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

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TOOL SHED BREWING COMPANY INC.

DOCUMENT **BENCH BRIEF**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART I - INTRODUCTION

1. Tool Shed Brewing Company Inc. ("**Tool Shed**" or the "**Company**") is insolvent. On January 31, 2024 (the "**Filing Date**"), Tool Shed filed a Notice of Intention to Make a Proposal pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"). KPMG Inc. consented to act as proposal trustee (the "**Proposal Trustee**") with respect to Tool Shed's proposal proceedings (the "**NOI Proceedings**").[1]

2. Tool Shed is seeking to utilize the NOI Proceedings to restructure its financial affairs to address its liquidity crisis for the benefit of its stakeholders.

3. This bench brief is provided in support of an application (the "**Application**") by Tool Shed before the Court of King's Bench of Alberta (the "**Court**"), seeking the following relief, among other things:

   (a) abridging the time for service of this Application and the supporting materials, as necessary, and deeming service thereof to be good and sufficient;

   (b) pursuant to section 50.4(9) of the BIA, extending the time by which Tool Shed may file a proposal to its creditors for a 45-day period from the date following the current deadline of March 1, 2024, up to and including 11:59 p.m. (local Calgary time) on April 15, 2024, or such other date as this Honourable Court may order;

   (c) granting an Administration Charge (as defined below) over the assets and property of Tool Shed, in the amount of $250,000, as security for the payment of professional fees and disbursements incurred and to be incurred by counsel for the Company, the Proposal Trustee, and counsel to the Proposal Trustee;

   (d) authorizing the Company to borrow under a credit facility from 2582568 Alberta Inc. (the "**Interim Lender**") on the terms and subject to the conditions set forth in the interim financing term sheet between the Company and the Interim Lender (the "**Interim Loan Agreement**");

   (e) granting an Interim Lender's Charge (as defined below) over the assets and property of Tool Shed, in the amount of $300,000, in favour of the Interim Lender

[1] Affidavit of James Costello sworn February 5, 2024 (the "**Second Costello Affidavit**") at para 6.

as security for the amounts advanced pursuant to the Interim Loan Agreement, plus interest, costs, and fees;

(f) approving the proposed sale and investment solicitation process (the "**SISP**") and authorizing and directing the Proposal Trustee, in consultation with the Company, to implement and carryout the SISP;

(g) approving the share purchase agreement (the "**Stalking Horse Agreement**") between the Company and 2582568 Alberta Inc. (the "**Stalking Horse Bidder**") as a stalking horse bid (the "**Stalking Horse Bid**") in connection with the SISP and approving the Break Fee as defined in the Stalking Horse Agreement; and

(h) granting such further and other relief as counsel may request and this Honourable Court may deem appropriate.

4. Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Affidavit No. 2 of James Costello, sworn February 5, 2024 (the "**Second Costello Affidavit**").

PART II - FACTS

5. The facts relevant to the Application are set out in detail in the Second Castello Affidavit. A summary of the key facts as they relate to the relief requested in the Application is set out in the following section.

A. Background

6. Tool Shed is an Alberta Corporation which operates out of a leased commercial premises in Calgary.[2] It has been brewing craft beer for the last 11 years and specializes in alcoholic and non-alcoholic beverages.[3] Tool Shed employs approximately 20 full time and part time staff.[4]

[2] *Ibid* at paras 11 and 14.

[3] *Ibid* at para 13.

[4] *Ibid* at para 24.

7. Tool Shed holds certain licenses and permits which allows it to brew and/or distribute alcoholic beverages in the provinces of Alberta, British Columbia, Saskatchewan, and Manitoba (the "**Licenses and Permits**").[5]

B. Tool Shed's Financial Issues

8. Since 2020, Tool Shed has faced an extraordinary strain on its financial resources, including the negative effects on the brewing industry brought on by the Covid-19 pandemic and the maturation of its credit facility with ATB Financial, which the Company was unable to re-finance.[6]

9. Tool Shed to date has been unable to secure alternative financing and has had to rely on cash injections and individual investors to sustain operations.[7] Unfortunately, it does not have the necessary funds required to repay investors which has resulted in multiple judgments being registered against the Company.[8]

10. As of November 30, 2023, Tool Shed has assets of approximately $1,200,740.53 and estimated liabilities of approximately $5,011,947.67.[9]

11. Tool Shed has four secured creditors with registrations against it at the Alberta Personal Property Registry.[10] Those secured creditors are owed approximately $713,338.35 by Tool Shed.[11]

12. Tool Shed also owes approximately $2,750,819.94 to 25 unsecured investors.[12]

13. As of January 9, 2024, Tool Shed owed $571,091.70 (the "**CRA Debt**") in unremitted source deductions to the Canada Revenue Agency (the "**CRA**").[13] As a result of the CRA Debt, the Alberta Gaming, Liquor and Cannabis Commission ("**AGLC**") advised on

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[5] *Ibid* at para 28.
[6] *Ibid* at paras 34-35.
[7] *Ibid* at para 36-37.
[8] *Ibid* at para 40.
[9] *Ibid* at paras 48-49, Exhibit I.
[10] *Ibid* at para 63, Exhibit E.
[11] *Ibid* at paras 64-68, Exhibits L and M.
[12] *Ibid* at para 71, Exhibit O.
[13] *Ibid* at para 54, Exhibit J.

January 29, 2024, that the CRA issued it a requirement to pay notice (the "**Requirement to Pay**").[14]

14. Tool Shed currently owes $14,057.82 in arrears to its landlord as at February 5, 2024,[15] and approximately $1,097,853.94 to its trade creditors as at January 25, 2024.[16]

15. As a result of the Requirement to Pay, the AGLC withheld revenues which Tool Shed requires to fund its payroll obligations on February 7, 2024, as well as pay critical suppliers and operational expenses.[17]

16. Tool Shed does not have sufficient liquidity to meet its obligations as they generally become due. When the AGLC withheld funds from Tool Shed, it was forced to file for these NOI Proceedings and bring an emergency application for an order directing the AGLC to release to Tool Shed all funds currently due and owing to the Company, or that may become due and owing to the Company, which are being held by the AGLC pursuant to the Requirement to Pay during the NOI Proceedings.

17. This application was heard February 5, 2024, and the Court granted the relief sought, as without access to its revenues held by AGLC, Tool Shed can no longer continue to operate. [18]

C. Pre-Filing Sales Process and Conversion Attempts

18. Tool Shed carried out a robust out-of-court sale and investment solicitation process (the "**Initial SISP**") from April to September of 2023, in order to restructure its debt load, find a purchaser, or find an equity partner to allow it to pay off debt and continue to grow its operations.[19]

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[14] *Ibid* at para 56.

[15] *Ibid* at para 74.

[16] *Ibid* at para 76.

[17] *Ibid* at para 56.

[18] Order pronounced February 5, 2024.

[19] Second Costello Affidavit, *supra* note 1 at paras 78 and 92.

