

**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 13 June 2012)**

Dated: 7 June 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 of UBS.

Affidavit of Robert Ulicki, sworn 16 March 2012 (“**Ulicki March Affidavit**”), paras 3 and 4.

2. The Initial Order contains a broad stay that prevents the continuation of proceedings or the enforcement of rights or remedies as against UBS or its property.
3. DOL Technologies Inc. (“**DTI**”), Alex Dolgonos (“**Dolgonos**” and, together with DTI, “**DOL**”), Jolian Investments Limited (“**JIL**”) and Gerald McGoey (“**McGoey**” and, together with JIL, “**Jolian**”) have brought Motions (the “**Lift Stay Motions**”) seeking to lift the stay of proceeding imposed by the Initial Order to enforce a pre- 5 July 2011 Order, which Order is described further below, that requires that UBS make advances to DOL and Jolian in respect of professional fees against which DOL and Jolian assert UBS is obliged to indemnify them
4. The Lift Stay Motions are opposed by UBS. DOL and Jolian: (a) are not claiming any hardship on account of the operation of the stay contained in the Initial Order; and (B) have not asserted that they require advances from UBS in order to pursue their claims against UBS or to defend the claims that UBS has brought, at their insistence, against them in the CCAA claims procedure. There is ALSO no basis for UBS to provide DOL and Jolian with advances against disputed claims against UBS.
5. At the insistence of DOL and Jolian – with UBS’s consent – the determination of certain claims that UBS has as against DOL and Jolian have been included in the CCAA claims procedure.
6. DOL and Jolian have brought Motions (the “**Third Party Claims Motions**”) wherein they seek to advance claims against the former directors and, in the case of DOL, a

former officer, of UBS to be heard and dealt with in the CCAA proceedings. DOL and Julian have not sought an Order lifting the stay to permit them to commence proceedings against the former directors and officers of UBS.

7. The Third Party Claims Motions are opposed by UBS on the basis that, *inter alia*: (a) the CCAA is not intended to deal with claims as between a creditor of the debtor company and third parties who the creditor asserts may, on some basis, be liable to the creditor for the creditor's claim against the debtor company; and (b) the Court has no jurisdiction to bring such claims into the CCAA proceedings to be determined in accordance with the summary procedure mandated by s. 21 of the CCAA for the determination of claims against the debtor company.

PART II – THE FACTS

8. UBS is an insolvent company incorporated pursuant to the *Business Corporation Act*, R.S.O. 1990, c. B.16.

Ulicki March Affidavit, para 10.

9. The Initial Order provides, *inter alia*:

THIS COURT ORDERS that until and including 4 August 2011, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

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.

Initial Order, para 13.

10. Stay Period, as defined in the Initial Order, has been extended a number of times and currently expires on 30 July 2012.

Ulicki March Affidavit, paras 3 – 9 and Order dated 13 April 2012.

11. On 4 August 2011, the Court made an Order (the “**First Extension and Claims Order**”), *inter alia*, establishing a procedure for the filing of claims against UBS and a procedure has been put in place for the determination of the disputed claims against UBS being asserted by DOL and Jolian (the “**Claims Procedure**”).

Ulicki March Affidavit, paras 6, 21 and 22 and Order dated 13 April 2012.

12. DOL filed a proof of claim against UBS for an aggregate amount of more than \$8,042,716, including claims for indemnification against past and future professional fees. The DOL Claim is disputed by UBS. Jolian filed a proof of claim against UBS for in excess of \$10,122,648, including claims for indemnification against past and future professional fees. The Jolian Claim is also disputed by UBS. McGoey and Dolgonos have also filed proofs of claim against UBS. McGoey’s and Dolgonos’ claims relate only to indemnification against past and future professional fees.

Ulicki March Affidavit, paras 15, 17 and 22. Affidavit of Alex Dolgonos sworn 28 March 2012, Exhibits G – I. Affidavit of Gerald McGoey sworn 15 March 2012, Exhibits B – D. Proof of Claim of Alex Dolgonos dated 16 September 2011. Proof of Claim of Gerald McGoey dated 16 September 2011.

13. At the insistence of DOL and Jolian, the Order that established the schedule for determining DOL’s and Jolian’s disputed claims against UBS provides that any known claims by UBS against DOL and Jolian be asserted and determined in the CCAA Claims Procedure. UBS has indicated that it will assert a claim against Dolgonos and McGoey in

connection with transactions that appear to have resulted in UBS giving up its right to acquire a 2/3 interest in a company.

