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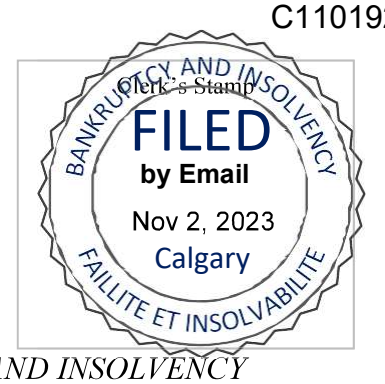

COURT FILE NUMBER	~~25-2979735~~
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
APPLICANTS	GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Suite 2700, Brookfield Place 255 – 6th Avenue SW Calgary, AB T2P 1N2 Solicitors: Randal Van de Mosselaer / Emily Paplawski Phone: 403.260.7000 / 7071 Email: rvandemosselaer@osler.com / epaplawski@osler.com Matter: 1247318

APPLICATION BEFORE THE HONOURABLE JUSTICE SIDNELL ON NOVEMBER 8, 2023 AT 2:00 PM ON THE COMMERCIAL LIST

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the applicants, Griffon Partners Operation Corp. ("**GPOC**"), Griffon Partners Holding Corp. ("**GPHC**"), Griffon Partners Capital Management Ltd. ("**GPCM**", and together with GPOC and GPHC, the "**Griffon Entities**"), Stellion Limited ("**Stellion**"), 2437801 Alberta Limited, 2437799 Alberta Limited, 2437815 Alberta Limited (together with Stellion, 2437801 Alberta Limited and 2437799 Alberta Limited, the "**Shareholder Corporations**"), and Spicelo Limited ("**Spicelo**") (collectively, the "**Applicants**"). The Applicants filed Notices of Intention to Make a Proposal (the "**NOIs**", and each, an "**NOI**") under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "**BIA**") on August 25, 2023 (the "**Proposal Proceedings**").

2. The Applicants now seek an Order, among other things:

   (a) extending the time within which the Applicants are required to file a proposal (the "**Stay Period**") to December 23, 2023; and

   (b) approving the key employee retention plan (the "**KERP**") described in the Third Report (the "**Third Report**") of Alvarez and Marsal Canada Inc. in its capacity as Trustee under the NOIs (in such capacity, the "**Proposal Trustee**") and granting a second ranking Court-ordered charge (the "**KERP Charge**") as security for payments under the KERP, up to the maximum amount of $100,000.

3. The requested extension to the Stay Period and KERP should be granted by this Honourable Court. The Applicants have been acting in good faith and with due diligence in these Proposal Proceedings. They require an extension of the Stay Period to permit the sale investment and solicitation process (the "**SISP**") approved by the Court on October 18, 2023 to proceed. The SISP is currently in its early stages, with the due diligence period commencing on October 30, 2023 and non-binding letters of intent ("**Non-Binding LOIs**") due on December 12, 2023. Any termination of these Proposal Proceedings would be premature and risks needlessly destroying the enterprise value of the Applicants which would otherwise accrue to all stakeholders.

4. There is no prejudice to the Lenders (as defined below) by either the requested extension to the Stay Period or the KERP. By their own admission, and as previously found by the Court, the Lenders are overcollateralized. The Court has, to date, refused to grant the Lenders' continued requests for appointment of a Receiver over Spicelo, and should continue to do so now. It is in the best interests of both the Applicants and their stakeholders that the requested extension to the Stay Period and the KERP are granted.

II. FACTS AND BACKGROUND

5. The NOIs at issue in this case derive from financial difficulties encountered by the Griffon Entities. All of the Griffon Entities are private corporations existing under the laws of the Province of Alberta, with their registered offices in Calgary, Alberta. GPCM is the ultimate parent company of the Griffon Entities. GPHC and GPOC are wholly-owned, direct subsidiaries of GPCM. [1]

> First Affidavit of Daryl Stepanic, sworn September 14, 2023 (the "**First Stepanic Affidavit**") at para 6

6. Each of the Griffon Entities (other than GPHC) has the same four directors: Elliott Choquette, Jonathan Klesch, Trevor Murphy and Daryl Stepanic, all of whom have been directors of the Griffon Entities since the incorporation of each company in 2022. GPHC has one additional director, Dave Gallagher, who is a nominee of Signal (as defined below).

> First Stepanic Affidavit at para 7

7. GPCM is wholly owned by the four Shareholder Corporations, which are in turn each legally or beneficially owned by a director of the Griffon Entities. All of the Shareholder Corporations are incorporated pursuant to the laws of Alberta except for Stellion, which is incorporated pursuant to the laws of the Republic of Cyprus and extra-provincially registered in Alberta.

> First Stepanic Affidavit at paras 8-9

[1] The First Stepanic Affidavit (without exhibits) can be found at Exhibit "A" to the Third Stepanic Affidavit (as defined below) and includes a simplified corporate chart at paragraph 10 showing the Applicants' organization.

8. Spicelo is an investment company incorporated pursuant to the laws of Cyprus and is extra-provincially registered in Alberta. Spicelo is related to Stellion (one of the Shareholder Corporations) in that both Spicelo and Stellion are beneficially owned by Mr. Klesch, who is a director of each of the Griffon Entities.

First Stepanic Affidavit at para 11

9. As discussed more fully below, all four of the Shareholder Corporations and Spicelo are guarantors in respect of the principal obligation of the Griffon Entities.

The Business of the Applicants

10. The business of the Griffon Entities is the exploration and development of light oil and natural gas liquids in the Viking formation in western Saskatchewan and eastern Alberta. All the Griffon Entities' oil and gas interests are held in the name of or otherwise through GPOC, which conducts all business and operations on behalf of the Griffon Entities.

First Stepanic Affidavit at para 13

11. GPOC holds rights in more than 120,000 acres in the Viking light oil and natural gas fairway. As at December 31, 2022, the Griffon Entities had total proved reserves of approximately 5.75 million barrels of oil equivalent ("**MBOE**") and total proved plus probable reserves of approximately 9.40 MBOE. The net present value of future net revenue before taxes discounted at a rate of 10% of such proved reserves is approximately $70.7 million and proved plus probable reserves is $119.3 million.

First Stepanic Affidavit at paras 14, 50

12. The Griffon Entities' average daily production for the year ended December 31, 2022 totalled 1,679 barrels per day, comprised of approximately 30% light oil, 50% natural gas, and 20% natural gas liquids. All the Griffon Entities' commodity production is marketed and sold by Trafigura Canada Limited ("**Trafigura**") pursuant to three marketing agreements.

First Stepanic Affidavit at paras 16-17

13. The Shareholder Corporations and Spicelo are investment corporations. The only assets held by the Shareholder Corporations are their respective shares of GPMC. The only significant assets held by Spicelo are approximately 1.125 million common shares in Greenfire Resources Inc. ("**Greenfire")**.

First Stepanic Affidavit at paras 19-20

14. On September 20, 2023, Greenfire closed a business combination with M3-Brigade Acquisition III Corp., a New York Stock Exchange ("**NYSE**") listed special purpose acquisition company. The common shares of the newly combined company ("**New Greenfire**") commenced trading on the NYSE on September 21, 2023. Pursuant to the terms of the business arrangement, Spicelo will receive its proportionate share of US$75 million for a total pre-tax payment of US$6.6 million and approximately 5.5 million common shares in New Greenfire (the "**New Greenfire Shares**"), in each case upon tendering its common shares in Greenfire.

First Stepanic Affidavit at paras 64-70

Principal Indebtedness of the Applicants

15. As of June 30, 2023, the Griffon Entities had total assets having a book value of approximately $69 million CAD and liabilities of approximately $75 million CAD.

First Stepanic Affidavit at paras 23-24

(a) Trafigura Loan Agreement

16. GPOC is indebted to Trafigura and Signal Alpha C4 Limited ("**Signal**", and together with Trafigura, the "**Lenders**") pursuant to a Loan Agreement executed July 21, 2022 (as amended, the "**Loan Agreement**"). As at August 16, 2023, approximately USD $37.9 million (approximately CAD $51.6 million) is outstanding under the Loan Agreement.

First Stepanic Affidavit at paras 11, 30

17. GPOC's obligations under the Loan Agreement are secured by a Fixed and Floating Charge Debenture over all of GPOC's present and after-acquired real and personal property.

First Stepanic Affidavit at para 28

18. To further secure the obligations under the Loan Agreement, GPHC and GPCM each provided the Lenders with: (i) a full unconditional guarantee of the obligations of GPOC, each of the Shareholder Corporations, Spicelo, and GPCM or GPHC; (ii) a fixed and floating charge debenture granting a security interest over all present and after-acquired real and personal property; and (iii) a pledge in respect of all securities in the capital of GPHC or GPOC and any proceeds derived.

First Stepanic Affidavit at paras 28-29

19. In addition to the foregoing, all of the Shareholder Corporations and Spicelo each provided the Lenders with a Limited Recourse Guarantee and Share Pledge Agreement pursuant to which all of GPOC's obligations under the Loan Agreement were guaranteed, and such guarantees were secured by, in respect of the Shareholder Corporations, a pledge of their securities in the capital of GPCM and any proceeds derived therefrom and, in respect of Spicelo, a pledge of all of the Greenfire Shares (and, currently, New Greenfire Shares) and any proceeds derived therefrom.