19. The Company canvassed the opportunity with a number of identified potential investors, stakeholders, and creditors, which included advertising on "Insolvency Insider" and sending teasers to potentially interested parties.[20]

20. The Company received six expressions of interest and one bid in the Initial SISP. The bid received was conditional on the Company obtaining creditor support, which was never obtained.[21]

21. Following the termination of the Initial SISP, Tool Shed underwent six months of intense consultation process with its secured creditors, convertible debenture holders, and shareholders to try to reach an agreement to see a significant portion of Tool Shed's debt voluntarily converted into equity.[22]

22. Following months of consultations, in December 2023, Tool Shed proposed a debt settlement agreement which would have seen the forgiveness of up to 90% of the total unsecured debt, with 15% of the amounts owing to unsecured creditors being repaid in the form of Class A common shares in the share capital of the Company at a deemed price per share of $54.59.[23]

23. Tool Shed's attempts at converting its debt failed and the Company put its creditors on notice that it would have no choice but to file an insolvency proceeding.[24]

D. NOI Proceedings

24. This Honourable Court has the jurisdiction to grant the relief requested in order to address the circumstances in which Tool Shed finds itself.

25. The goal of the NOI Proceedings is to re-market Tool Shed through the SISP in order to canvass the open market for potential purchasers or equity investors with the certainty

[20] *Ibid* at paras 80-83, Exhibits R and Q.
[21] *Ibid* at paras 85-89, Exhibits T and U.
[22] *Ibid* at para 93.
[23] *Ibid* at paras 95-96, Exhibit V.
[24] *Ibid* at paras 99-100, Exhibit W.

that a transaction with any potential counter-party could be closed through the NOI Proceedings.[25]

26. It is Tool Shed's expectation that it and its stakeholders will derive a greater benefit from the proposed SISP than through a liquidation in a receivership or a bankruptcy.[26]

27. The Company, in consultation with the Proposal Trustee and their respective legal counsel, have been working to develop, implement, and commence the SISP to solicit interest in, and opportunities for, the sale of, or investment in, the business and the property of Tool Shed.[27]

28. The proposed SISP milestones are:[28]

Milestone	**Deadline**
Commencement of the SISP	February 12, 2024
Bid Deadline (12:00 p.m. MDT)	March 11, 2024
Notice of Auction (if any)	March 13, 2024
Auction (if any)	March 19, 2024
Approval Application	April 15, 2024

PART III - ISSUES

29. The following issues are before the Court:

(a) Should the Court extend the time to file a proposal?

(b) Should the Court grant the Administration Charge?

(c) Should the Court approve the Interim Loan Facility and grant the Interim Lender's Charge?

[25] *Ibid* at para 9.

[26] *Ibid* at para 124.

[27] *Ibid* at para 108.

[28] *Ibid* at paras 109 and 112, Exhibit Y.

(d) Should the Court approve the SISP?

(e) Should the Court approve the Stalking Horse Agreement as a Stalking Horse Bid?

(f) Should the Court approve the Break Fee?

PART IV - LAW AND ANALYSIS

A. The Court should extend the time to file a proposal

30. Tool Shed filed the NOI Proceedings on January 31, 2024.

31. Section 50.4(8) of the BIA requires Tool Shed to file a proposal with the official receiver within 30 days of the filing of the NOI (the "**Proposal Period**"). In the event that Tool Shed does not file a proposal with the official receiver within 30 days from January 31, 2024, Tool Shed will have been deemed to have made an assignment in bankruptcy.[29]

32. Pursuant to section 50.4(9) of the BIA, before the expiry of the Proposal Period, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days. When determining whether an extension is appropriate, the Court is to be satisfied that:

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

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

(c) no creditor would be materially prejudiced if the extension being applied for were granted.[30]

33. Tool Shed bears the burden of establishing that an extension of the Proposal Period is warranted.[31]

34. Since filing the NOI, Tool Shed has been diligently complying with the various requirements under the BIA, including working diligently with the Proposal Trustee to

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[29] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**") at s. 50.4(8) [**TAB 1**]

[30] *BIA,* supra note 29 at s 50.4(9) [**TAB 1**]; *Castle Rock Research Corp v AGC Investments Ltd*, 2012 ABQB 208 at para 8 [*Castle Roc*k] [**TAB 2**].

[31] *Castle Rock*, *ibid*, at para 9.

complete a cash flow forecast from January 28, 2024 through to April 15, 2024,[32] bringing the emergency application, negotiating the Stalking Horse Agreement, and preparing the form of SISP in consultation with legal counsel and the Proposal Trustee.[33]

35. To allow for the administration of the SISP, the Company is seeking a 45–day extension from the current deadline of March 1, 2024 to and until 11:59 pm on April 15, 2024. The test for the Court to grant the extension of the Proposal Period are met in the circumstances of this case:

    (a) the Company is insolvent and acting in good faith and with due diligence in working with the Proposal Trustee to prepare the SISP that will maximize value for the Company's stakeholders;[34]

    (b) an extension will allow the Company to carry-out and complete the SISP, which will enhance the Company's ability to make a viable proposal;[35] and

    (c) the extension should not adversely affect or prejudice any group of creditors.

36. The Company has worked with the Proposal Trustee on a cash flow that will give it sufficient liquidity to carry out the SISP and return to Court for approval of a transaction before the expiry of the proposed Proposal Period extension.[36]

37. Based on the above considerations, the Company submits that the Court should grant the extension of the Proposal Period up to and until 11:59 pm on April 15, 2024.

B. <u>The Administration Charge should be granted</u>

38. The Company seeks the Administration Charge over all of its property, assets and undertakings (the "**Property**"), in priority to existing creditors of the Company, including the CRA, up to a maximum amount of $250,000, to secure the fees of the Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Company incurred in connection with the NOI Proceedings.

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[32] Second Costello Affidavit, *supra* note 1 at para 8.

[33] Ibid at para 124.

[34] Ibid para 113.

[35] Ibid.

[36] Ibid at para 8.

39. Section 64.2 of the BIA provides the Court the statutory jurisdiction to grant the Administration Charge as follows:[37]

> ***64.2(1) Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division;
>
> […]
>
> **64.2(2) Priority:** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

40. Administration charges have been approved in BIA proposal proceedings where, as in the present case, the debtor has limited means to obtain professional assistance and the participation of insolvency professionals is necessary to ensure a successful restructuring under the BIA.[38]

41. This Court has the authority to order that an administration charge, in an amount the Court considers appropriate, be granted in priority to the claims of any secured creditors if they are provided with notice of the relief sought.[39]

42. The proposed Administration Charge is supported by the following factors:

    (a) the secured creditors of Tool Shed have received notice of the Application;

    (b) the CRA has received notice of the Application;

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[37] *BIA, supra* note 29, s 64.2 [**TAB 1**].

[38] *Re Mustang GP Ltd.,* 2015 ONSC 6562 at para 33 [*Mustang*] [**TAB 3**].

