order approved for use on the Commercial List of the Ontario Superior Court as well as the model or template Initial Orders approved for use in each of the other provinces that has developed a model or template Initial Order.
59. In *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 5379 (S.C.J.), the Court found, in the course of interpreting the scope of the provisions of the Initial Order in those proceedings that was identical to paragraph 13 of the Initial Order, that the stay of proceedings imposed in a CCAA proceeding is broad and "extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company" (emphasis added).

*Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 5379 (S.C.J.), para 28.

60. The Dolgonos Partial Bid is clearly: (a) in respect of UBS; and (b) affects UBS's business. Mr. Dolgonos has asserted that he is not pleased with the course being taken by UBS in the CCAA proceedings, and the Dolgonos Partial Bid was launched for the express purpose of acquiring sufficient shares of UBS at a premium to the current market price to enable Mr. Dolgonos to attempt: (a) to replace the UBS board; and (b) to change the course of the UBS reorganization.

61. 206 Ontario understood that the hostile partial take-over bid that was press released in June of 2011 was stayed or suspended by the Initial Order. In a letter to the OSC dated 9 February 2012, 206 Ontario's counsel advised the OSC that:

*The CCAA filing that occurred on July 5, 2011 had the commercial effect of stopping the Proposed July Bid, which was intended to commence after July 6, 2011.*<sup>8</sup>

62. It is not clear why Mr. Dolgonos believed that he could proceed with the Dolgonos Partial Bid without consent or leave when he clearly understood he could not proceed with his June 2011 hostile takeover bid.
63. In the Endorsement dated 25 January 2012, Mr. Justice Wilton-Siegel suggested, in *obiter*, that the other shareholders of UBS might, notwithstanding s. 11.5 of the CCAA, have the ability to apply to have the directors of UBS removed under the OBCA<sup>9</sup>, but did not find that any such proceedings could be commenced without complying with the provisions of the Initial Order. Mr. Justice Wilton-Siegel was not, having denied the 206 Ontario's motion to remove and replace the majority of the UBS board, inviting Mr. Dolgonos to launch a hostile partial take-over bid or granting Mr. Dolgonos leave to launch a hostile partial take-over bid to acquire enough shares of UBS to replace the UBS board and thereby, indirectly, obtain the same relief he had just been denied.

*Unique Broadband Systems, Inc. (Re), 2011 ONSC 224 (S.C.J.), para 36.*

64. Mr. Justice Wilton-Siegel did not find any issues with the actions of UBS or the course being taken by UBS in these proceedings.
65. The proper approach, if Mr. Dolgonos wishes to launch a hostile partial takeover bid to change the UBS board and the course of the UBS reorganization, is for 206 Ontario to apply to the Court for leave to initiate a partial take-over bid. In the context of such a

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<sup>8</sup> UBS had asserted to the OSC that the partial take-over bid announced by 206 Ontario in June of 2011 was part of the same transaction as the Dolgonos Partial Bid.

<sup>9</sup> The issue as to whether s. 11.5 of the CCAA displaces the provisions of corporate legislation with respect to the removal of directors was not before Mr. Justice Wilton-Siegel on 20 December 2012. Mr. Justice Wilton-Siegel's point was that Mr. Dolgonos' efforts to replace the UBS board was not being supported by other shareholders who were not also creditors of UBS.

motion, the Court can consider, *inter alia*, whether there are sound reasons for permitting a partial take-over bid consistent with the objectives of the CCAA and the impact of the proposed takeover bid on UBS stakeholders.

66. Each of the Court supervising a CCAA and the OSC, as regulator, has an important role to play in a takeover bid for a public company subject to CCAA proceedings. Both the CCAA and the *Securities Act* are instruments of public policy. While they have different objectives, those objectives overlap in circumstances where a hostile takeover bid is made in respect of a public company subject to the CCAA.

See *Toronto Stock Exchange Inc. v. United Keno Hill Mines Limited*, [2000] O.J. No. 1814 (S.C.J.).

67. The role of the OSC, as regulator, in the context of a hostile takeover bid is to ensure that the procedures in the *Securities Act* are followed and, on the application of any interested person, to determine whether the takeover bid is coercive on shareholders such that the purchase of the shares should be prevented by way of a cease trade order in respect of the bid.

*Securities Act*, s. 104.

68. The takeover bid regime under the *Securities Act* presumes that any person – an offeror – may attempt to gain control of a public company through a hostile takeover bid and seeks to regulate the conduct of such a bid with a view to protecting the interests of shareholders. The primary objective of the *Securities Act* takeover bid regime is to protect the bone fide interests of the target company's shareholders. A secondary objective is to provide a regulatory framework within which takeover bids may proceed in an open and even-handed environment.

National Policy 62-202, s. 1.1(2).

69. While the OSC has the jurisdiction to prevent the offeror from acquiring the target company's shares through the hostile takeover bid, the OSC, when considering whether to cease-trade a hostile takeover bid, does not generally consider: (a) the intention of the offeror in seeking to gain control of the target through a hostile takeover bid, (b) whether

the target company has the financial resources to respond to or defend against the bid; or  
(c) how the takeover bid, if successful, will impact other stakeholders.