First Stepanic Affidavit at para 29

(b) Tamarack Promissory Note

20. The Griffon Entities' current oil and gas production and related assets were acquired by GPOC from Tamarack Valley Energy Ltd. ("**Tamarack**") for a purchase price of $70 million. This purchase was funded in part by financing from the Loan Agreement and in part by a Subordinated Secured Promissory Note in the amount of $20 million granted by GPOC in favour of Tamarack (the "**Subordinated Tamarack Note**"). The Subordinated Tamarack Note bears interest at a rate of 12% annually until the maturity date of July 21, 2025. Any unpaid interest when due bears interest at the interest rate plus 2% per annum during the period in arrears. As of August 16, 2023, approximately CAD $22.7 million is

outstanding under the Subordinated Tamarack Note. The Subordinated Tamarack Note is secured against the property of GPOC.

First Stepanic Affidavit at paras 31-32

21. Pursuant to an Intercreditor Agreement between GPOC, Tamarack, and the Collateral Agent for the Lenders under the Loan Agreement, the Subordinated Tamarack Note is subordinated to all secured obligations under the Loan Agreement.

First Stepanic Affidavit at para 22

Events Leading to the Applicants' Insolvency

22. The Griffon Entities' business strategy depended on economies of scale, which in turn required significant production volumes. The Griffon Entities' business plan in the fall of 2022 was to acquire oil and gas assets within Western Canada capable of generating production volumes of (at minimum) 15,000 to 20,000 boe/d. The Tamarack transaction was expected to add approximately 2,000 boe/d of production to the Griffon Entities' portfolio.

First Stepanic Affidavit at para 36

23. At the time of the Tamarack transaction in summer 2022, the Griffon Entities had three other potential acquisitions subject to letters of intent and ongoing negotiation. Two failed to proceed. Negotiation of the third transaction took significantly longer than expected and a Share Purchase and Sale Agreement was only signed on May 30, 2023.

First Stepanic Affidavit at para 37

24. In order to address the shortfall increase in expected production volumes, in winter 2022, the Griffon Entities implemented a drilling program. However, the two wells produced lower volumes than anticipated while generating significant cost overruns. Then, in November 2022, the Kindersley area of Saskatchewan (where a majority of GPOC's wells are located) experienced unprecedented amounts of snowfall, which cut off access to the well sites. The unprecedented weather conditions exacerbated the high cost of equipment

and materials existing in November 2022, and obtaining the necessary snow removal equipment proved impossible. GPOC was forced to shut-in production at 40% of its operated wells for significant periods of time over the winter, further reducing production levels by approximately 350 boe/d.

First Stepanic Affidavit at paras 38-42

25. The combination of increased drilling costs and severely constrained commodity production volumes significantly impacted the Griffon Entities' available cash flow, causing an already difficult forecast to become dire. As a direct result of the foregoing, starting in November 2022, GPOC was unable to make the required monthly payment of principal to the Lenders pursuant to the Loan Agreement.

First Stepanic Affidavit at para 43

26. While the Lenders waived GPOC's payment defaults in November and December 2022, it was clear to the Griffon Entities that a longer-term solution was required. Accordingly, in January 2023 the Griffon Entities consulted with Houlihan Lokey and retained Imperial Capital ("**Imperial**") and ARCO Capital Partners ("**ARCO**") to assist them in canvassing the market for a sale, investment, or other solution to refinance and/or restructure the Griffon Entities' debt and cash flow issues. Although Imperial and ARCO contacted 54 strategic third parties, no transaction resulted and efforts were terminated in June 2023. At the time, the Griffon Entities were focused on a transaction to address working capital constraints. They did not explore any refinancing or takeout of the Lenders.

First Stepanic Affidavit at paras 44-45

27. Finally, in July 2023, as a result of declining commodity prices, narrowing hedges, and continuing constraints to the Griffon Entities' cash flows, GPOC paid only a portion (64%) of the required monthly interest payment to the Lenders. While GPOC suggested various cash sweep arrangements and partial payment options to the Lenders, none of GPOC's proposals were accepted. On August 16, 2023, the Lenders served each of the Applicants with Demands for Payment and Notices of Intention to Enforce Security.

First Stepanic Affidavit at para 48

28. In response to the Demands and Notices of Intention to Enforce Security, the Applicants each filed an NOI on August 25, 2023.

The Proposal Proceedings

(a) The First Stay Extension Application

29. On September 22, 2023, the Applicants brought an application (the "**First Stay Extension Application**") to the Court for an Order: (i) extending the time for the Applicants to file a proposal to November 8, 2023, (ii) granting an administration charge against the Applicants' property as security for professional fees and disbursements incurred by their counsel, the Proposal Trustee and the Proposal Trustee's counsel, (iii) granting a second ranking charge against the Applicants' property as security for any obligations and liabilities the Applicants' directors and officers may incur in their roles as directors and officers (the "**D&O Charge**"), (iv) approving the Applicants' engagement of Alvarez & Marsal Canada Securities ULC (the "**Transaction Agent**") to assist the Applicants in conducting a (at that time, proposed) SISP, (v) authorizing the Applicants to make certain pre-filing payments; and (vi) administratively consolidating the Applicants' estates.

Third Affidavit of Daryl Stepanic, sworn October 30, 2023 (the "**Third Stepanic Affidavit**") at para 6

30. The Lenders opposed the First Stay Extension Application and filed a cross-application to terminate the Proposal Proceedings as against Spicelo and appoint a Receiver over Spicelo (the "**Receivership Application**").

Third Stepanic Affidavit at para 7

31. On September 22, 2023, the Court granted the Applicants' First Stay Extension Application in full (with the exception only of the D&O Charge) (the "**First Stay Extension Order**"). The Court did not grant the Receivership Application and expressly noted in granting the First Stay Extension Order that:

> In this case I accept that what the applicants are proposing this time is different and includes engaging a refinancing advisor, which could have the impact of repaying the lender in full. Indeed, the proposal (WEBEX AUDIO INTERRUPTED) is indeed to pay all of the creditors in full. I also note that the proposal provides an opportunity for the business to continue to operate and the stay would provide an opportunity for the applicants to attempt to restructure on a going concern basis. I've also considered that the market conditions are improved and that any proposal will be with the full oversight of the proposal trustee. I find this part of the test has been satisfied.
>
> Third Stepanic Affidavit at para 8 and Exhibit C, p. 3:14-21

(a) The SISP Application

32. On October 13, 2023, the Applicants filed an application (the "**SISP Application**") to the Court for an Order approving a SISP to solicit interest in, and opportunities for, the sale of some or all of the assets of the Griffon Entities, an investment in the Griffon Entities, a refinancing of the Applicants through the provision of take out or additional financing, or some combination of the foregoing.

> Third Stepanic Affidavit at Exhibit D (being the Order (Sales and Investment Solicitation Process) granted October 18, 2023 ("**SISP Approval Order"**) at Appendix "A", p. 2)

33. On October 18, 2023, the Court heard the SISP Application, including the Lenders' objections to same. The Court dismissed the Lenders' objections and granted the Applicants' SISP Approval Order in full including, in particular, the timelines provided thereunder. In approving such timelines, the Court held that:

> I am not satisfied -- despite able representations by Ms. Fellowes in particular, I am not satisfied that the secured creditors, her clients, will be harmed in any way by the longer sales process over the shorter one primarily because they are -- they are at least thinly overcollateralized and arguably significantly overcollateralized.
>
> Third Stepanic Affidavit at Exhibit E, p. 44:2-5

34. In accordance with the SISP, the Transaction Agent prepared a list of prospective bidders and circulated an initial public offering summary and a draft nondisclosure agreement to such prospective bidders on or about October 25, 2023. The due diligence period under the SISP commenced on October 30, 2023, with Non-Binding LOIs due on December 12, 2023, and final bids due on January 8, 2024.

Third Stepanic Affidavit at Exhibit D, SISP Approval Order at Appendix "A", p. 2

III. ISSUES

35. This Bench Brief addresses whether this Honourable Court should:

(a) extend the time within which the Applicants are required to file a proposal; and

(b) approve the KERP and grant the KERP Charge.

IV. LAW AND ARGUMENT

A. The Stay Extension Should be Granted

36. The Stay Period of the Applicants expires on November 8, 2023. The Applicants are required to file a proposal within the Stay Period unless they obtain an extension of time from the Court prior to the expiry of the current Stay Period, failing which the Applicants will be deemed to have made an assignment into bankruptcy.

BIA section 50.4(8) **[Tab 1]**

37. Pursuant to section 50.4(9) of the BIA, 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 provided the Court is 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.

BIA section 50.4(9) **[Tab 1]**

38. The Applicants are seeking an extension to the Stay Period to December 23, 2023. The Applicants respectfully submit that the test in section 50.4(9) of the BIA is satisfied and the stay extension ought to be approved because:

(a) the stay extension is required in order for the Applicants to continue advancing the SISP in accordance with the terms and timelines approved by the Court in the SISP Approval Order and prepare and finalize a proposal for the benefit of their stakeholders;

(b) the Applicants have acted in good faith and with due diligence and meet the criteria to make a proposal under the BIA; and

(c) no creditor will be materially prejudiced, and many stakeholders stand to benefit, if the stay extension is granted.

BIA section 50.4(9) **[Tab 1]**

39. The Applicants respectfully submit that this Court should exercise its discretion to grant the stay extension.

(a) The Stay Extension is Required to Present a Proposal for the Benefit of All Stakeholders

40. The proposal sections of the BIA have remedial objectives: they are designed for the reorganization of business entities that are insolvent, so that when the proposal has been accepted by creditors and approved by the court, the business will become viable in an operational sense. When considering whether to extend a proposal stay period or terminate proposal proceedings, matters are to be judged on a rehabilitation basis rather than on a liquidation basis.