[39] *BIA*, *supra* note 29, s 64.2 [**TAB 1**].

(c) the Administration Charge is necessary to ensure that the proposed beneficiaries' fees and disbursements are protected;

(d) the Administration Charge will allow for Tool Shed to obtain the critical advice and direction it requires from its professional advisors and the Proposal Trustee to successfully carry out the SISP;[40]

(e) the quantum of the Administration Charge is reasonable in the circumstances when considering the amounts owed to professionals in the NOI Proceedings; and

(f) the Company understands that the Administration Charge is supported by the Proposal Trustee.[41]

43. Given Tool Shed's liquidity crisis, it has limited financial means to finance the professional services required to complete the SISP. As such, the Administration Charge is appropriate in the circumstances.

C. The Interim Loan Facility and Interim Lender's Charge should be approved

44. The Company seeks the approval of the Interim Loan Facility and the Interim Lender's Charge.

45. Section 50.6(1) of the BIA provides the Court with the authority to grant the Interim Lender's Charge, in an amount the Court considers appropriate, "on notice to the secured creditors who are likely to be affected by the security or charge."[42] This charge may be made in priority to the claim of any secured creditor.[43]

46. In making a determination to grant a charge securing interim financing, a Court is to consider the factors outlined in section 50.6(5) of the BIA:

(a) the period during which the debtor is expected to be subject to proceedings under the BIA;

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[40] Second Costello Affidavit, *supra* note 1 at paras 129-131.

[41] *Ibid* at para 132.

[42] *BIA,* supra note 29, s 50.6(1) [**TAB 1**]

[43] *Ibid,* s 50.6(3) [**TAB 1**]

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report.[44]

47. Courts have granted an interim financing charge in BIA proceedings in instances where debtors would cease operations if the relief sought was not granted.[45]

48. The circumstances in which courts have granted interim financing and a charge securing the same reflect the remedial purposes of the BIA's proposal provisions to "avoid the social and economic losses resulting from liquation of an insolvent company" and create conditions for preserving the *status quo* while an insolvent company has the opportunity to establish a proposal. [46]

49. The Interim Loan Agreement to be entered into between Tool Shed and the Interim Lender provides for a term loan in the amount of $250,000, plus interests and costs of the Interim Lender (the "**Interim Loan Facility**").[47]

50. The purpose of the Interim Loan Facility is to provide the Company with access to funding so that it can continue operations, carry out the SISP, and ensure that its obligations such

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[44] *Ibid* at s. 50.6(5); *Re Eureka 93 Inc. et al*, 2020 ONSC 1482 [*Eureka*] at para 16 [**TAB 4**]; *Re PJ Wallbank Manufacturing Co*, 2011 ONSC 7641 [*PJ Wallbank*]) [**TAB 5**].

[45] *Mustang, supra* note 38 at para 28 [**TAB 3]** *; PJ Wallbank, ibid* at para 13 [**TAB 5]**

[46] *Re Ted Leroy Trucking Ltd.,* 2010 SCC 60, (*sub nom Century Services Inc. v AG of Canada*) at paras 15, 60 [**TAB 6**]. *Mustang, supra* note 3838 at para 28 [**TAB 3**]; *Eureka, supra* note 44 at para 24 [**TAB 4**].

[47] Second Costello Affidavit, *supra* note 1 at para 102, Exhibit X.

as payroll, payments to critical suppliers, and necessary operating expenses are met during the NOI Proceedings.[48]

51. The key terms of the Interim Facility are as follows:

    (a) It is conditional upon approval by this Court and upon the Interim Lender receiving a second priority Court-ordered charge on the assets, property, and undertakings of the Company, in priority to any and all Encumbrances (as defined therein), subordinate only to the Administration Charge, up to the maximum amount of $300,000;

    (b) Advances under the Interim Facility are to bear interest at 12% per annum; and

    (c) Aside from payment of the Interim Lender's legal fees arising in connection with the Interim Facility, there are no other fees payable pursuant to the Interim Facility.[49]

52. The Company submits that the Interim Loan Facility and the Interim Lender's Charge satisfy the criteria set out in s. 50.6(1) and 50.6(5) of the BIA and are reasonable in the circumstances.

53. With respect to s. 50.6(1) of the BIA:

    (a) notice has been given to all known secured creditors, including the CRA; and

    (b) Tool Shed has prepared a Cash Flow Statement with the assistance of the Proposal Trustee, which will be included in a report filed by the Proposal Trustee in advance of the Application.

54. With respect to s. 50.6(5) of the BIA:

    (a) the quantum of the Interim Facility was arrived at in consultation with the Proposal Trustee and the Company's legal counsel;[50]

[48] *Ibid* at paras 101 and 105.

[49] *Ibid* at para 104.

[50] *Ibid* at para 106.

(b) the Company will operate as a going concern, under the supervision of the Proposal Trustee and in accordance with the Cash Flow Statement throughout the NOI Proceedings;

(c) the Interim Loan Facility will enable the Company to carry out the SISP and avoid the social and economic losses that would result from a liquidation of Tool Shed;

(d) if the Interim Loan Facility and Interim Lender's Charge are not approved by the Court, the Company will not be able to carry on business or complete the NOI Proceedings, and will be forced to shut down operations to the detriment of its stakeholders;[51]

(e) the successful completion of the SISP will enhance the prospects of a viable proposal being made to its creditors;

(f) no creditor would be materially prejudiced as a result of the Interim Lender's Charge; and

(g) it is a condition of the Interim Loan Agreement that the Interim Lender's Charge is granted.[52]

55. The Proposal Trustee supports the Interim Loan Financing and the Interim Lender's Charge.[53]

56. In consideration of the factors listed under ss. 50.6(1) and 50.6(5) of the BIA, and in light of the support of the Proposal Trustee, the Company submits that the Interim Loan Financing and the Interim Lender's charge should be granted in the circumstances.

D. Priority of BIA Charges

57. The Companies request that the priorities of the Administration Charge and the Interim Lender's Charge (collectively, the "**Charges**"), as among them, be as follows:

(a) First – the Administration Charge; and

[51] *Ibid* at para 133.

[52] *Ibid* at para 135,

[53] *Ibid* at para 138;

(b) Second – the Interim Lender's Charge.

58. The Court may order, pursuant to section 50.6(3), 64.1(2), and 64.2(2) of the BIA, that the Charges rank in priority over the claim of any secured creditor of the debtor.

59. The Company understands that the Proposal Trustee is supportive of this proposed priority ranking of the BIA Charges and will file a report stating such views in advance of the Application.