70. Paragraph 13 of the Initial Order does not prohibit takeover bids from being made in respect of UBS, but establishes a "gateway" for takeover bids to ensure that the interests of all stakeholders are considered and protected within the CCAA proceedings.
71. In the context of an attempt to gain control of a company subject to CCAA proceedings by way of a hostile takeover bid, the role of the Court supervising a CCAA proceeding is to determine whether, having regard to all of the circumstances and the purpose of the CCAA, the hostile takeover bid ought to be permitted to be launched. The Court will assess, *inter alia*: (a) the intention of the offeror in making the proposed takeover bid and whether those intentions are consistent with the objective of the CCAA; and (b) the impact of the proposed hostile takeover bid on all stakeholders, including the debtor company, shareholders and creditors. The Court may, in exercising its jurisdiction under s. 11 of the CCAA, impose conditions on the hostile takeover bid on the offeror to protect the interests of all stakeholders. The application of paragraph 13 of the Initial Order does not prevent hostile takeover bids, but only ensures that they are made in a manner that is fair to all stakeholders and consistent with the purposes of the CCAA. If takeover bids in respect of a company subject to proceedings under the CCAA were not subject to the jurisdiction of the Court, the debtor could be forced to expend limited cash and other resources responding to and defending against hostile takeover bids launched for purposes that are counter to (or not in accordance with) the objectives of the CCAA and prejudicial to the interests of stakeholders.
72. If the debtor company and the monitor consent to a hostile takeover bid or the Court determines that the offeror ought to be permitted to make a hostile takeover bid in respect of the debtor company, the debtor company is required to comply with the *Securities Act* takeover regime and is, subject to s. 11.1 of the CCAA, subject to the jurisdiction of the OSC.

73. The fact that Mr. Dolgonos has a disputed claim and that the Dolgonos Partial Bid seeks to acquire only sufficient shares of UBS to permit Mr. Dolgonos to change the UBS board and alter the course of the CCAA proceedings are significant.
74. In the securities law context, partial takeover bids are generally considered to be coercive when launched in respect of solvent companies by shareholders or third parties.

See, for example, *Ivanhoe III Inc. (Re)*, Reasons for Decision, 19 January 1999 (O.S.C.).

75. Where a partial takeover bid is to be launched in respect of an insolvent company subject CCAA proceedings by a creditor with a very large disputed claim for the stated purpose of altering the course of the CCAA proceedings, the concerns with respect to the impact of the bid on shareholders (and other stakeholders) is particularly acute. Not only are there issues with respect to the going forward value and liquidity, but there are issues with respect to the ability of the creditor/shareholder to exert control over the CCAA process and thereby adversely impact the value of the company's shares (and the interests of other stakeholders)<sup>10</sup>. The application of paragraph 13 of the Initial Order ensures that these issues are taken into account and addressed.

**b. Stay or Suspension Pursuant to Section 11 of the CCAA**

76. Section 11 provides the Court supervising a CCAA proceeding with broad jurisdiction to make any Order it determines is appropriate. Appropriateness under the CCAA is assessed by inquiring whether the Order being requested advances the policy objectives underlying the CCAA – the question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA.

*Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60 (S.C.C.), para 70 and 71.

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<sup>10</sup> As noted, the future value of the UBS shares is largely dependent on the determination of the DOL Claim and the Jolian Claim and the current course involves those claims being determined in accordance with the Claims Order and the CCAA.

77. The issue on the UBS Motion, assuming that the Court determines that the Dolgonos Partial Bid is not subject to paragraph 11 of the Initial Order, will be whether an Order suspending the Dolgonos Partial Bid will “usefully further efforts [by UBS] to achieve the remedial purpose of the CCAA”.

*Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60 (S.C.C.), para 70 and 71.

78. One of the key objectives of the CCAA is to preserve the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all of the stakeholders. The fair and proper determination of the claims against the debtor company are a key aspect of the reorganization process. It is respectfully submitted that suspending the ability of a shareholder that also has a disputed claim against the debtor company from making a hostile partial takeover bid to change the course of the CCAA pending a determination of the shareholder’s claim is entirely consistent with that objective.

*Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60 (S.C.C.), para 77.  
See also *Clothing for Modern Times Ltd. (Re)*, [2011] O.J. No. 5803 (S.C.J.).

79. The motivation for and the intention of the Dolgonos Partial Bid is clearly stated in the materials prepared by Mr. Dolgonos – Mr. Dolgonos does not like the course that UBS is on and he wants to change the UBS board in the hopes that a new board will take different decisions *vis-a-vis* Mr. Dolgonos’ interests – the DOL Claim and the LOOK Proceeding – than the current board. The Dolgonos Partial Bid may advance Mr. Dolgonos’s personal objectives, but it potentially prejudices the interests of the other UBS stakeholders.
80. The situation *vis-à-vis* the Dolgonos Partial Bid is, UBS submits, analogous to the situation where claims against a debtor company are acquired for the purpose of impacting a reorganization for an improper purpose. In *Laserworks Computer Services Inc. (Re)*, [1998] N.S.J. No. 60 (C.A.), the Nova Scotia Court of Appeal found that

*Few legitimate reasons come to mind for buying into an [insolvent] estate. When somebody does so, it is a matter of common sense to assume, subject to*

*correction, they intend to use the [insolvency] process for some purpose it was not meant for....*

*Laserworks Computer Services Inc. (Re)*, [1998] N.S.J. No. 60 (C.A.), para 62.