Mernick, Re, 1994 CarswellOnt 257 (Ont CJ [Gen Div]) at para 5 **[Tab 9]**
Cantrail Coach Lines Ltd, Re, 2005 BCSC 351 [*Cantrail*] at para 11 **[Tab 3]**

41. Operational viability is the Applicants' goal in these Proposal Proceedings. The stay extension is required to allow the Applicants to conclude the SISP and put forward a viable

proposal to creditors, allowing them to restructure on a going-concern basis and preserve their enterprise value. If the stay extension is granted, the Applicants expect to put forward a viable proposal.

42. "Viable" for the purposes of obtaining the stay extension is not a high threshold. To grant the stay extension, this Court need only conclude that it "might well happen" that if the stay extension is granted, the Applicants can put forward a proposal that would be "reasonable on its face to a reasonable creditor". This is an objective standard that "ignores the possible idiosyncrasies of any specific creditor".

> *Enirgi Group Corp v Andover Mining Corp*, 2013 BCSC 1833 [*Enirgi*] at paras 66, 74 **[Tab 5]**

43. Courts in proposal proceedings have repeatedly emphasized when granting extensions to file proposals that they must take a "broad approach and look at a number of interested and potentially affected parties", even in the face of objecting secured creditors.

> *Cantrail* at para 12 **[Tab 3]**

44. Courts have emphasized that a lone objecting secured creditor cannot be permitted to hamstring a potentially viable proposal proceeding. An extension may be granted to allow the debtor to file a proposal even if a substantial secured creditor has said that it will veto any proposal the debtor could put forward. "That may take place but thus far there is no proposal and [the objecting creditor] will have to make a business decision about its response in the event that one is presented."

> *Enirgi* at para 75 **[Tab 5]**
> *Cantrail* at paras 15-16 **[Tab 3]**

45. A creditor may not "pre-reject" an as-yet-nonexistent proposal.

> *Rizzo, Re*, 2016 ONSC 8192 at para 16 **[Tab 11]**

46. If events during the proposed extension period will allow the debtor to make a superior proposal to the objecting secured creditor, an extension will be granted.

High Street Construction Ltd, Re, 1993 CarswellOnt 210 (Ont SCJ [Gen Div]) at para 5 **[Tab 7]**

47. If the stay extension is granted, the Applicants will likely be able to make a viable proposal to their creditors. The Applicants are at a critical juncture in their restructuring efforts. The SISP was only approved by the Court on October 18, 2023. The due diligence period thereunder commenced on October 30, 2023. Non-Binding LOIs are due for submission by December 12, 2023, with final bids due on January 8, 2024. The SISP is in its early stages and requires the necessary time to be undertaken in accordance with the SISP Approval Order in order to maximize the value of the Applicants for the benefit of stakeholders. Completion of the SISP is a necessary precondition to the ability of the Applicants to fund a viable proposal (including by arranging take-out financing with which to repay the Lenders in full).

48. The Proposal Trustee supports the granting of the stay extension.

(b) The Applicants are Acting in Good Faith and Meet the Criteria for BIA Protection

49. The Applicants have acted in good faith and with due diligence in these Proposal Proceedings. In granting the First Stay Extension Order and dismissing the Receivership Application, the Court found, among other things, that:

> Are the applicants acting in good faith and have they exercised due diligence?
>
> I again find the applicants have satisfied this part of the test…. I note that the proposal trustee has confirmed that in their view the applicants have and are acting in good faith and with appropriate due diligence. I also note or find that the applicants have been taking concrete steps since the NOIs were filed, as more particularly set out in the affidavit filed by the applicants, including, without limitation, bringing this application, identifying and analyzing creditors, providing the proposal trustee with records and books, engaging a refinancing advisor, communications with stakeholders, and other steps to ensure their operations continue to be viable.
>
> Third Stepanic Affidavit at Exhibit C, p. 3:23-34

50. Since the First Stay Extension Order was granted on September 22, 2023, the Applicants have continued to act in good faith and due diligence in these Proposal Proceedings. In addition to developing the SISP, seeking and obtaining the SISP Approval Order, and

commencing the process to implement the SISP in accordance with its terms, the Applicants have:

(a) continued engaging in discussions with a significant number of contractual counterparties, royalty holders, suppliers and creditors regarding these Proposal Proceedings, the status of such party's accounts receivable/payable with the Applicants, and the continuing supply of goods and/or services during these proceedings;

(b) worked with the Proposal Trustee to prepare updated cash flow forecasts;

(c) engaged with the Saskatchewan Ministry of Energy and Resources and the Alberta Energy Regulator regarding the current Proposal Proceedings, the Applicants' regulatory obligations, and their ongoing commitment to meeting same;

(d) negotiated and finalized a one-year extension of the Griffon Entities' directors & officers – commercial insurance policy with Travelers Insurance Company of Canada which had previously expired on September 1, 2023; and

(e) operated the business in the normal course with a view to maximizing the value of the Applicants for the benefit of all stakeholders.

Third Stepanic Affidavit at paras 9(f)-(j)

(c) No Creditor would be Materially Prejudiced by the Stay Extension

51. Finally, section 50.4(9) asks this Court to assure itself that no creditor would be materially prejudiced by the stay extension. This criterion is a balancing test which asks the Court to "weigh[] the interests of the debtor against the hardship incurred on the creditor. This has been referred to as the 'balance of hurt' test."

Lockhart Saw Ltd, Re, 2007 NBQB 93 at para 13 **[Tab 8]**

52. Importantly, the test is not whether a creditor is "prejudiced" but whether a creditor would be "materially prejudiced". A secured creditor seeking to cut short a debtor's time to make

a viable proposal must present evidence that it is "substantially or considerably prejudiced if the extension being applied for is granted", over and above the "simple prejudice" of having its secured obligation stayed.

Cantrail at paras 21-22 **[Tab 3]**

53. The "material prejudice" standard is an objective test that considers the impact of an extension of time on the prejudice suffered by the creditor vis-à-vis the indebtedness and the attendant security. Where there is no evidence that a creditor's security will be lessened if an extension is granted, the creditor will not be materially prejudiced.

Lockhart at para 12 **[Tab 8]**
Enirgi at para 76 **[Tab 5]**
Cantrail at para 22 **[Tab 3]**

54. A creditor alleging material prejudice must put forward particulars of this prejudice, including quantifying the extent of the losses it will suffer as a result of the extension sought by the debtors.

Nortec Colour Graphics Inc, Re, 2000 CarswellOnt 2797 (Ont SCJ [Gen Div]) at paras 14-16 **[Tab 10]**

55. There is no evidence that the Lenders, or any other creditors of the Applicants, will be prejudiced, much less materially prejudiced. In granting the First Stay Extension Order, this Court expressly found that, "although there may be some prejudice to the respondents, it is not material." In granting the SISP Approval Order, including the timelines provided therein, this Court held: "I am not satisfied that the secured creditors . . . will be harmed in any way by the longer sales process over the shorter one primarily because they are -- they are at least thinly overcollateralized and arguably significantly overcollateralized." The Lenders have admitted that "the assets of Spicelo are more than sufficient to repay the Lenders," without even taking into account the assets of the Griffon Entities over which the Lenders hold first lien security.

Third Stepanic Affidavit at Exhibit C, p. 5:3-4 and Exhibit E, p. 44:3-5
Affidavit of Dave Gallagher, sworn September 19, 2023 at para 59

56. This Court has already found that the Lenders have failed to establish that they will be "harmed in any way" by a SISP which is structured to continue into early 2024. The requested extension to the Stay Period is necessary to allow that SISP to proceed. The Applicants have engaged the Transaction Agent and commenced the SISP precisely to secure take-out financing to repay the Lenders the full amount of the debt owing to them. In these circumstances, it is impossible to suggest that the Lenders would be "materially prejudiced" by a stay extension.

57. To the contrary, terminating these Proposal Proceedings and forcing the Applicants into bankruptcy (or permitting the Lenders to appoint a Receiver) would destroy the value which would otherwise accrue to other creditors and stakeholders. The Griffon Entities' business has significant value both currently and on a go-forward basis. An extension of the Stay Period is necessary and appropriate to allow that value to be realized for the benefit of all stakeholders. Accordingly, the Applicants' application to extend the time for the filing of the Proposal ought to be granted.

B. The KERP Charge Should be Granted

58. The Applicants seek approval of a KERP for the Chief Executive Officer of GPOC, Mr. Daryl Stepanic, payable upon achieving (a) the Final Bid Deadline (as defined in the SISP) and (b) the closing of a sale or refinancing transaction under the SISP, and the granting of a second-ranking KERP Charge up to the maximum aggregate amount of $100,000 as security for payments under the KERP.

Proposal Trustee Third Report at paras 17-19, 21

59. Key employee retention plans have frequently been approved in proposal proceedings under the BIA. KERPs are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts.

Danier Leather Inc. (Re), 2016 ONSC 1044 at paras 75-77 **[Tab 4]**

60. In *Re Grant Forest Products Inc*., Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan,

including the following: (a) whether the court appointed officer supports the retention plan; (b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan; (c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring; (d) whether the quantum of the proposed retention payments is reasonable; and (e) the business judgment of the board of directors regarding the necessity of the retention payments.

Grant Forest Products (Re), 2009 CanLii 42046 at paras 8-22. **[Tab 6]**

61. The court's role in assessing a request to approve a KERP is to assess the totality of circumstances to determine whether the process has provided a reasonable means for objective business judgment to be brought to bear and whether the end result is objectively reasonable. Three criteria underlie the factors applicable to approving a KERP or similar incentive program in an insolvency proceeding: (a) arm's length safeguards; (b) necessity; and (c) reasonableness of design. Within these parameters, the scope of the KERP and the amounts allocated to beneficiaries are both highly fact dependent, based on the needs of the particular debtor and the role of the beneficiaries in the business and the restructuring.