E. The SISP Should Be Approved

60. In *Re Nortel Networks Corp*, the Ontario Superior Court of Justice [Commercial List] articulated the following four items that the Court should consider when deciding whether to approve a sales process backstopped by a stalking horse bid:

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

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

(c) Do any of the debtor's creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?[54]

61. If the SISP is successful, the Court is authorized to approve a sale in a proposal proceeding under s. 65.13(4) of the BIA. This section sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business:

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

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

[54] Re *Danier Leather Inc,* 2016 ONSC 1044 [*Danier*] at paras 22-23 [**TAB 7**], citing *Re Nortel Networks Corp*, 2009 CanLII 39492 (ON SC) [*Re Nortel*] at para 49 [**TAB 8**];

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

(d) the extent to which creditors were consulted;

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

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[55]

62. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sale process proposed by a debtor must be assessed in light of the factors that a court will consider when considering the approval of a proposed sale.[56]

63. The Company submits that the above criteria from *Re Nortel* and s. 65.13 of the BIA are satisfied, and the SISP ought to be approved for several reasons.

64. First, conducting the SISP is the only viable option that the Company has to continue operating, avoid liquidation in order to maximize value, and keep its employees working. Due to the financial difficulties faced by the Company including its limited cash flow, the CRA Debt, and significant indebtedness owing to secured and unsecured creditors, the only way to save Tool Shed as an operating business and to maximize value for its stakeholders is to restructure through a Court supervised sale process.[57]

65. A transaction through the SISP, including the Stalking Horse Bid, provides the employees of Tool Shed the reassurance that their jobs will be maintained and that the business will continue to operate throughout, and at the end of, the SISP. Therefore, the Company submits that the SISP is not only warranted at this time—it is necessary.

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[55] *BIA, supra* note 29 at s 65.13 [**TAB 1**]; *Danier*, *ibid* at paras 34–35 [**TAB 7**].

[56] *CCM Master Qualified Fund v blutip Power Technologies, 2012 ONSC 1750* [*CCM Master Qualified Fund*] at para 6 **[TAB 9]**

[57] Second Costello Affidavit, *supra* note 1 at para 107.

66. Second, the duration of the SISP is reasonable in the circumstances. As stated above, Tool Shed conducted an extensive out-of-court sale and investment process from April through September of 2023. During this time it canvassed a number of potential investors, stakeholders, and creditors for interest in purchasing or becoming an equity partner of the Company to allow it to continue operations.[58] Despite best efforts, no bid was received that was satisfactory to Tool Shed's creditors.[59]

67. Given the extensive discussions and canvassing of interest that the Company engaged in prior to these formal NOI Proceedings, and recognizing the limited pool of investors that have an interest in the brewing industry, a truncated sales process is reasonable. The proposed 4-week solicitation period is sufficient to provide potential purchasers or investors the opportunity to place a bid that is superior to the Stalking Horse Agreement.

68. Third, the SISP is designed to allow potential bidders to submit an offer for some or all of the Company's assets, or to make an investment in the Company or acquire the business as a going concern.[60] This flexibility will allow Tool Shed and the Proposal Trustee to select not only the bid that provides the most cash, but also to consider other factors as well, such as levels of conditionality and overall impact on stakeholders.[61]

69. Fourth, The SISP was developed by the Company in consultation with the Proposal Trustee. The SISP provides for a fair and transparent process which will be conducted in such a manner as to give potential bidders equal opportunity to express their interest in making an offer on the Tool Shed's business and/or assets.

70. Tool Shed understands that the Proposal Trustee supports the proposed SISP in these proceedings, and that it is the opinion of the Proposal Trustee that the SISP would be more beneficial to the Company's creditors than a sale or disposition under a bankruptcy in the first instance. The Company understands that the Proposal Trustee will file a report highlighting these points in advance of this Application.

71. In light of the above, it is in the best interests of the Company and its stakeholders to carry out the SISP. A transaction that preserves the going concern value of the Company's

[58] *Ibid* at paras 78-80.

[59] *Ibid* at para 92.

[60] *Ibid* at para 108.

[61] *Ibid* at para 111.

business through the NOI Proceedings will likely achieve a better long-term result for the Company's stakeholders as compared to a forced liquidation of the Company's assets.

F. The Stalking Horse Agreement should be Approved as the Stalking Horse Bid

72. Stalking horse sales processes have been recognized and frequently utilized in various insolvency proceedings, including BIA proposals, in an attempt to obtain the best price for the business or assets being marketed, and to establish a baseline price and transactional structure.[62]

73. In *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, the British Columbia Supreme Court observed that in determining whether to approve a stalking horse agreement, the Court will assess the same factors as in determining whether to approve a proposed sale process generally.[63] Those factors, found in s. 65.13(4) of the BIA, were listed above at paragraph 60.

74. In addition to the reasons articulated above as to why the SISP satisfies the requisite *Re Nortel* and s 65.13(4) criteria, the following factors support this Court approving the Stalking Horse Agreement and designating it as the Stalking Horse Bid:

    (a) the Stalking Horse Agreement will establish a baseline bid for the SISP, thereby providing competitive tension to the process and maximizing the value to be derived with respect to Tool Shed and its business;[64]

    (b) the consideration contemplated in the Stalking Horse Agreement is *prima facie* reasonable and fair;

    (c) the Stalking Horse Agreement purchase price includes a cash payment to bring the Lease into good standing;[65]

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[62] *Danier,* supra note 54 at para 20 [**TAB 7]***; CCM Master Qualified Fund,* supra note 56 at para 7 [**TAB 9].**

[63] *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855 at para 21 **[TAB 10]**

[64] Second Costello Affidavit, *supra* note 1 at para 125.

[65] *Ibid* at para 120.

(d) the Stalking Horse Agreement purchase price includes an amount equal to the value of the Assumed Liabilities, as set out in the Stalking Horse Agreement, which includes full repayment of the CRA Debt post-closing;[66]

(e) a potential sales transaction, including the transaction contemplated in the Stalking Horse Agreement, will allow Tool Shed to continue as a going concern and keep its Licenses and Permits;[67] and

(f) absent the Stalking Horse Bid, the SISP could potentially result in the receipt of substantially less attractive offers, or no offers at all.

75. The Stalking Horse Agreement provides a stable backstop within the proposed SISP, while leaving open the possibility of superior bids. Additionally, the Stalking Horse Agreement, if ultimately the successful bid, provides for the continuation of Tool Shed as a going concern, assuring a customer for suppliers, a tenant for Tool Shed's landlord, employment for its staff, an ongoing business for the CRA to tax, and an ongoing supplier for its many customers.

76. The proposed Stalking Horse Agreement is structured as a reverse vesting order ("**RVO**"), which courts have confirmed is an available transaction method in BIA proposals.[68]

77. Courts have also applied the factors in section 65.13(4) of the BIA when considering whether to grant an RVO in the BIA context.[69]

78. In *Harte Gold,*[70] Penny J. of the Ontario Superior Court of Justice [Commercial List] provided commentary and guidance regarding the issuance of RVOs. The test he formulated requires the applicant, purchaser, and court officer seeking the approval of the RVO to answer the following questions:

(a) Why is the RVO necessary in this case?

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[66] *Ibid* at para 120.