Order dated 13 April 2012.

14. On 27 April 2011, Justice Marrocco made an Order (the “**Marrocco Order**”) requiring, *inter alia*, that UBS make advances to DOL and Jolian in respect of the professional fees incurred in dealing with the litigation that underlies the claims that DTI and Jolian have made in the CCAA proceedings, subject to those advances being repaid to UBS in the event that it is determined that UBS was not required to indemnify DOL and/or Jolian. Mr. Justice Marrocco did not determine whether there was an obligation on UBS to indemnify DOL and Jolian against professional fees, only that interim advances were required to be made by UBS in respect of professional fees.

Order dated 24 June 2011. *Jolian Investments Ltd. v. Unique Broadband Systems Inc.*, 2011 ONSC 3241.

15. UBS appealed the Marrocco Order.
16. On 8 March 2012, Justice Simmons of the Ontario Court of Appeal made the following Endorsement (the “**Simmons Endorsement**”):

[1] The April 26, 2012 appeal hearing date is vacated on the understanding that the respondents may proceed with a motion before Wilton-Siegel J. requesting that the stay be lifted and that they be paid the monies ordered to be paid as advances by Marrocco J. This motion shall proceed on the assumption that the order of Marrocco J. is valid. If the respondents are successful, the appeal of the order of Marocco J. can proceed forthwith.

[2] The parties should apply to Wilton-Siegel J. for a motion date. Once they have such a date, the appeal hearing date can be scheduled.

[3] Costs reserved to the panel hearing the appeal.

[4] If not successful before Wilton-Seigel J., the appeal of the order of Marrocco J. is adjourned to a date to be fixed by me.

Endorsement of Justice Simmons dated 8 March 2012.

17. On 16 March 2012, Jolian brought a Motion – a Lift Stay Motion – with respect to the Marrocco Order. Jolian has described its Lift Stay Motion as being a Motion to enforce the Marrocco Order:

MR. MacFARLANE: And you understood...I mean, I think you appreciate that there was a stay of proceedings, the applicant is not required to pay anyone anything unless it has been ordered by the court.

MR. GROIA: And I am asking for a court order to enforce the Marrocco judgment.

MR. MacFARLANE: But you are not seeking a lift stay; is that correct? What you are seeking is a mandatory injunction or something against the applicant to enforce the Marrocco judgment? I just don't...

MR. GROIA: I am saying that we are asking that the court order the payment to McGoeys and/or Jolian of the amounts that are necessary in order for McGoeys and Jolian, essentially, to be given the benefit of the judgment that they were awarded prior to the CCAA order being made.

Transcript from Cross-examination of McGoeys on 28 May 2012 (“McGoey Transcript”), Q 18 and 19

...McGoey has a judgment of Justice Marrocco, and he is asking that that judgment be complied with. It's as straightforward as that.

McGoey Transcript, Q 30.

...If you say that requires the stay to be lifted, that is a position UBS can argue in court. I am asking that the Marrocco judgment be complied with.

McGoey Transcript, Q 18. Notice of Motion dated 15 March 2012.

18. The only evidence filed by Jolian in support of the request that the Marrocco Order be enforced notwithstanding the stay contained in the Initial Order is a short affidavit sworn by McGoeys attaching: (a) Mr. Justice Marrocco's decision released 30 May 2012; (b) JIL's proof of claim against UBS; (c) the Monitor's notice disallowing JIL's claim; (d) JIL's notice disputing the Monitor's disallowance of its claim; and (e) the Simmons Endorsement.
19. Jolian is not asserting that funding is required by McGoeys and Jolian:

I don't think we have ever said Mr. McGoey requires funding. I think we have said McGoey has a judgment of Justice Marrocco, and he is asking that that judgment be complied with. It's as straightforward as that. There is nothing in the material that I have read, but I certainly stand to be corrected, that he says he requires funding.

McGoey Transcript, Q 30.

20. On 28 March 2012, DOL brought a Motion – a Lift Stay Motion – seeking to lift the stay imposed by the Initial Order for the purpose of enforcing the Marocco Order.

DOL Notice of Motion dated 28 March 2012.