Aralez Pharmaceuticals Inc., (Re), 2018 ONSC 6980 at paras 27-30 **[Tab 2]**

62. Here, the KERP was developed by the Applicants, in consultation with the Proposal Trustee and its legal counsel, to facilitate the continued participation of Mr. Stepanic in these Proposal Proceedings. Mr. Stepanic has been CEO of GPOC (the operating entity within the Applicants) since its incorporation in 2022, and is the only full-time contractor of GPOC. He has in-depth knowledge of the Applicants' business and operations, including its finances, relationships, supply chain, regulatory approvals and limitations, contracts, and business plans. Mr. Stepanic has assumed, and will continue to assume through the remainder of the Proposal Proceedings, a significantly increased workload balancing the demands of the SISP and the Proposal Proceedings with his regular responsibilities running the day to day business of GPOC. He will, undoubtedly, have more certain employment opportunities. His continued employment with GPOC is integral to the success of the

refinancing process as he has significant experience and specialized expertise that cannot be easily replicated or replaced.

Proposal Trustee Third Report at para 20

63. The process for developing the KERP was objectively reasonable. The Applicants developed the KERP in consultation with the Proposal Trustee and its legal counsel. In structuring both the quantum and terms of the KERP, the Proposal Trustee reviewed other recent KERPs approved by Canadian courts in restructuring proceeds and confirmed that the KERP is fair, reasonable and consistent with market rates. In addition, the proposed KERP is proportionately reasonable to the size and nature of the business and the milestones are consistent with the timeline set out in the SISP. The total quantum of the KERP payment is modest, is limited to a single individual, and the KERP is structured in a way that reasonably incentivizes retention.

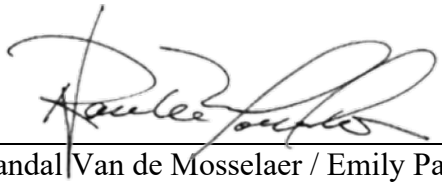
Proposal Trustee Third Report at paras 17-19

64. In the business judgment of the Applicants, the KERP is both objectively reasonable in scope and quantum and is necessary to facilitate the Proposal Proceedings. As such, the Applicants respectfully submit that this Honourable Court exercise its discretion to approve the KERP and grant the requested KERP Charge.

V. CONCLUSION AND RELIEF SOUGHT

65. For the reasons above, the Applicants request the Order sought be granted as it is fair, necessary and reasonable in the circumstances and will enable the Applicants to continue the SISP in accordance with the SISP Approval Order, with the benefit of the experience and knowledge of their “key employee”, all for the benefit of stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2023.



Randal Van de Mosselaer / Emily Paplawski
Osler, Hoskin & Harcourt LLP
Counsel for the Applicant

TABLE OF AUTHORITIES

TAB 1

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 September 13, 2023

Last amended on April 27, 2023

À jour au 13 septembre 2023

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

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

TAB 2

CITATION: Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980
COURT FILE NO.: CV-18-603054-00CL
DATE: 20181121

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC., Applicants

BEFORE: S.F. Dunphy J.

COUNSEL: *Maria Konyukhova and Kathryn Esaw* for Applicants

Jeffrey Levine, for the Official Committee of Unsecured Creditors

David Bish, for Richter Advisory Group, Monitor

Danish Afroz, for Deerfield Management Company, L.P.

HEARD at Toronto: November 16, 2018

REASONS FOR DECISION

[1] This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

[2] For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

[3] The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the

same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

[4] As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

[5] In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors – Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. – possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

[6] These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a "floor" under sale proceeds of approximately $240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately $275 million.

[7] I understand that a motion may be brought in the United States to challenge some aspects of Deerfield's security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield's input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield's pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield's benefit.

[8] Stated differently – Deerfield has significant "skin in the game" when it comes to a KERP or KEIP.

[9] Deerfield's interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield's secured claims.

Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

[10] This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

[11] The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

[12] While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

[13] The Canadian KERP impacts three employee of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be $256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

[14] The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

[15] The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the "super-stretch" targets could rise to as much as $4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of $240 million.

[16] Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

[17] The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company's Board was involved as was the debtor's counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

[18] The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

[19] With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

[20] The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim – and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

[21] In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

[22] Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

[23] KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

[24] The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. “Key” is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out “key” in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise “key” employees;
- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;
- it is easy to overstate the risk of loss of key employees if a “bunker mentality” causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and
- “business as usual” is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

[25] While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;

- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;

- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and

- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more – sometimes covering for colleagues who have being laid off or who have left for greener pastures - while earning a fraction of their former income.

[26] What is wanting to sort out these competing interests is one thing that the court – on its own at least – is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial "eyes and ears of the court" comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

[27] What the court is unable to supply on its own can be summed up in the phrase "business judgment". Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company's business judgment. In my view, the court's role in assessing a request to approve a KERP or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

[28] Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

[29] My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc. (Re),* 2012 ONSC 3767 (CanLII),

relying on the earlier decision of Newbould J. in *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ON SC)[1]. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
d. the employees' history with and knowledge of the debtor;
e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
h. whether the payments under the KERP are payable upon the completion of the restructuring process.

[30] I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

(a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process – from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly

[1] See also Pepall J. (as she then was) in *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para. 49-52.

benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

(b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

[31] In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

[32] The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

[33] The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed

incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

[34] The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

[35] Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

[36] The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

[37] In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

[38] The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

[39] Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

[40] In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of

the debtor companies or completion of the sales process and – for the KERP program at least – the perceived level of retention risk. The Monitor's input was sought at each level of the design and finalization of the programs.

[41] The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees – critical to the Canadian business being sold – would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

[42] The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

[43] At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

[44] I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

[45] The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is $256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of $62.5 million. Payment is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

[46] The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

[47] The KEIP program provides for incentive payments to participants based on the debtors' performance relative to target established for cash flow targets during the

bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold[2], Target, Stretch and Super Stretch).

[48] The real controversy on the motion was in respect of the KEIP.

[49] It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest "super-stretch" level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the "target" level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

[50] They also object to the level of incentives relative to salary as being unacceptably high.

[51] The answer to both of these objections lies in the peculiar facts of this case.

[52] The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight – and the past efforts of the employees – that has made the targets appear to be such an easy goal.

[53] Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

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[2] The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

[54] I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

[55] The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

[56] I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

[57] In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

[58] Order accordingly.

S.F. Dunphy J.

Date: November 21, 2018

TAB 3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***In the Matter of the Proposal of Cantrail Coach Lines Ltd.***
2005 BCSC 351

Date: 20050301
Docket: B050363
Registry: Vancouver

IN THE MATTER OF THE PROPOSAL OF CANTRAIL COACH LINES LTD.

Before: Master Groves

Oral Reasons for Judgment

In Chambers
March 1, 2005

Counsel for Petitioner	H. Ferris
Counsel for Creditor (Volvo)	R. Finlay
Place of Trial/Hearing:	Vancouver

[1] **THE COURT:** This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

[2] Cantrail applies to the Court pursuant to s. 50.4(9) of the ***Bankruptcy and Insolvency Act*** for extension of time for filing a proposal.

[3] VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-

applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

[4] The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

[5] Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as September 11th and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.

[6] Cantrail was apparently able to meet its obligations up until the 16th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20th of January 2005 and perhaps in response to that, but in any event, on the 1st of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81 creditors of Cantrail who have been notified of this application and only Volvo objects.

[7] I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

[8] As indicated, Cantrail is applying purport to s. 50.4(9) of the ***Bankruptcy and Insolvency Act***. That reads and I will take out some of the language that is not necessary:

> The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned in subsection (8), if satisfied on each application that:
>
> > (a) the insolvent person has acted and is acting in good faith and with due diligence;

> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

[9] Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

> The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned 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 expiry of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal before the expiry 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.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

[10] The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in

good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

[11] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of ***Re: N.T.W. Management Group Ltd.*** [1993] O.J. No. 621, a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the ***Act*** and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

[12] I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

[13] Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable

proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

[14] If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the ***Bankruptcy and Insolvency Act***. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

[15] If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the ***Bankruptcy and Insolvency Act*** if that were the case.

[16] If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if

50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[17] Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buy-out of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout -- a proposal which if they voted against they would probably be viewed as irrational businesspeople.

[18] In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

[19] I note the words in the legislation are “a viable proposal”. According to the *Concise Oxford Dictionary* viable means feasible. Viable also means practicable from an economic standpoint.

[20] I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

[21] Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

[22] There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The ***Act*** in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything

other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

[23] That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3rd of March 2004.

[24] It stands to reason from this analysis that the applications of Volvo are dismissed.

"Master J. Groves"

TAB 4

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.

[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.,* Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Re Grant Forest Products Inc., [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc*. involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

TAB 5

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Andover Mining Corp. (Re),*
2013 BCSC 1833

Date: 20131004
Docket: B131136
Registry: Vancouver

In the Supreme Court of British Columbia
in Bankruptcy and Insolvency

In the Matter of the notice of Intention to Make a Proposal of

Andover Mining Corp.

And in the matter of

The Application by Enirgi Group Corporation under ss. 50.4(11) and 47.1(1)(b) of the B*ankruptcy and Insolvency Act*, R.S.C. 1985, c. B-5

Between:

Enirgi Group Corporation

Creditor

And

Andover Mining Corp.