[67] *Ibid* at para 118.

[68] Re *PaySlate Inc*., 2023 BCSC 608 [*PaySlate*] at paras **[TAB 11]**.

[69] *Ibid* at para 108 **[TAB 11]**.

[70] *Harte Gold Corp (re)*, 2022 ONSC 653 [*Harte Gold*] at para 38 [**TAB 12**].

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable structure?

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (and other intangible assets) being preserved under the RVO structure?

79. The relief sought by the Company in the Application provides that if the Stalking Horse Agreement is the successful bid at the conclusion of the SISP, the Company will still be required to return to Court to seek approval of the RVO and that proposed transaction at that time.

80. For clarity, Tool Shed is not seeking approval from the Court at this Application to close the Stalking Horse Agreement should it be the successful bid.

The Break Fee should be accepted

81. The Court has frequently approved break fees in favour of a stalking horse bidder in insolvency proceedings. Break fees reflect not only the cost to the bidder of putting together the stalking horse bid, but often also represent "the price of stability" in a stalking horse sales process - thereby justifying a premium over simply covering the stalking horse bidder's expenses.[71] In the event that the Break Fee is paid, it will be provided as compensation to the Stalking Horse Bidder for the time and resources it has expended in negotiating the Stalking Horse Agreement.[72]

82. The Break Fee as contemplated by the Stalking Horse Agreement represents approximately 5% of the minimum amount payable under the proposed Stalking Horse Agreement.[73] Courts have approved reasonable break fees for Stalking Horse Agreements, including those within the BIA proposal context.[74]

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[71] *Danier Leather*, supra note 54 at para 41 [**TAB 7**].

[72] Second Costello Affidavit, *supra* note 1 at para 122.

[73] *Ibid* at para 122.

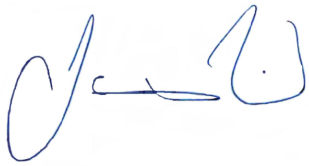
[74] *Danier Leather*, supra note 54 at para 42 [**TAB 7]**.

83. Should the Stalking Horse Bid not be the successful bid in the SISP, the Break Fee should be approved to compensate the Stalking Horse Bidder for its costs, time, effort, and undertaking the risks to pursue the proposed transaction for the benefit of stakeholders.

PART V - CONCLUSION

84. For the reasons set out above, the Company requests that this Honourable Court grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th day of February, 2024



Miller Thomson LLP
Per: James W. Reid and Bryan A. Hosking
Counsel for Tool Shed Brewing Company Inc.

TABLE OF AUTHORITIES

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to January 14, 2024

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to January 14, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of January 14, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 14 janvier 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 14 janvier 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable

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

Creditors may obtain statement

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

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Where assignment deemed to have been made

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

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

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

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

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

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

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

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

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

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

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

Court may not extend time

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

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

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

file a report thereof in the prescribed form with the official receiver, who shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 49.

R.S., 1985, c. B-3, s. 63; 1992, c. 27, s. 28; 2004, c. 25, s. 34(F).

la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49.

L.R. (1985), ch. B-3, art. 63; 1992, ch. 27, art. 28; 2004, ch. 25, art. 34(F).

Removal of directors

64 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor in respect of whom a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or is likely to act inappropriately as a director in the circumstances.

Révocation des administrateurs

64 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur d'un débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) s'il est convaincu que l'administrateur, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de faire une proposition viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

R.S., 1985, c. B-3, s. 64; 1992, c. 27, s. 29; 1997, c. 12, s. 40; 1999, c. 31, s. 20; 2005, c. 47, s. 42.

Vacances

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

L.R. (1985), ch. B-3, art. 64; 1992, ch. 27, art. 29; 1997, ch. 12, art. 40; 1999, ch. 31, art. 20; 2005, ch. 47, art. 42.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la personne peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le

obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

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

dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Court may order security or charge to cover certain costs

64.2 (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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

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

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

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

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnément à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement

(b) the insolvent person has made good faith efforts to renegotiate the provisions of the collective agreement; and

(c) the failure to issue the order is likely to result in irreparable damage to the insolvent person.

c) elle subirait vraisemblablement des dommages irréparables s'il ne la rendait pas.

No delay on vote on proposal

(3) The vote of the creditors in respect of a proposal may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent has not expired.

Vote sur la proposition

(3) Le vote des créanciers sur la proposition ne peut être retardé pour la seule raison que le délai imparti par les règles de droit applicables aux négociations collectives entre les parties à la convention collective n'a pas expiré.

Claims arising from revision of collective agreement

(4) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the insolvent person, the bargaining agent that is a party to the agreement has a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Réclamation consécutive à la révision

(4) Si les parties acceptent de réviser la convention collective après que des procédures ont été intentées sous le régime de la présente loi à l'égard d'une personne insolvable, l'agent négociateur en cause est réputé avoir une réclamation à titre de créancier non garanti pour une somme équivalant à la valeur des concessions accordées pour la période non écoulée de la convention.

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Ordonnance visant la communication de renseignements

(5) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Maintien en vigueur des conventions collectives

(6) Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du

dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Avis aux créanciers

(3) La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

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

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

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

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

Facteurs à prendre en considération

(4) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

Autres facteurs

(5) Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Personnes liées

(6) Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Autorisation de disposer des actifs en les libérant de restrictions

(7) Le tribunal peut autoriser la disposition d'actifs de la personne insolvable, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction à l'égard des employeurs

(8) Il ne peut autoriser la disposition que s'il est convaincu que la personne insolvable est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 60(1.3)a) et (1.5)a) s'il avait approuvé la proposition.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266.

Restriction à l'égard de la propriété intellectuelle

(9) Si, à la date du dépôt de l'avis d'intention prévu à l'article 50.4 ou du dépôt d'une copie de la proposition prévu au paragraphe 62(1), la personne insolvable est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (7), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 44; 2007, ch. 36, art. 27; 2018, ch. 27, art. 266.

Court of Queen's Bench of Alberta

Citation: Castle Rock Research Corporation (Re), 2012 ABQB 208

Date: 20120329
Docket: BK03 115587
Registry: Edmonton

In the Matter of the Notice of Intention to make a proposal filed by Castle Rock Research Corporation

Under the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended

Between:

Castle Rock Research Corporation

Applicant

- and -

A.G.C. Investments Ltd. And Osman Auction Inc.

Respondents

And Between:

A.G.C. Investments Ltd.

Applicants
(Cross-Application)

- and-

Castle Rock Research Corporations and BDO Canada Limited in its capacity as Trustee under the Notice of Intention to make a proposal

Respondents
(Cross-Application)

Reasons for Judgment
of the
Honourable Mr. Justice R. Paul Belzil

The Applications

[1] Castle Rock Research Corporation seeks an order for extending the time within which it must file a Proposal to Creditors. Its main creditor A.G.C. Investments Ltd. has filed a cross-application seeking an order declaring that the time for Castle Rock to file a Proposal to Creditors has expired.