21. The only evidence filed by DOL in support of the request that stay contained in the Initial Order is a short affidavit sworn by Dolgonos attaching: (a) accounts rendered by Roy Elliott O'Connor LLP to 2064818 Ontario Inc. and DTI; (b) Mr. Justice Marrocco's decision released 30 May 2012; (c) the Marrocco Order; (d) DOL's proof of claim against UBS; (e) the Monitor's notice disallowing DOL's claim; (f) DOL's notice disputing the Monitor's disallowance of its claim; and (g) the Simmons Endorsement.
22. DOL is not asserting any hardship or prejudice resulting from the fact that the Marocco Order is stayed:

Can I...having sat through the previous [McGoey] examination, and in order, perhaps, to shortcut the process, we are not taking the position on this application that Mr. Dolgonos faces hardship as a result of having to pay legal fees.

Transcript from Cross-examination of Dolgonos on 28 May 2012 ("Dolgonos Transcript"), Q 16.

23. When cross-examined, both Mr. Dolgonos and Mr. McGoey refused to answer any questions with respect to their assets, finances, etc.

Dolgonos Transcript, Q 14 – 23, 26 and 32 – 35, and McGoey Transcript, Q 12 – 16, 25 – 29 and 32 - 44.

24. Pursuant to an Order dated 13 April 2012, all known claims that UBS has as against DOL and Jolian are required to be asserted and determined in the Claims Procedure and UBS was required to identify those by 7 May 2012.

Order dated 13 April 2012.

25. UBS is also asserting independent claims¹ against McGoe and Dolgonos for:
- (a) the return of certain expenses that appear to have been improperly claimed by each of DOL and Jolian;
 - (b) the return of any legal fees advanced to them by UBS prior to the commencement of the CCAA proceedings should the Court ultimately determine that McGoe and Dolgonos were not entitled to be indemnified by UBS;
 - (c) damages from McGoe in connection with a transaction involving a company – UBS Ltd. – that purchased UBS’ operating business and the failure of McGoe, in his capacity as CEO of UBS, to ensure that the interests of UBS were protected in connection with a right that UBS had to acquire 2/3 of the shares of UBS Ltd. for \$1, which right UBS asserts Mr. McGoe allowed to expire without obtaining instructions from the UBS board; and
 - (d) damages from Dolgonos, in his personal capacity, for his involvement in the failure of McGoe to cause UBS to exercise its right to acquire the shares of UBS Ltd.

Affidavit of Gerald McGoe sworn 28 May 2012, Exhibits G and H.

26. UBS is asserting claims against DTI and JIL for the return of any legal fees advanced to them by UBS prior to the commencement of the CCAA proceedings should the Court ultimately determine that DTI and JIL were not entitled to be indemnified by UBS.

Affidavit of Gerald McGoe sworn 28 May 2012 (“McGoe May Affidavit”), Exhibits G and H.

¹ UBS is not asserting that McGoe and Dolgonos are jointly responsible for these claims.

27. DOL has brought a Motion – the Third Party Claim Motion – that seeks to have 4 of the former directors of UBS, McGoe, Louis Mitrovich, Douglas Reeson and Peter Minaki, and, Malcolm Buxton-Forman, the former CFO of UBS, “brought into” the Claims Procedure so that any claim(s) that DOL might have against these individuals may be determined as part of the Claims Procedure.

DOL Notice of Motion dated 29 May 2012.

28. DOL has filed no affidavit evidence in support of its Motion to bring third parties into the Claims Procedure.
29. Jolian has also brought a Third Party Claim Motion seeking to have Mr. Mitrovich, Mr. Reeson and Mr. Minaki, but not the former CFO, “brought into” the Claims Procedure so that any claim(s) that Jolian might have against these individuals may be determined as part of the Claims Procedure.

Notice of Motion dated 29 May 2012.

30. Jolian has filed an Affidavit of Gerald McGoe sworn 28 May 2012 in support of its Motion to bring third parties into the Claims Procedure. In this Affidavit, McGoe asserts that he wishes to make claims against the former directors of UBS for contribution, indemnity and misrepresentation for, *inter alia*, misrepresenting to JIL and McGoe that the agreements that UBS is attempting to have set aside in the context of the dispute with respect to the validity of Jolian’s claim against UBS were *intra vires*, authorized and binding on UBS.

McGoe May Affidavit, paras 11 and 12.

31. One of the fundamental claims for which Mr. McGoe asserts that Jolian will seek contribution and indemnity is in respect of UBS’ potential claim against UBS Ltd. for a 2/3 interest in that company, which claim will not be determined in the Claims Procedure.

McGoe May Affidavit, paras 11 and 12, Order dated 13 April 2012 and Exhibit G and H.