Insolvent Person

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Creditor:	D.R. Brown M. Nied
Counsel for the Insolvent Person:	M.R. Davies
Place and Date of Trial/Hearing:	Vancouver, B.C. September 24, 2013
Place and Date of Judgment:	Vancouver, BC. October 4, 2013

Introduction

[1] Enirgi Group Corporation ("Enirgi") holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover Mining Corp. ("Andover"). One of the notes, in the amount of $2.5 million, was due on October 1, 2012 and it has not been paid. In August 2013 Andover filed an intention to file a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). That proposal expires on October 4, 2013.

[2] This is a decision about two applications related to those notes.

[3] Andover seeks an order pursuant to s. 50.4(9) of the *BIA* for an extension of time for the filing of a proposal for a period of 45 days. According to Andover it has acted, and is acting, in good faith and with due diligence. Further, it would likely be able to make a viable proposal if the extension was granted and no creditor would be materially prejudiced if the extension was granted. Andover also submits that it has significantly more assets than debts and Enirgi has persistently been disruptive of the affairs of Andover as part of a campaign to target the assets of Andover.

[4] The second application is by Enirgi pursuant to s. 50.4(11) of the *BIA*. It seeks declarations that Andover's attempt to file a proposal is immediately terminated, a previous stay of proceedings is lifted, Andover is deemed bankrupt and a trustee in bankruptcy is appointed. The primary basis for Enirgi's application is the submission that Andover will not be able to make a proposal before the expiration of the period in question that will be accepted by Enirgi. Enirgi disputes that Andover has significantly more assets than debts. It also submits that it has a veto over any proposal by Andover because it is the largest creditor, it has lost faith in Andover's ability to manage its assets and it is concerned that Andover is restructuring its affairs to dissipate its assets. In the alternative, if there is to be an extension of Andover's proposal, Enirgi submits that a receiver should be appointed pursuant to s. 47.1 of the *BIA* to ensure transparency and fairness.

[5] Each party submits that its application should supersede the application of the other party. There are also disputes between the parties about a number of factual issues set out in affidavit evidence.

Background

[6] Andover is an advanced mineral exploration company incorporated under the laws of British Columbia in 2003. Its shares have been listed for trading on the TSX Venture Exchange since 2006. As of September 6, 2013 approximately 12,000,000 shares of Andover were issued and outstanding with more than 398 shareholders. Andover had a market capitalization of about $9 million, as of September 14, 2013; its payroll is $2,441 per month. According to publicly available audited financial statements, as of March 31, 2013, Andover had $42.5 million of assets and $9.1 million of liabilities.

[7] Andover has two main assets. It owns 83.5% of Chief Consolidated Mining Company ("Chief") that owns extensive amounts of land and mining equipment in Utah, U.S.A. Andover also owns 100% of the shares of Andover Alaska Inc. ("Alaska"), a company with large land holdings and mineral claims in Alaska, U.S.A. Affidavit evidence from Andover is that it has the prospect of significant and imminent cash flow from more than one project. This is discussed below.

[8] Enirgi is a natural resources development company incorporated under the laws of Canada.

[9] In 2011 and 2012 Andover issued non-interest bearing, unsecured promissory notes to Sentient Global Resources Fund IV ("Sentient"). The first note was dated September 23, 2011 with a principal of $2.5 million and a maturity date of October 1, 2012. The second note was dated April 30, 2012 with a principal of $2.5 million and a maturity date of May 1, 2014. The third note was dated August 31, 2012, the principal was $1.5 million and the maturity date was September 1, 2014.

[10] In September 2012 there were discussions between Andover, Enirgi and Chief in regards to a potential joint venture, with the possibility that Enirgi would take

majority ownership of Andover. A memorandum of understanding was executed and Enirgi commenced a process of due diligence. According to Enirgi, the due diligence revealed a complex joint venture agreement between Chief and another company. Ultimately, in March 2013, the parties were not able to agree on terms that were commercially acceptable to Enirgi. On March 27, 2013 Sentient assigned the above three promissory notes to Enirgi including all of the rights and obligations of Sentient under the terms of the notes. These notes are the subject of the current applications. According to Enirgi, it made a reasonable business decision to cease discussions with Enirgi, it became the assignee of the three promissory notes and it then sought repayment of the first promissory note.

[11] Andover had not paid the first promissory note at this time, March 2013 (and it had not been paid up to the date of the hearing of these applications). According to Andover, the reason it was not paid on the due date was because there was an expectation that Sentient and then Enirgi would become a partner of Andover in the joint venture (or something more significant) and discussions on this were taking place as late as January 2013. The expectation of all parties, according to Andover, was that any agreement would have included cancellation of the first promissory note. Andover says Enirgi knew this and agreed to it.

[12] By letter dated April 5, 2013 Enirgi advised Andover of the assignment of the notes from Sentient to it and that the full amount of the first note (with a maturity date of October 1, 2012) remained outstanding. The letter also expressly put Andover on notice that demand for repayment could occur at any time. According to Andover, Enirgi's demand was made at a meeting in Toronto in May 2013. Andover describes the demand from Enirgi as a "shock" because Andover believed Enirgi acquired the notes from Sentient as part of a process to become a partner with Andover. Because of the short demand period, three days, Andover had no ability to meet the demand. This was the beginning of Enirgi becoming "very aggressive", according to Andover.

[13] In a letter dated May 28, 2013 Andover advised Enirgi that it was making its best efforts to secure funding to repay the first promissory note. On May 30, 2013

Enirgi again demanded repayment of the first promissory note. In a letter of that date Enirgi advised Andover that failure to pay would be considered default and the second and third notes would become immediately due and payable. Enirgi takes the position that, by application of the wording of the other two notes, they are now due and owing. As above, the total for all three notes is $6.5 million and the due date for the second and third notes are May 1, 2014 and September 1, 2014, respectively. Whether Enirgi is correct in its interpretation of the notes and, therefore, all three notes are now due and owing is not an issue to be decided at this time.

[14] At the end of May 2013 Andover received $1.7 million as a result of a private placement. Enirgi objects to the fact that Andover did not make prior public disclosure of Enirgi's demand letter prior to closing the private placement. Andover did not use the funds from the private placement to repay the first note. There is a dispute between the parties as to how the $1.7 million was used.

[15] In a letter dated May 31, 2013 Andover advised Enirgi that it was expecting to receive funds from Chief greater than the amount of the first promissory note. The letter also offered a written undertaking to pay the first promissory note no later than September 3, 2013. On June 3, 2013 Enirgi demanded repayment of the first note, for the third time.

[16] Enirgi commenced this action on June 4, 2013 seeking to recover the total amount of the three promissory notes. At the end of July 2013 Andover filed affidavit evidence that it was engaged at the time in negotiations with third parties to raise funding to pay the $2.5 million of the first promissory note. This payment was expected to occur on or before August 22, 2013. On August 8, 2013 the parties agreed to a Consent Order in the following terms:

> . . .
>
> BY CONSENT the Defendant [Andover] is required to pay the Plaintiff [Enirgi] the amount of CAD $2,604,000 on August 22, 2013 and if that amount is not paid by the Defendant to the Plaintiff as of August 22, 2013 this order shall for all purposes be of the same effect as a judgment of This Honourable Court for the payment of CAD $2,604,000 by the Defendant to the Plaintiff;

. . .

[17] Andover says it agreed to the Consent Order because it expected to receive the funds to pay the Order. However, Enirgi obstructed the negotiations that were ongoing for the loan. Enirgi says that Andover's actions were misleading. These and other disputes between the parties are discussed below.

[18] According to Enirgi, Andover avoided having to meet its obligations pursuant to the first promissory note and the August Consent Order and this resulted in Enirgi losing confidence in Andover. Disclosure of information from the trustee was sought by Enirgi but, according to their submission, only very limited information was provided with regards to Andover's prospects and intentions. For example, Enirgi characterizes a September 6, 2013 letter from Andover as unresponsive and inconsistent with previous statements made by Andover. Enirgi also takes issue with a cash flow statement prepared by the trustee and it is submitted by Enirgi that subsequent requests for disclosure were also not complied with. Enirgi responds, in part, by saying that, as a result of a sophisticated tracking system, Andover has information available to it at a level of detail that is not normally available.

[19] As well, on September 4, 2013, Enirgi sent Andover a proof of claim and requested that Andover approve the claim. The claim was for payment of all three promissory notes as well as court order interest with respect to the first promissory note. In a letter dated September 12, 2013 the trustee acknowledged Enirgi's proof of claim but denied that the second and third promissory notes were due and payable. Further, according to the trustee, the proof of claim should be amended accordingly or it would be denied.

[20] On August 22, 2013 Andover filed a notice of intention to make a proposal under s. 50.4(1) of the *BIA* and a trustee was appointed. It would have been open to Enirgi to enforce the judgment described in the August 8, 2013 Consent Order the following day, August 23, 2013. The notice listed all of the creditors of Andover and the total is $7,476,961.43. Enirgi is listed as the largest single creditor of Andover with a claim of $6.5 million.

[21] During the hearing of these applications on September 24, 2013 counsel for Andover presented an affidavit filed the same day. Attached to the affidavits were two short emails and a letter from the president of Ophir Minerals LLC ("Ophir") in Payson Utah, U.S.A. The letter states:

> The following is a letter stating the intentions of Ophir Minerals LLC and Andover Ventures.. In an attempt to help secure the future of Andover Ventures, Al McKee, CEO of Ophir Minerals LLC, is in the process of securing a three dollar million loan ($3,000,000) privately. This loan will be provided to Gordon Blankstein, Operating Manager for Andover Ventures. This loan will be considered prepayment of royalties due to Andover Ventures through mining operations of Ophir Mineral LLC.; The repayment of the loan will be deducted from the royalties to be paid. The purpose of the loan is to assist in the future financial security between the two companies to ensure future business operations.
>
> [Reproduced as written].