Factual Background

[2] Castle Rock filed a Notice of Intention (NOI) to make a proposal to its creditors on February 15, 2012 pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended (*BIA*).

[3] On February 28, 2012 Burrows, J. issued an order naming BDO Canada Ltd. as the Interim Receiver of Castle Rock.

[4] Pursuant to section 50.4(8) Castle Rock is required to file a proposal to its creditors within 30 days of the filing of a Notice of Intention to make a proposal unless this time is extended pursuant to section 50.4(9). On March 16, 2012 Veit, J. issued a Consent Order extending the deadline for filing of the proposal to March 23, 2012.

[5] On March 20, 2012 the Interim Receiver filed a Second Report. Paragraphs 6 to 10 of which read as follows:

> 6. That since filing the Trustee's Report of March 9, 2012, the Trustee has been provided weekly Monitoring Reports in adherence with the Monitoring Program initiated by the Trustee;
>
> 7. That the Debtor and management have been co-operative in addressing queries in relation to the Monitoring Reports which have satisfied the Trustee;
>
> 8. That while the Trustee has expressed to the Debtor concerns over the financial reporting system utilized by the Debtor, management indicates that they are

prepared to take the necessary steps to implement a suitable financial reporting system;

9. That since filing of the Trustee's Report on March 9, 2012, the Trustee is in receipt of a Business Plan dated March 6, 2012 which provides detailed information about the Company Plan including Profile, Products and Services, Marketing Plan and the Future Direction of the Company. The Trustee has not had an opportunity to review and assess that Business Plan; and

10. That it is the Trustee's opinion that the Debtor is acting in good faith and with due diligence and that the Debtor will be able to make a viable Proposal if an additional extension were granted.

[6] The application and cross-application were heard by me on March 22, 2012. Counsel for BDO confirmed that its opinion contained in the Second Report remains unchanged. Counsel for Osman Auction Inc. supports the Castle Rock Application.

[7] I undertook to render a decision on March 28 and with the consent of all parties, extended the deadline for filing of the proposal to 4:30 p.m. that day.

Discussion

[8] It is common ground that the Court may grant an extension for the filing of a Proposal to Creditors not exceeding 45 days if three requirements outlined in section 50.4(9) are satisfied:

a. The insolvent person has acted, and is acting, in good faith and with due diligence;

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

c. No creditor would be materially prejudice if the extension being applied for were granted.

[9] It is also common ground that Castle Rock bears the burden of establishing its entitlement to an extension.

[10] As part of its Application, Gautam Rao, President and CEO of Castle Rock swore an affidavit on March 9, 2012 in which he deposed that since the filing of Castle Rock's NOI, it has continued to operate in the ordinary course of business without the necessity for debtor in possession financing.

[11] He further deposed that Castle Rock does not anticipate the need for further financing in the course of the proposal proceedings.

[12] In the course of argument, counsel for Castle Rock provided two License Agreements both dated February 24, 2012. The first provides for payments to Castle Rock of $600,000.00 together with royalty payments and the second 1.5 million dollars together with royalty payments.

[13] In his affidavit Rao also deposed to other pending business opportunities which were not specified and that senior staff within the company are supportive.

[14] Finally, he deposed that the company is proceeding in good faith, with due diligence and that no creditor will be prejudiced if an extension were granted.

[15] Andrew Clark, the President of A.G.C., deposed in an affidavit that Castle Rock is being mismanaged and that funds are being transferred to a related company in India. He also deposed that no proposal would be acceptable to A.G.C.

[16] Clark was questioned on his affidavit and acknowledged that the existence of the related company in India was known to him and indeed the India company is referred to in Castle Rock's financial statements.

[17] It is highly significant that the Trustee supports this request for the extension. BDO was appointed by Court Order and as such is acting as an Officer of the Court.

[18] It has expressed no concern that Castle Rock is acting in bad faith or without due diligence and if it is suspected that this was the case, it would be duty bound to report this to the Court. The Second Report asserts that Castle Rock will make a proposal.

[19] A.G.C. argues that it is suffering material prejudice because Castle Rock is transferring funds to its related company in India.

[20] As noted above, this was well known to Clark before he invested in Castle Rock and therefore this cannot constitute material prejudice.

Conclusion

[21] I find that Castle Rock has met the burden of establishing that an extension of time for the filing of the proposal to creditors should be granted. The cross-application by A.G.C. is

dismissed. Counsel may speak to the terms of the Order granting the extension, including costs.

Heard on the 22nd day of March, 2012.
Dated at the City of Edmonton, Alberta this 28th day of March, 2012.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

Michael McCabe, Q.C.
Reynolds Mirth Richards Farmer LLP
for the Applicant

Darren Bieganek, Q.C.
Duncan & Craig LLP
for the Respondent

Rick Reeson, Q.C.
Miller Thomson
Independent Counsel for BDO

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

BEFORE: Justice H. A. Rady

COUNSEL: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

Introduction

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

Preliminary Matter

[2] As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

d) the D & O charge

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
COURT FILE NO.: 33-2618511
DATE: 2020/03/09

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENEDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

HEARD: March 6, 2020

DECISION AND REASONS

[1] The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements ("DIP financing").

[2] Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Act*[1]. Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

[3] The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group

[1] RSC 1985, C. B-3 as amended

proceedings without initial court approval while, subject to compliance with the terms of the Act, it attempts to put itself in the position to make a proposal. But the Act only permits this for 30 days within which time it is necessary to either put together a proposal or to obtain further approval and protection from the court.[5]

[16] The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the Act. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including those set out in subsection (5). That subsection reads as follows:

> **Factors to be considered**
>
> (5) In deciding whether to make an order, the court is to consider, among other things,
>
> - (a) the period during which the debtor is expected to be subject to proceedings under this Act;
> - (b) how the debtor's business and financial affairs are to be managed during the proceedings;
> - (c) whether the debtor's management has the confidence of its major creditors;
> - (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
> - (e) the nature and value of the debtor's property;
> - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> - (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[17] It is the position of the noteholders that the proposed interim financing would materially prejudice the noteholders by placing another $2.3 million in debt in priority to its security. This of course is inherent in approving DIP financing and is not the only consideration.[6] Still it is part of the analysis. $2.3 million in additional debt over the next month is significant. It is also the position of the noteholders that they have no confidence in management or the ability of that management to successfully bring the project to fruition and generate positive cash flow.