PART III – ISSUES

32. The issues to be determined by the Court are:
- (a) Should the stay of proceedings imposed by the Initial Order be lifted in favour of the Moving Parties on the Lift Stay Motions to enforce the Marrocco Order as against UBS?
 - (b) Does the Court have jurisdiction to order that DOL's and Jolian's third party claims be determined in the UBS CCAA proceedings?

PART IV – LAW AND ARGUMENT

A. Lifting the Stay

33. There is no dispute that DOL's and Jolian's claims for indemnification and interim advances under the Morocco Order are subject to the CCAA proceedings. The claims:
- (a) relate to debts or liabilities, present or future, to which the UBS was subject as at 5 July 2010; and/or
 - (b) relate to debts or liabilities, present or future, to which UBS may become subject before a compromise or arrangement is sanctioned by reason of an obligation incurred prior to 5 July 2010.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"), s. 19(1).

34. The stay imposed by the Initial Order stays enforcement of the Marrocco Order and any other rights that DOL and Jolian might have under that Order to claim interim advances pending the determination in the Claims Procedure of their ultimate claims for indemnification from UBS.

35. There is no statutory test that governs the lifting of a stay imposed by the Court in the context of proceedings under the CCAA and a creditor faces a **very heavy** onus if it requests an Order lifting the stay.

Canwest Global Communications Corp. (Re); [2009] O.J. No. 5379 (S.C.J.); *Canwest Global Communications Corp. (Re)*, [2010] O.J. No. 3075 (S.C.J.) and *Azure Dynamics Corp. (Re)*, [2012] B.C.J. No. 1068 (S.C.).

36. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including: (a) a consideration of the balance of convenience; (b) the relative prejudice to parties; and where relevant, (c) the merits of the proposed action.

Canwest Global Communications Corp. (Re); [2009] O.J. No. 5379 (S.C.J.); *Canwest Global Communications Corp. (Re)*, [2010] O.J. No. 3075 (S.C.J.) and *Azure Dynamics Corp. (Re)*, [2012] B.C.J. No. 1068 (S.C.).

37. The situations where the Court may exercise its discretion to lift the stay in a CCAA proceeding are:

- (a) the plan of compromise or arrangement proposed by the debtor company is likely to fail;
- (b) the applicant creditor shows hardship -- the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor;
- (c) the applicant creditor shows necessity for payment -- where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence;
- (d) the applicant creditor would be significantly prejudiced by the refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
- (e) it is necessary that the stay be lifted to permit the applicant creditor to take steps to protect a right which could be lost by the passage of time;

- (f) after the lapse of a significant time period, the insolvent is no closer to a plan than at the commencement of the stay period;
- (g) there is a real risk that the applicant creditor's loan will become unsecured during the stay period;
- (h) it is necessary to allow the applicant creditor to perfect a right that existed prior to the commencement of the stay period; or
- (i) it is in the interests of justice that the stay be lifted to permit the applicant creditor to pursue its claim against the debtor outside of the CCAA.

Canwest Global Communications Corp. (Re), [2009] O.J. No. 5379 (S.C.J.); *Canwest Global Communications Corp. (Re)*, [2010] O.J. No. 3075 (S.C.J.) and *Azure Dynamics Corp. (Re)*, [2012] B.C.J. No. 1068 (S.C.).

- 38. Notwithstanding the heavy onus imposed on them, neither DOL or Jolian have put forward any evidence whatsoever to: (a) allow the Court to undertake the balancing exercise required on a motion to lift the stay imposed pursuant to the CCAA; or (b) establish that any of the situations outlined by this Court in *Canwest Global Communications Corp. (Re)*, in fact, exist.
- 39. DOL and Jolian have conceded that advances from UBS are not necessary to allow them to participate in the Claims Procedure:

I don't think we have ever said Mr. McGoey requires funding. I think we have said McGoey has a judgment of Justice Marrocco, and he is asking that that judgment be complied with. It's as straightforward as that. There is nothing in the material that I have read, but I certainly stand to be corrected, that he says he requires funding.

McGoey Transcript, Q 30.

Can I...having sat through the previous [McGoey] examination, and in order, perhaps, to shortcut the process, we are not taking the position on this application that Mr. Dolgonos faces hardship as a result of having to pay legal fees.

Dolgonos Transcript, Q 16.