81. The Court in *Laserworks Computer Services Inc. (Re)* found that the “creditor” was acting for an improper purpose not related to the objectives underlying the insolvency proceedings and provided a remedy to prevent that improper conduct. The Court prohibited the “creditor” from voting the claims it had acquired to defeat the debtor’s proposal.

**ii. Irreparable Harm to UBS**

82. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which either: (a) cannot be quantified in monetary terms; or (b) cannot be cured.

See, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), para 58 and 59.

83. The harm to UBS and its stakeholders – not to mention the reorganization generally -- that will result from forcing UBS to incur costs and dedicate resources it does not have to respond to, and defend against, the Dolgonos Partial Bid – which may very well be void *ab initio* having been commenced in contravention of paragraph 13 of the Initial Order – pending the determination as to whether the bid should proceed cannot be quantified.

See *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), leave to appeal ref’d, [2009] O.J. No. 1442 (S.C.J.)

84. This case involves public interest considerations insofar as it involves the application of a stay or suspension of proceedings imposed in the context of a proceeding under the CCAA to protect all of UBS stakeholders and to preserve the *status quo* for the benefit of UBS’s stakeholders. The Supreme Court has recognized that proceedings under the CCAA involve the public interest and where an injunction is being sought in the context of proceedings involving the public interest the potential harm suffered by parties other than the applicant – UBS stakeholders generally – should be considered.

See, *Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60 (S.C.C.), para 18; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), para 67 and 68.

**iii. Balance of Convenience**

85. Until such time as it is determined whether the Dolgonos Partial Bid is stayed or suspended by paragraph 13 of the Initial Order or ought to be stayed or suspended, UBS should not be required to incur costs responding to a defending what may be an “illegal” take-over bid to which UBS would not be required to respond to or defend against – the *status quo* should be maintained. The costs that will be incurred by UBS in responding to and defending the Dolgonos Partial Bid will be extensive and are not provided for in UBS’s CCAA cash flow statements.
86. The only effect on 206 Ontario of the relief being requested by UBS is that 206 Ontario may, if UBS is not successful *vis-à-vis* the Dolgonos Partial Bid on 21 February 2012, be forced to extend the Dolgonos Partial Bid.
87. The minimum period that a take-over bid must be “open” under the *Securities Act* is thirty-five (35) days.

*Securities Act*, s. 98.

88. The Dolgonos Partial Bid is open only until 9 March 2012 – 206 Ontario chose to have the Dolgonos Partial Bid open for the minimum time required by the *Securities Act*. If the Dolgonos Partial Bid, including UBS’s obligation to respond to the Dolgonos Partial Bid, is stayed and enjoined pending the hearing and determination of the UBS Motion, 206 Ontario may, in the worst case scenario, be required to incur costs to extend the Dolgonos Partial Bid to permit 206 Ontario to respond, if it chooses to do so, to the circular UBS will be required to deliver in response the Dolgonos Partial Bid, if the UBS Motion is not successful and the Dolgonos Partial Bid is permitted to proceed.

See, *Securities Act*, s. 94.4.




89. Any costs incurred by 206 Ontario in extending the Dolgonos Partial Bid can be easily determined and compensated by an Order requiring that UBS pay those costs.
90. The interests of the regulator *vis-à-vis* the Dolgonos Partial Bid should also be considered by the Court.
91. In *Toronto Stock Exchange Inc. v. United Keno Hill Mines Limited*, [2000] O.J. No. 1814 (S.C.J.), the Court considered the interplay between the securities regulatory regime and the CCAA in the context of a request by the TSE to lift the stay imposed in respect of the debtor company to continue hearings into the continued eligibility of the debtor for listing on the TSE. The Court found that regimes under both the applicable securities legislation and the CCAA are instruments of public policy. The Court balanced the interest of the debtor company and the TSE and found that, in the circumstances, compliance by the debtor with the TSE hearing procedure would, in and of itself, be prejudicial to the debtor company and that the TSE was not able to establish any harm to the public that would result from suspending the TSE hearing for a period of time.

*Toronto Stock Exchange Inc. v. United Keno Hill Mines Limited*, [2000] O.J. No. 1814 (S.C.J.).  
See also *Versatech Group Inc. (Re)*, [2000] O.J. No. 3785 (S.C.J.).

#### **PART V – ORDER REQUESTED**

92. UBS requests:
  - (a) an Order enjoining and staying the Dolgonos Partial Bid, including UBS's obligation to respond to the Dolgonos Partial Bid, pending the hearing and determination of the UBS Motion on its merits; and
  - (b) costs plus applicable taxes.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of February 2012



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