[18] I appreciate the concerns of the noteholders. I share the concern that there is a significant risk inherent in cultivating a first crop of cannabis and finding buyers. This is an industry in its infancy and the struggles of some of the established companies in this area are public knowledge. In fact, on the day of the hearing Canopy Growth Corp. announced it was closing two greenhouse facilities in British Columbia and cancelling a project planned for Ontario. [7]

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[5] See *Cumberland Trading Inc. (Re)*, (1994) 23 CBR (3d) 225 (Ont. Ct., Gen Div., Commercial List)
[6] See *OVG Inc., (Re)*, 2013 ONSC 1794
[7] See: https://business.financialpost.com/cannabis/canopy-growth-lays-off-500-workers-shuts-massive-b-c-greenhouse-facilities

CITATION: Re P.J. Wallbank Manufacturing Co. Limited, 2011 ONSC 7641
COURT FILE NO.: CV-11-0123-OTCL
DATE: 20111221

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF THE Proposal of P.J. Wallbank Manufacturing Co. Limited

BEFORE: D. M. Brown J.

COUNSEL: J. Fogarty and S-A. Wilson, for the Applicant

G. Moffat, for General Motors LLC

T. Slahta, for TCE Capital Corporation

HEARD: December 21, 2011

REASONS FOR DECISION

I. Overview of motion for approval of DIP financing

[1] P.J. Wallbank Manufacturing Co. Limited, a manufacturer of springs and wireforms for automotive and other industrial customers, filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* on December 12, 2011. Doyle Salewski Inc. was appointed as Proposal Trustee. Wallbank moves under section 50.6 of the *BIA* for authorization to borrow under a DIP credit facility from General Motors LLC, as well as the granting of an Interim Financing Charge against its property in favour of GM.

[2] This motion was brought on less than 24 hours notice. From the affidavits of service filed, I am satisfied that notice was given to interested parties in accordance with my directions of yesterday.

II. The Debtor and its creditors

[3] Since 2008 Wallbank has experienced a downturn in its business linked, in part, to a slowdown in the automotive sector and, more recently, to the loss of a major customer this past summer.

[4] Wallbank has several secured creditors. It owes Danbury Financial Services Inc. about $720,000.00 under a credit facility. Until September, 2011, TCE Capital Corporation factored

…

(5) In deciding whether to make an order, the court is to consider, among other things,

(*a*) the period during which the debtor is expected to be subject to proceedings under this Act;

(*b*) how the debtor's business and financial affairs are to be managed during the proceedings;

(*c*) whether the debtor's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(*e*) the nature and value of the debtor's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the trustee's report referred to in paragraph 50(6)(*b*) or 50.4(2)(*b*), as the case may be.

B. Consideration of the various factors

B.1 Likely duration of NOI proceedings

[13] The evidence indicates that Wallbank likely will not be subject to NOI proceedings past the end of February, 2012. It requires the DIP Facility to continue operating, and by its terms that facility has a maximum term of 60 days from the date of filing the NOI. The cash-flow statement filed by Wallbank projects that it will have drawn fully on the DIP Facility by the middle of next February.

B.2 Management of Wallbank's affairs

[14] Although current management will continue to operate Wallbank, as described above the Accommodation Agreement places significant restrictions on the company's operations. Simply put, GM wants to use the next 45 days or so to build up an inventory of needed component parts and is insisting that any other customer who wishes to order product from Wallbank must do so on the credit and pricing terms set out in the Accommodation Agreement. Those terms require very prompt payment of receivables and an agreement to pay a higher price for Wallbank's products.

[15] The materials do not disclose how many employees presently work at Wallbank. Some employees are members of the Canadian Auto Workers. The Proposal Trustee reports that a dispute currently exists whereby the CAW is not permitting Wallbank to ship product to Gates Corporation, a result of which could be a reduction by $40,000.00 in the opening accounts receivable forecast in the cash-flow statement.

[23] TCE does not oppose the order sought, as revised, provided the order is made subject to three conditions:

(i) The order would be without prejudice to TCE's asserted position with respect to its ownership of factored receivables;

(ii) Wallbank, TCE and GM will agree on a process for the collection and remittance of accounts receivable; and,

(iii) GM waives its rights of set-off relating to pre-November 30, 2011 accounts receivable purchased by TCE, save and except for Allowed Set-Offs as defined in section 2.4(B) of the Accommodation Agreement.

Both Wallbank and GM are amenable to those conditions. I accept those conditions and make them part of my order.

B.7 Prejudice to creditors as a result of the Interim Financing Charge

[24] Although, like any charge, the Interim Financing Charge will impact all creditors' positions to some degree, the terms of the charge's priority have been negotiated to minimize the prejudice to Danbury and TEC. As well, given the immediate cessation of Wallbank's activities would result from the failure to approve the DIP Facility and Interim Financing Charge, on balance the benefit to all stakeholders of the proposed DIP Facility significantly outweighs any prejudice.

[25] Sections 2.1 and 2.2 of the Accommodation Agreement contemplated that both components of the Initial Financing advanced by GM – professional fees and the funding of operations – would be secured by the Interim Financing Charge. Section 50.6(1) of the *BIA* provides that a charge "may not secure an obligation that exists before the order is made". Wallbank advised that all funds made available by GM for professional fees are unspent and remain in counsel's trust account. Wallbank intends to return those funds to GM which plans, in turn, to advance similar amounts to Wallbank in the event a DIP Order is made. GM confirmed that the amounts advanced to date under section 2.1(C) of the Accommodation Agreement would not be subject to the Interim Financing Charge, but would be secured by the security described in the opening language of section 2.1 of the Accommodation Agreement. In my view the proposed treatment of the funds relating to professional fees is consistent with the intent of section 50.6(1) of the *BIA* and I approve it.

B.8 Conclusion

[26] For these reasons I am satisfied that it is appropriate to authorize Wallbank to enter into the DIP Facility agreement and to grant the proposed Interim Financing Charge. Accordingly, an order shall go in the form submitted by the applicant, which I have signed.

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

SUPERIOR COURT OF JUSTICE - ONTARIO

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

BEFORE: Penny J.

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

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

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

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

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

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

(a) approve a stalking horse agreement and SISP;

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

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

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

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

Background

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

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

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

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

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

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

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

The Stalking Horse Agreement

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

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

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

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

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

The SISP

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

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

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

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

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

(2) Bid deadline: February 22, 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Is there a better viable alternative?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Break Fee

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

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

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

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

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

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

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

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

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

Financial Advisor Success Fee and Charge

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

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

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

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

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

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

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

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

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD &
DECIDED: JUNE 29, 2009

E N D O R S E M E N T

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two

convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

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[1] (1991), 7 C.B.R. (3d) 1 (C.A.).

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the

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[2] *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 2.
[3] *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.
[4] *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co.*, 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.).
[5] Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.,* 2014 BCSC 1855

Date: 20141002
Docket: S-139627
Registry: Vancouver

Between:

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd.

Petitioners

And

P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Receiver, Ernest & Young Inc.:	J.D. Schultz J.R. Sandrelli
Counsel for the Petitioners:	D.E. Gruber
Counsel for Valiant Trust Company:	J.D. Shields
Counsel for 0964502 B.C. Ltd.:	C.K. Wendell

[19] The Receiver seeks an order approving the SH Agreement and vesting the assets in Aquilini, subject to the Bidding Procedures and no better bid being received.