40. DOL and Jolian argue simply that: (a) the Marrocco Order was made; (b) is presumed, pending the determination of UBS's appeal, to be valid; and (c) should be enforceable by DOL and Jolian against UBS notwithstanding the CCAA proceedings.
41. The position of DOL and Jolian *vis-à-vis* the Marrocco Order and their claims to the interim advances from UBS as ordered by the Marrocco Order are no different than the rights/claims of any other creditor in any other CCAA proceeding.
42. The Lift Stay Motions are intended as further tactical maneuvering by DOL and Jolian to increase the costs of the CCAA proceedings and to delay the determination of their claims on their merits in the hope that Dolgonos will be able to replace the UBS board with his chosen directors. It is worth noting that DOL and Jolian have not even complied with the intention underlying the Claims Procedure that the parties would lay out the factual and legal basis for their claims.
43. Of significance is the fact that even if the Lift Stay Motions are successful, this matter will not be determined. Justice Simmons Ordered that, if DOL and Jolian were successful in having the stay imposed by the Initial Order lifted to permit the enforcement of the Marrocco Order, UBS' appeal of the Marrocco Order would be expedited so the validity of the Marrocco Order could be determined. The only effect of granting the Lift Stay Motions would be to expedite UBS's appeal of the Marrocco Order, increase the costs of the CCAA proceedings and delay the determination of DOL's and Jolian's Claims on their merits in accordance with the Claims Procedure. DOL and Jolian know this.
44. Mr. Justice Marrocco ordered advances in respect of DOL's and Jolian's yet-to-be-determined rights to indemnification. The obligation to make advances under the Marrocco Order was subject to DOL's and Jolina's obligation to return any advances made by UBS should it be ultimately determined that UBS was not required to indemnify DOL and/or Jolian.

45. DOL and Jolian have filed proofs of claim in the CCAA proceedings asserting claims for, *inter alia*, indemnification from UBS. The validity and quantum of those (disputed) claims will be determined in the Claims Procedure.
46. Any advances to DOL and/or Jolian made by UBS in the CCAA proceedings would be interim distributions in respect of DOL's and Jolian's disputed claims. There is no precedent for unsecured creditors to receive advances against disputed claims in a CCAA proceeding, particularly where there is no evidence to establish that the advances will be recoverable by the debtor company should the claim prove to be invalid and the creditor has refused to answer any questions whatsoever with respect to its assets and finances.
47. *SemCanada Crude Company (Re)*, 2009 ABQB 90 (CanLII), the Court considered a request for an interim distribution on secured claims in a CCAA proceeding. The interim distribution was opposed on the basis, *inter alia*, that the secured creditors' were potentially subject to attack by creditors. The Court found that while orders allowing interim distributions to creditors for one reason or another are not without precedent, an application for an interim distribution must be carefully scrutinized and found to be justifiable for good and sustainable reasons. The Court founds that it was required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders.

SemCanada Crude Company (Re), 2009 ABQB 90 (CanLII). It is worth noting that the interim distribution was not permitted notwithstanding that the Monitor supported the interim distribution and there was an opinion with respect to the validity of the secured creditors' security.

48. DOL and Jolian have provided no evidence whatsoever to establish that there are "good and sustainable reasons" to provide them with advances against their disputed claim for indemnification or to permit the Court to consider the prejudice to UBS of providing advances that may never be recoverable. In fact, they both take the position that they do not require advances to pay the professional fees they are incurring and Jolian's only justification for requesting advances is:

McGoey has a judgment of Justice Marrocco, and he is asking that that judgment be complied with. It's as straightforward as that.

McGoey Transcript, Q 30.

49. Even if DOL and Jolian were seeking security for their professional fees, which they are not, they would be required to establish to the Court that the security being requested **is necessary for their effective participation in the CCAA proceedings**. DOL and Jolian have clearly stated that they do not need any assistance to pay their professional fees and, on that basis, refused to answer any questions with respect to their assets and finances.

CCAA, s. 11.52(1).

B. Third Party Claims

50. DOL and Jolian are seeking to bring 4 former directors of UBS and, in the case of DOL, the former CFO of UBS into the procedure put in place pursuant to s. 21 of the CCAA to determine claims as between UBS and DOL and Jolian. The purpose for DOL and Jolian bringing the 4 former directors and the former CFO into the Claims Procedure is to facilitate the ability of DOL and Jolian to recover claims against those individuals, and is not related in any way to any plan of compromise or arrangement that UBS might develop or the determination of the claims against UBS for the purpose of voting on or receiving a distribution under a plan of compromise or arrangement developed by UBS – while providing an additional source of recovery for DOL and Jolian, the claims DOL and Jolian wish to “bring into” the Claims Procedure are not directly connected to the reorganization of UBS in any rational manner.
51. The purpose of the CCAA is to deal with the insolvency of a debtor company. In this regard, the CCAA is intended to, *inter alia*, facilitate the determination, in a summary fashion, and compromise of claims made against the debtor company. In CCAA proceedings, the Court does not have jurisdiction to “bring-in” claims that creditors may have as against each other or as against third-parties into the CCAA proceedings:

The purpose of a CCAA proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of

a company and a third party, even if the company was also involved in the subject matter of the dispute.

See, Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580 (S.C.). See also *Stelco Inc. (Re)*, [2005] O.J. No. 4814 aff'd, [2005] O.J. No. 4883 (C.A.). See also CCAA, s. 11.04.

52. DOL's and Jolian's claims against the former directors and the former CFO of UBS, to the extent that they have any merit cannot be:
- (a) brought into the process established pursuant to s. 21 of the CCAA to determine claims by creditors against UBS; and
 - (b) impacted by the CCAA proceedings – and nothing that happens in the CCAA proceedings will be binding *vis-à-vis* third parties and the ultimate determination of claims against third parties.

See, Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580 (S.C.).

53. It is clear that the intention of the CCAA is that claims against persons other than the debtor company will be determined outside of the CCAA, and not in accordance with s. 21 of the CCAA. The CCAA provides, for example, that claims against the directors of a debtor company may be stayed, that stay expires when the CCAA proceedings terminate, at which point creditors may pursue surviving claims against the directors outside of the CCAA.

CCAA, s. 11.03(1).

54. UBS notes that the Initial Order includes a provision that imposes a temporary stay on proceedings against the former directors and officers of UBS.

Initial Order, para 17.

55. DOL and Jolian have not sought leave to commence proceedings against the former directors and officers of UBS.
56. UBS also notes that the issue that arises in connection with releases contained in CCAA plans is not whether the claims by creditors against non-debtors that the debtor company seeks to have released are to be determined in the CCAA proceedings, but whether the

claims may be pursued in litigation outside of the CCAA proceedings in the face of the release contained in the plan.

See, for example, *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. No. 4749 (C.A.) leave to appeal dismissed 6 April 2000 (whether release in plan prevented proceedings against officer for misrepresentation).

PART V – ORDER REQUESTED

57. UBS requests:

- (a) An Order dismissing the Fee Advancement Motions and the Third Party Claims Motions; and
- (b) costs plus applicable taxes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June 2012



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SCHEDULE “A”

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

Canwest Global Communications Corp. (Re), [2010] O.J. No. 3075 (S.C.J.).

Azure Dynamics Corp. (Re), [2012] B.C.J. No. 1068 (S.C.).

SemCanada Crude Company (Re), 2009 ABQB 90 (CanLII).

Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580 (S.C.).

Stelco Inc. (Re), [2005] O.J. No. 4814 aff’d, [2005] O.J. No. 4883 (C.A.).

NBD Bank, Canada v. Dofasco Inc., [1999] O.J. No. 4749 (C.A.).

SCHEDULE "B"

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

2. (1) In this Act,

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called;

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

...

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

- (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
 - (i) the day on which proceedings commenced under this Act, and
 - (ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
- (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

- (a) the amount of an unsecured claim is the amount
 - (i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,
 - (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or
 - (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and
- (b) the amount of a secured claim is the amount, proof of which might be made under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, to be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Business Corporations Act, R.S.O. 1990, c. B.16.

136. (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

(2) A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1), but the individual shall repay the money if the individual does not fulfil the conditions set out in subsection (3).

(3) A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation's request.

(4) In addition to the conditions set out in subsection (3), if the matter is a criminal or administrative action or proceeding that is enforced by a monetary penalty, the corporation shall not indemnify an individual under subsection (1) unless the individual had reasonable grounds for believing that the individual's conduct was lawful.

(4.1) A corporation may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to obtain a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).

(4.2) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking an indemnity,

- (a) was not judged by a court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
- (b) fulfils the conditions set out in subsections (3) and (4).

(4.3) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual,

- (a) in the individual's capacity as a director or officer of the corporation; or
- (b) in the individual's capacity as a director or officer, or a similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.

(5) A corporation or a person referred to in subsection (1) may apply to the court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit.

(6) Upon an application under subsection (5), the court may order notice to be given to any interested person and such person is entitled to appear and be heard in person or by counsel.

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

AND IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS INC.

(the "Applicant")

ONTARIO

SUPERIOR COURT OF JUSTICE
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

FACTUM OF

UNIQUE BROADBAND SYSTEMS, INC.
(RETURNABLE 13 JUNE 2012)

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