[22] Andover relies on this letter as a basis for meeting its obligation to pay the first promissory note in the amount of $2.5 million. Enirgi points to the use of "in the process" in the letter and submits that the letter is of little weight.

[23] At the conclusion of argument I was advised by counsel that Andover's proposal expired that day, September 24, 2013. I extended the proposal to October 4, 2013.

Analysis

Review of the evidence

[24] There are some significant differences between the parties about the facts in this case. Some of these are portrayed by one party as evidence of bad faith on the part of the other party. These are primarily set out in original and reply affidavits from Gordon Blankstein, the CEO of Andover, and Robert Scargill, the North American Managing Director of Enirgi. There are the usual difficulties preferring one version of events over another on the basis of affidavit evidence. A full trial would be necessary to fully and conclusively decide these issues and this matter was set down for two hours, presumably because of the need to hear at least the application by Andover on the day its proposal expired.

[25] It is not in dispute that Enirgi holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover. One of the notes, in the amount of $2.5 million was due on October 1, 2012 and it has not been paid for the reasons discussed below. Enirgi's right to have the other two notes paid out is in dispute since they are due in 2014; that dispute is not part of the subject applications. All three notes are unsecured, non-interest bearing instruments.

[26] In April or May 2013 Enirgi demanded payment of the first note ($2.5 million). Enirgi made a second demand in May 2013 and a third in June 2013.

[27] In June 2013 Enirgi commenced this action and in August 2013 Andover filed a notice of intention to file a proposal pursuant to s. 50.4(1) of the *BIA.* A trustee was appointed. A Consent Order of this court, dated August 8, 2013, stated that Andover was to pay an amount of $2,604,000 to Enirgi on August 22, 2013.

[28] Andover has not paid the $2.5 million due on the first promissory note (or the amount of $2,604,000) for the reasons discussed below.

[29] I set out some of the factual differences between the parties as reflected in the affidavit evidence and my conclusions on that evidence as follows:

(a) Mr. Blankstein, on behalf of Andover, deposes that in May 2013 Enirgi issued an Insider Report advising the public of its demand on the first promissory note. According to Mr. Blankstein there "was no apparent legal basis to do so" and the directors of Andover "considered this a move to deflate Andover's share value and curtail its ability to raise funds."

In reply Mr. Scargill, with Enirgi, deposes that it "did not issue an insider report or otherwise advise the public that it had made demand on the first note at or about the time it made such demand on May 23, 2013." Further, "the first public announcement of the fact of the demand was made by Andover on June 5, 2013 only after Enirgi had commenced legal proceedings."

The result is that I am asked to prefer one person's affidavit evidence over another: either Enirgi issued an insider's report with the information of its demand, as deposed by Mr. Blankstein, or it did not, as deposed to by Mr. Scargill. However, since there is no evidence of an insider report with the statement in question I am unable to agree with Andover that such a report exists.

(b) There were negotiations between Andover and Enirgi (and Chief) in October 2012 about a potential joint venture. A memorandum of understanding was signed but, following due diligence by Enirgi, there was no agreement on the joint venture.

According to Mr. Blankstein the prospect of these negotiations being successful (as well as previous negotiations to a similar end with Sentient) was the main reason that the first note was not paid. It was anticipated, by Andover at least, that any joint venture agreement would include purchase of stock in Andover and cancellation of the first note. There were "verbal assurances" from Sentient and Enirgi that there was no intention to make demand on the note and it was intended to convert the note as part of a venture agreement. Further, according to Andover, the demand on the first note was the beginning of a very aggressive campaign by Enirgi to ultimately get access to the assets of Andover, assets which were and are worth significantly more than the first note or all three notes.

In his affidavit evidence Mr. Scargill agrees that there were negotiations as described by Mr. Blankstein. However, they ended when he (Mr. Scargill) asked Mr. Blankstein to consider all or majority ownership by Enirgi in Andover. This was the "only possible involvement" by Enirgi in Andover, according to Mr. Scargill. He asked Mr. Blankstein to consider "what sort of transaction" that he and Andover might be interested in "but no transaction was ever proposed by Mr. Blankstein outside of a sale by him and his family of their equity ownership stake." Since there was "no realistic likelihood" of a

transaction, Enirgi decided to cease its efforts and turn its attention on being repaid for the first note.

It is clear that negotiations between Andover and Enirgi did not work out. It is also clear that Andover was surprised that the three promissory notes were assigned from Sentient to Enirgi. The evidence does not suggest that either party was more responsible than the other for the lack of an agreement (assuming there is some legal significance to that issue).

Mr. Scargill does not deny or mention the point raised by Mr. Blankstein that Enirgi agreed not to demand payment of the first note. Therefore, I conclude that there was at least acquiescence between the parties at the time of their negotiations that cancellation of the first promissory note would be part of any agreement. This conclusion also explains why payment on a note worth $2.5 million and due in October 2012 was not demanded by Sentient and then Enirgi until after the negotiations failed.

In any event, the negotiations did fail and any commitment not to demand payment on the note ended. There is no evidence of any collateral agreement that amended the terms of payment and, therefore, the terms of the notes applied. That was obviously a shock to Andover's cash flow but it was permitted under the terms of the note, including the short period to make payment.

(c) As above, I am not determining the issue of whether the second and third promissory notes are now due and payable because the first note was not paid.

A related matter is that Enirgi says that one of the deficiencies by Andover in disclosure of information relates to the Proof of Claim sent by Enirgi to Andover in September 2013. It required the trustee of Andover to confirm that the second and third notes were due and payable. The trustee declined to do so as long as the proof of claim included all three notes.

Since the issue of whether the second and third notes are now due is very much in dispute, I can find nothing objectionable in the trustee's response.

(d) In May 2013 Andover obtained about $1.7 million from a private placement. According Mr. Scargill, none of this money was used to pay the first promissory note. Instead, it was used to repay a shareholder loan and to settle a wrongful dismissal lawsuit. Enirgi is concerned that all of the money from the private placement has been used for purposes other than payment of the first note.

Mr. Blankstein agrees that Andover received $1.7 million from a private placement. However, he deposes that Mr. Scargill "neglects to include" all of the facts although Mr. Scargill "knew all about" the placement "from its inception" and Enirgi "was invited to participate in it." Specifically, Mr. Scargill was "fully aware" of the payment of the shareholder loan (in the amount of $375,000). He was told about it at the time and he "never indicated any objection" to it then. Further, the funds from the placement were committed in April 2012 to "pay certain items" and for the operating expenses of Andover "for the next several months, well before the sudden demand for repayment by Energi [sic] on May 23, 2013." Despite knowing that Andover was to receive the money from the private placement at the time of its demand, Enirgi raised no complaints or allegations until Mr. Scargill's affidavit, filed September 17, 2013.

Mr. Blankstein also deposes that the former employee involved in the lawsuit was an employee of Chief and it made the settlement. The settlement was for $275,000 but it is to be paid in instalments and only $50,000 has thus far been paid. Chief is responsible for paying the balance.

Overall there was a private placement of about $1.7 million dollars that was received by Andover before its proposal was filed. It was used to pay for a shareholder loan and for operating expenses and some of these at least were committed to as early as April 2012. Further, the wrongful dismissal payment

was a matter involving Chief, rather than Andover, and only $50,000 has been paid by Chief. I conclude that Mr. Scargill did not have all of the pertinent information before him when he gave his affidavit evidence.

(e) According to the affidavit of Mr. Scargill, Andover's agreement to the August 2013 Consent Order:

> … was calculated to encourage Enirgi to consent to the Judgment and mislead Enirgi into believing that Andover would be in a position to pay the Judgment as required and that available funds would not be used in the interim, for the Preferential Payments [the private placement, discussed above] or other improper purposes.

On the other hand, Mr. Blankstein deposes that Andover agreed to the Consent Order because it thought at the time that it was to receive $3 million as a result of mortgaging assets of its Utah operations, through Chief. However, the mortgage did not complete. Efforts to obtain an unsecured loan were then unsuccessful. Mr. Blankstein has also deposed that in the summer of 2013, counsel for Enirgi contacted counsel for Andover, "[d]espite there being no apparent legal basis for doing so", and "insisted that Chief entering into a mortgage transaction would violate the agreements between Energi [sic] and Andover and was prohibited." This left Mr. Blankstein "scrambling to raise an unsecured loan in a very short time frame."

In argument, Enirgi described Mr. Blankstein's evidence on this issue as misleading. The basis of this is that the correspondence between counsel was without prejudice, it occurred on or about June 21, 2013 and, therefore, "the suggestion that Andover only learned after August 8, 2013 [the date of the Consent Order] that Enirgi refused to consent is clearly misleading."

From this I take it that Enirgi did contact Chief to say any mortgage by Chief would violate agreements between Andover and Enirgi. This took place before the date of the Consent Order. On its face it supports the contention by Andover that Enirgi has obstructed its efforts to obtain funding although there

is no evidence or argument before me to decide whether Enirgi was correct in taking the view it did with Chief.

(f) Enirgi asserts, through Mr. Scargill, that Andover is attempting to restructure its assets and this is evidenced from its "continued failure to engage Enirgi" by refusing to provide information regarding its plans or opportunities, despite Enirgi's repeated requests for information. Mr. Blankstein replies by deposing that Andover is not attempting to restructure; [i]t is simply attempting to gain some time and distance so as to be able to pay Enirgi."

All that can be said on this point is that there is no evidence that Andover is restructuring its assets. Mr. Scargill is concerned that is happening or it is going to happen but the evidence here does not support that conclusion.