Analysis

The Stalking Horse Bid

[20] The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.,* 2012 ONSC 1750 at para. 7 [*CCM*]; *Bank of Montreal v. Baysong Developments Inc.,* 2011 ONSC 4450 at para. 44 [*Baysong*]; *Re Digital Domain Media Group Inc.*, 2012 BCSC 1567.

[21] The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) at para. 16:

a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

b) the efficacy and integrity of the receiver's sale process by which offers were obtained;

c) whether there has been unfairness in the working out of the process; and

d) the interests of all parties.

[22] The Receiver submits that the SH Agreement is reasonable based upon the appraisals it has received. If the SH Agreement is approved, the Receiver proposes to follow the Bidding Procedures by publishing several newspaper advertisements and retaining the firm of Colliers International ("Colliers"), a well know firm that provides a variety of real estate services, to assist in the marketing of the project to

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PaySlate Inc. (Re),*
2023 BCSC 608

Date: 20230414
Docket: B220504
Estate No.: 11-2891281
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of PaySlate Inc.

Corrected Judgment: The text of these Reasons for Judgment has been corrected at paras. 1, 11 and 86 on April 18, 2023.

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for PaySlate Inc.:	T. Bennett L. Beatch, Articled Student
Counsel for Paysafe Merchant Services Inc.:	P. Bychawski C.I. Hildebrand
Counsel for the Proposal Trustee, Grant Thornton Limited:	R. Gurofsky G.P. Nesbitt
Counsel for Ayrshire Real Estate Management Inc.:	S. Collins E. Wilson
Place and Dates of Hearing:	Vancouver, B.C. March 10, 22, 27, 28 and 31, 2023
Place and Date of Judgment:	Vancouver, B.C. April 14, 2023

> following are some initial suggestions as to questions the courts should be asking: …
>
> - Has the monitor in its report offered an evidence-based rationale as to why the proposed transaction is at least equivalent to respecting the rights and remedies of creditors under a plan of arrangement?
>
> …
>
> [Emphasis added]

[99] Lastly, and also important to this case, careful consideration should be given to proposed releases where creditors have no opportunity to vote (and to that I would add, in the instant circumstances where counterparties to Retained Contracts have not been served with the application):

> [at 23]
>
> Also of concern are the broad releases in respect of potential liability claims being granted against directors, officers, insolvency professionals, and third-parties, without the reasoning that usually underpins such broad releases, including contributions to the value of the assets that remain to satisfy creditors' claims. Prior to RVO, the courts had established clear tests for endorsing broad liability releases, which both protect the integrity of the insolvency system and encourage parties to negotiate in the shadow of liability risk. The tests have included: whether the claims to be released are rationally connected to the purpose of the plan; whether the plan can succeed without the releases; whether the parties being released contributed to the plan; whether the releases benefit the debtors as well as the creditors generally; whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and whether the releases are fair, reasonable, and not overly-broad.
>
> While willful misconduct and fraud liability are often excluded from the release, in a number of the RVO cases, releases are being granted in respect of a broad range of statutory claims without discussion of potential prejudice from such releases or reference to the developed jurisprudence. As one commentary observes, courts have granted broad releases in RVO transactions, thereby achieving third-party releases without creditors being asked to vote on this issue, undermining one of the key criteria for approval that the courts have used.
>
> [Emphasis added]

Factors to be Considered

[100] What other factors should be considered on an application to approve an RVO other than those discussed above?

[101] In *Quest*, Fitzpatrick J. was clear that RVOs should not be employed or approved in a *CCAA* restructuring "simply to rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests", nor should it be used to expedite the debtor's desired result without regard to the remedial objectives of the *CCAA*": para. 171. The analysis should consider whether the relief is appropriate in the circumstances and whether the stakeholders are treated fairly and reasonably as the circumstances permit.

[102] After considering the balance between competing interests and the good faith of the debtor Quest who acted with due diligence to promote the best outcome for all stakeholders, Fitzpatrick J. determined, in the absence of any other offers, that the proposed RVO in that case was the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group that includes Southern Star and Dana [who opposed the RVO]": para. 172.

[103] In *Harte Gold*, Penny J. said at para. 23, factors to consider when an RVO is sought in a *CCAA* context include those set out in s. 36(3) of the *CCAA*, excerpted below:

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

[104] Justice Penny also said the s. 36(3) *CCAA* criteria correspond to the principles set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137, 1991 CanLII 2727 (C.A.) for the approval of asset sales in an insolvency context. He did not confine his remarks to *CCAA* cases:

> [21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727(ONCA) for the approval of the sale of assets in an insolvency scenario:
>
> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:
>
> see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.
>
> [Emphasis added]

[105] In *Blackrock Metals*, Paquette C.J.Q.S. also referred to the s. 36(3) *CCAA* factors as well as the additional factors discussed by Penny J. in *Harte Gold* when scrutinizing a proposed RVO: at paras. 100-124.

[106] Likewise, in *Nemaska*, Justice Gouin also said approval should be considered with the s. 36 criteria in mind, subject to determining, whether sufficient efforts to get the best price have been made and whether the parties acted providently, the efficacy and integrity of the process followed, the interests of the parties, and whether any unfairness resulted from the process: see, e.g., paras. 3-8, 46, 49-54, 57.

[107] In the context of the *BIA*, the following questions were outlined by Penny J. in *Harte Gold* as those that should be answered by the debtor, proposed purchaser, and the court's officer:

> [38] … The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[108] In my opinion, those same factors considered in the *CCAA* context apply to the RVO proposed in the context of PaySlate's NOI proceeding.

[109] With this discussion in mind, I turn now to consider whether, apart from the service issue, PaySlate has established that the RVO is appropriate in this case.

Determination

Position of PaySlate and Ayrshire

[110] I will begin this section by setting out PaySlate's position, supported by Ayrshire, that it has established the necessary prerequisites for the RVO.

[111] PaySlate says that its primary assets are its intellectual property, tax attributes, and value as a going concern (encompassing its Retained Contracts with its critical suppliers and customers). The proposed transaction, PaySlate and Ayrshire maintain, is structured as an RVO in order to enable PaySlate to continue its business operations under new ownership with minimal disruption and to avoid losing PaySlate's tax attributes, which they submit, are otherwise non-transferable. PaySlate's tax attributes, they say, are an important factor supporting the RVO. There are no licenses or permits as in other cases where RVOs have been granted.

[112] According to PaySlate and Ayrshire, the proposed transaction is the only viable option available to PaySlate and provides the greatest recovery available and greatest certainty to PaySlate's emergence from these proceedings as a going concern.

[113] They submit that since PaySlate has limited liquidity, its financial position does not allow it to meet its obligations to conduct a further SISP or use an alternative process to find an alternative transaction that could lead to a proposal. They submit that PaySlate has provided appropriate evidence of value to support the consideration offered by Ayrshire and to demonstrate there is nothing available for unsecured creditors in any other scenario.

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.