(g) In argument Enirgi submits that Andover has been "unresponsive" to requests for information about the proposal process being followed by Andover. For example, Mr. Scargill deposes that Andover, in correspondence in August 2013, did not adequately address the concerns of Enirgi. Similarly, according to Enirgi, Andover has provided a deficient cash flow statement and has generally provided inadequate information. Enirgi also submits that Andover has given only "vague assertions" and inconsistent information about its assets and its potential plans.

For its part, Mr. Scargill deposes that Andover asked Enirgi by letter of September 6, 2013 (through counsel) to present "whatever proposal or suggestion" Enirgi might have and Andover would be "more than happy to consider same." No reply was received.

Mr. Blankstein also deposes that Andover provided information to Enirgi about all of Chief's information, files and data with the agreement by Enirgi that it would be returned. It was not returned. In reply Mr. Scargill deposes that "by oversight" the information was not returned and it was returned on or about September 18, 2013.

The evidence is that both parties have been tactical in their requests for information and their responses to those requests. There has been some unresponsiveness and some vagueness as the parties have positioned themselves for their competing applications. I can find no legal or other issue that is relevant to those applications.

(h) In its 2013 financial statements Andover stated that it had filed a notice "to seek creditor protection" and it was done "to ensure the fair and equitable settlement of the Company's liabilities in light of the legal challenges launched" by Enirgi. According to Enirgi the reference to "legal challenges" is incorrect and this statement by Andover demonstrates that the notice of proposal was a "purely defensive" act on the part of Andover.

I take it as beyond dispute that Andover has been operating in a defensive manner since the demand on the first note was made in May 2013. Further, I accept that its notice of intention to file a proposal is also defensive. As for what are "legal challenges" that is a phrase that is capable of many meanings.

(i) Andover alleges that Enirgi has obstructed its efforts to obtain financing to pay the first promissory note of $2.5 million. Mr. Blankstein deposes that, to this end, Enirgi has done the following (in part, this is a summary of some of the above issues): made an abrupt demand for payment (after it and Sentient had given verbal assurances that there would be no demand); made demands on the second and third promissory notes that are payable in 2014; interfered in attempts by Andover to enter into a joint venture with Ophir without any legal basis to do so; and disrupted a mortgage transaction between Andover and Chief in the summer of 2013.

Mr. Scargill, in reply, deposes that neither he nor anyone ("after due inquiry") has been in contact with Ophir.

The allegation by Andover about Ophir is a vague one and I accept Mr. Scargill's evidence on it. I have discussed the issues of Enirgi's abrupt demand on the first promissory note and the allegation that Enirgi disrupted a mortgage arrangement between Andover and Chief above. Enirgi interprets the language of the three promissory notes to mean that all are due on default of the first one. That is a legal issue that is not before me.

(j) Enirgi attempts to minimize the assets of Andover and maximize its debts. There may well be more detailed evidence that supports a different valuation of the assets than presented by Andover. However, on the evidence in this application, I accept that Andover is cash poor and asset rich.

[30] Despite vigorous argument to the contrary by both parties I am unable to find bad faith on the part of either party. There is the apparent communication by Enirgi to Chief about a possible mortgage arrangement for Andover which reflects the aggressive approach that Enirgi has taken to Andover. That represents the aggressiveness of Enirgi rather than any bad faith.

[31] Clearly there has been a falling out between the parties and it is also clear that Andover is vulnerable because of its lack of cash and Enirgi is being aggressive in seeking repayment of, at least, the first note.

The applications

[32] Andover now seeks an extension of its proposal pursuant to s. 50.4(9) of the *BIA* and Enirgi seeks termination of Andover's proposal pursuant to s. 50.4(11) of the *BIA*.

[33] I set out the two provisions of the *BIA* at issue as follows;

Extension of time for filing proposal

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five

> months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.
>
> . . .
>
> **Court may terminate period for making proposal**
>
> 50.4(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.

[34] Each party says that its application should prevail over the other's application. I will review the case law presented by the parties on this issue as well as some interpretive issues under s. 50.4(9) and s. 50.4(11).

The approaches in *Cumberland* and in *Baldwin*

[35] In a decision relied on by Enirgi, Mr. Justice Farley of the Ontario Court of Justice denied the appeal of a registrar's decision that had dismissed an application for an extension of time by debtors under s. 50.4(9): *Baldwin Valley Investors Inc. (Re)*, [1994] O.J. No. 271, (C.J. (Gen. Div.)). The court noted that the test under s. 50.4(9)(b) was whether the debtors "would likely be able to make a viable proposal if the extension being applied for was granted." "Likely" did not mean a certainty and, using the Oxford Dictionary, it was defined as "such as might well

happen, or turn out to be the thing specified, probable … to be reasonably expected." Applied to the facts, the conclusion was that it was not likely the debtors would be able to make such a proposal since they had only submitted a cash flow statement. At para. 4, Mr. Justice Farley concluded "I do not see the conjecture of the debtor companies' rough submission as being 'likely'". Further, the court noted at para. 6 that the debtors did not even attempt to meet the condition of material prejudice under s. 50.4(9)(c) and the debtor was changing inventory into cash.

[36] The court also noted that the registrar (who made the decision being appealed) focused on the fact that the creditor had lost all confidence in the debtor. The creditor held a substantial part of the creditor's debt. Mr. Justice Farley pointed out, at para. 3, that that was not the test under s. 50.4(9)(b):

> This becomes clear when one examines s. 50.4(11)(b) and (c); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(b) and 11(b)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(c) but with no corresponding clause in s. 50.4(9)).

[37] Enirgi relies on this statement for its submission that its application for termination under s. 50.4(11) should prevail over the application of Andover under s. 50.4(9).

[38] However, that statement was made as a comment on the previous registrar's reliance on the fact that the creditor (who held significant security) would not vote for any proposal. Mr. Justice Farley in *Baldwin* pointed out that was not the test under s. 50.4(9). He reasoned that this was clear because Parliament had distinguished between a situation of a viable proposal under s. 50.4(9)(b) and s. 50.4(11)(b) from a situation where it is likely that the creditors will not vote for a proposal no matter how viable, under s. 50.4(11)(c). In s. 50.4(9) there was no clause corresponding to s. 50.4(11)(c). The result is that this part of *Baldwin* does not support Enirgi's submission that an application under s. 50.4(11) supersedes one under s. 50.4(9).

[39] The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under s. 50.4(11), unlike the subject case. At para. 8, the court did contrast the provisions

by saying that, if the debtor had been successful in its application to extend, it would have been a "Pyrrhic victory" because the creditor bank would have been able "to come right back in a motion based on s. 50.4(11)(c)."

[40] This is broad language but I acknowledge that it is capable of meaning that s. 50.4(11) is to supersede s. 50.4(9). However, such an interpretation would seem to be inconsistent with the other reference in *Baldwin* that the two provisions apply to different situations (discussed above). I also note that *Baldwin* only decided the merits of the s. 50.4(9) application, there was no application under s. 50.4(11) and there was no decision in favour of the creditor on the basis of that provision. The above statement was, therefore, *obiter*.

[41] Another decision relied on by Enirgi is *Cumberland Trading Inc. (Re)*, [1994] O.J. No. 132, (C.J. (Gen. Div.)) where a creditor sought to terminate a debtor's proposal after the notice of intention was filed. There does not appear to have been an application by the debtor to extend the proposal under s. 50.4(9), only an application under s. 50.4(11). Mr. Justice Farley found there was no indication what the proposal of the debtor was to be; "… there was not even a germ of a plan revealed" only a "bald assertion" and "[t]his is akin to trying to box with a ghost" (paragraph 8). The application for termination under s. 50.4(11) was allowed.

[42] The court noted, at para. 5, that the *BIA* was "debtor friendly legislation" because it provided for the possibility of reorganization by a debtor but it (and the *Companies Creditors Arrangement Act,* R.S.C. 1985 c. C–36) "do not allow debtors absolute immunity and impunity from their creditors". Concern was expressed about debtors too frequently waiting until the last moment, or beyond the last moment, before thinking about reorganization. The automatic stay available to a debtor by filing a notice of intention to file a proposal was noted. However:

> … [the] *BIA* does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case [the creditor] is utilizing s. 50.4(11) to do so.

[43] Enirgi relies on this statement in its submission that its termination application should proceed over the extension application of Andover. This is broad language but I acknowledge Enirgi's submission that this statement provides support for its position that s. 50.4(11) permits it to "cut short" a stay or extension under s. 50.4(9).

[44] The court also described s. 50.4(11)(c) as permitting termination of a proposal if the debtor cannot make one before the expiration of the "period in question, that will be accepted by the creditors …" Mr. Justice Farley concluded that s. 50.4(11) deals specifically with the situation "where there has been no proposal tabled." It provides that there is "no absolute requirement" that the creditors have to wait to see what the proposal is "before they can indicate they will vote it down" (paragraph 9). Enirgi relies on this statement.

[45] In my view, this statement goes no further than saying what is self-evident: under s. 50.4(11)(c) any proposal must be accepted by the creditors. However, as explained in *Baldwin,* that is not a requirement under s. 50.4(9). *Cumberland* also says that the making of the proposal may be still to come but a creditor can exercise its rights under s. 50.4(11)(c). I do not agree with Enirgi that this statement in *Cumberland* supports its submission.

[46] From the above I conclude that there is some support for the submission of Enirgi that I should consider (and allow) its application under s. 50.4(11) over that of Andover under s. 50.4(9). There is the *obiter* in *Baldwin* that a successful application under s. 50.4(9) would be a Pyrrhic victory because a creditor could come right back with an application under s. 50.4(11). And there is the statement in *Cumberland* that an application under s. 50.4(11) can cut short an application under s. 50.4(9).

The approach in *Cantrail*

[47] A quite different view is set out in a more recent British Columbia case, *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, 2005 BCSC 351, [*Cantrail*] a decision relied on by Andover. Master Groves, as he then was, was presented with a submission by the creditor in that case that it intended to vote against any proposal from the debtor because it had lost faith in the debtor. The creditor was one of 91

creditors and its share of the total debt was not explained. This is essentially the position of Enirgi.

[48] In response to the creditor's submission that it could vote under s. 50.4(11) against any proposal of the debtor under s. 50.4(9) the court said:

> 14. If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type [sic] of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.
>
> 15. If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.
>
> 16. If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[49] Since there was no evidence of bad faith on the part of the debtor in *Cantrail* and no determination of what the actual proposal would be, Master Groves allowed the application under s. 50.4(9) to extend the proposal and dismissed the application of the creditor under s. 50.4(11) to terminate the proposal (paragraphs 15-17). This is the result sought by Andover but opposed by Enirgi.

[50] Master Groves also adopted the view at para. 11 of *N.W.T. Management Group (Re),* [1993] O.J. No. 621 (C.J. (Gen. Div.)) that the intent of the *BIA* is that s. 50.4(9) and s. 50.4(11) should be judged on a rehabilitation basis rather than on a liquidation basis. And, in *Cantrail*, at para. 4, the court concluded that an objective standard must be applied to determine what a reasonable person or creditor would do, as was done in *Baldwin.*

[51] Enirgi distinguishes *Cantrail* on two grounds. First, it is submitted that at para. 9 *Cantrail* contains the inaccurate statement that "s. 50.4(11) is the mirror of s. 50.4(9)". As well, there was no discussion of *Cumberland* in *Cantrail*.

[52] I accept that, while there are a number of similarities between the two sections, there is one significant difference: under s. 50.4(11)(c) a creditor has a veto over any proposal. S. 50.4(9) does not contain such a veto and it is not a mirror to the extent of being exactly the same as s. 50.4(11). In my view this comment on a very small part of *Cantrail* does not affect the broader meaning of that judgement. And it is true that *Cumberland* was not discussed in *Cantrail* although the submission of the creditor in *Cantrail*, as recorded in the oral judgement, is in language very similar to that used in *Cumberland.*

[53] Another decision relied on by Andover as being similar to *Cantrail* is *Heritage Flooring Ltd. (Re)*, [2004] N.B.J. No. 286 (Q.B.) where a debtor filed an application under s. 50.4(9) for an extension and the creditor filed an application for termination under s. 50.4(11). The court allowed the application for an extension. The *Cumberland* and *Baldwin* decisions were noted but in *Heritage* the evidence was that the creditor would be paid out and, in any event, the creditor was not in a position to veto any proposal. *Cantrail* was also followed in *Entegrity Wind Systems Inc. (Re)*, 2009 PESC 25 although the facts in *Entegrity* did not include an application by the creditor under s. 50.4(11). The objective standard discussed in *Cantrail* was also adopted in *Convergix Inc. (Re)*, 2006 NBQB 288.

Cumberland* or *Cantrail?

[54] The result of the above is that there are different approaches to situations where there are competing applications under sections 50.4(9) and 50.4(11).

[55] The comments from *Cumberland* discussed above suggest that an application by a creditor under s. 50.4(11) can "cut short" an application under s. 50.4(9) and there is no absolute requirement that a creditor has to wait to see a proposal before voting it down. And in *Baldwin* there is a comment, in *obiter*, that

any successful application under s. 50.4(9) would be a Pyrrhic victory because the creditor could "come right back" with an application under s. 50.4(11).

[56] On the other hand, in *Cantrail* the court decided that there should be an extension for a viable proposal, not yet formulated, under s. 50.4(9) even though the creditor has lost faith in the debtor and has said it will vote against any proposal.

[57] As a matter of interpretation of the *BIA* I consider that s. 50.4(9) and s. 50.4(11) set out distinct rights and obligations. In the first case a debtor is entitled to an extension of time to make a proposal; in the second case a creditor can apply for the termination of the time for making a proposal. As I understand the submission of Enirgi the fact that it is the primary creditor (by some considerable margin), that it has lost confidence in Andover and that it will not accept any proposal from Andover supports consideration of its application for termination under s. 50.4(11).

[58] The problem with this submission is that it does not reflect the factors under s. 50.4(9) for granting an extension of time for a proposal. A creditor under this provision does not have the rights that Enirgi seeks over the debts of Andover. Those rights are in s. 50.4(11)(c) but that is a different inquiry. Indeed, one effect of the submission of Enirgi is to conflate s. 50.4(9) and s. 50.4(11). I recognize the comments from *Cumberland* and *Baldwin* that may support a contrary view. However, recognition must be given to the differences between the provisions in dispute and that contrary view does not do so. In my view the analysis and conclusions in *Cantrail* is to be preferred.

[59] I add that there are some situations where an application for an extension is overtaken by an application for termination. In *Cumberland* there was not even a germ of a proposal from the debtor for the analysis under s. 50.4(9). In that circumstance the court then proceeded to the other application before it from the creditor under s. 50.4(11).

[60] Other cases relied on by Enirgi are of a similar kind. In *Baldwin* the proposal was conjecture and rough (and the debtor had not even considered the issue of any

material prejudice to the creditor from the proposal). Similarly, in *St. Isidore Meats Inc. v. Paquette Fine Foods Inc.,* [1997] O.J. No. 1863 (Gen. Div.)) and *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Q.B.) the courts proceeded to a determination of the s. 50.4(11) application after finding there was no viable proposal. In *Triangle Drugs Inc. (Re)*, [1993] O.J. No. 40 (C.J. (Gen. Div.)) the creditors had a veto and they had actually seen the proposal. The court imported principles from the *Companies Creditors Arrangement Act,* R.S.C. 1985, c. C-36, concluded that it was fruitless to proceed with a plan that is doomed to failure and allowed the creditor's application under s. 50.4(11). In *Com/Mit Hitech Services Inc. (Re),* [1997] O.J. No. 3360 (C.J. (Gen. Div.)) there was no good faith or due diligence on the part of the debtor and the court proceeded to consider and allow the creditor's application under s. 50.4(11).

[61] In my view, these cases represent recognition of the procedural and business realities of the various situations rather than a legal conclusion that an application for termination will supersede an application for an extension.

[62] It follows that I find that Andover is entitled to have its application under s. 50.4(9) considered on its merits. If it is not meritorious then it is logical and consistent with the authorities to proceed with the application by Enirgi under s. 50.4(11).

The application by Andover under s. 50.4(9)

[63] With regards to the merits of Andover's application under s. 50.4(9) all of the following issues must be decided in its favour. Has it acted in good faith and with due diligence? Is it likely it would be able to make a viable proposal if an extension is granted? And, if an extension is granted, would a creditor be materially prejudiced?

[64] With regards to good faith and due diligence *N.T.W.* says that it is the conduct of Andover following the notice of intention in August 2013, rather than its conduct before then, that is to be considered. I have found above that the evidence does not support a finding of bad faith against either party.

[65] With regards to due diligence, since August 2013 Andover has obtained the September 24, 2013 letter from Ophir that says the latter "is in the process" of finalizing a loan of $3,000,000 to Andover. This is not a firm commitment of funds and nor does it need to be under s. 50.4(9); it does reflect some diligence on Andover's part. Mr. Blankstein also deposes that he has been having discussions with another party but he cannot reveal the name of that party because he is concerned that Enirgi will obstruct those discussions, as they did with Chief in June 2013. This latter information is not particularly helpful. Nonetheless I conclude that Andover has acted with sufficient due diligence.

[66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not be a certainty and "likely" means "such as might well happen."(*Baldwin*, paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

[67] I turn to a review of the assets of Andover in order to consider whether they provide some support for the viability of any proposal from Andover. The evidence for this review is from the affidavit of Mr. Blankstein.

[68] Alaska (wholly owned by Andover) is expecting, as a result of preliminary discussions, a N143101 Resource Calculation for a property to show approximately 1,200,000,000 pounds of copper with a gross value of about $3,600,000,000. An immediate net value of $60,000,000 and $120,000,000 is estimated, depending on the world price of copper. The State of Alaska is confident enough in the property that it has financed a road to it. In a separate property, Alaska has an estimated mineralization of 4,000,000 tons of 4.5 % copper and Andover has spent approximately $10,000,000 in developing this project. Alaska is solvent and up to date in its financial obligations.

[69] With respect to Chief (83% owned by Andover), it is also solvent and generally up to date on its obligations. Andover purchased 65% of the shares of Chief in 2008 for $8,700,000 with an environmental claim against it in the amount of $60,000,000. That claim has been negotiated down to a smaller number and the current amount due is $450,000, with half due in November 2013 and the other half due in November 2014. This has increased the value of Chief significantly, according to Andover.

[70] Financial statements in March 2013 showed Chief had $33,000,000 in equity, based on land and equipment (not mineral deposits). It owns more than 16,000 acres of land in Utah and leases an additional 2,000 acres. Plant and equipment have been independently appraised at $19,200,000. Andover estimates a cash flow in the next year of $7,000,000 to $11,000,000 to Chief.

[71] Andover and Chief are also presently involved in a joint venture with Ophir regarding deposits of silica, limestone and aggregate on property owned by Chief. Production will commence in November 2013 and sold to customers of Ophir. Ophir is spending $3,000,000 on exploration and development and production equipment has been ordered. Andover expects to receive from these two mines and a third (a joint venture with Rio Tinto) $7,200,000 to $10,900,000 in annual production net revenues commencing at the end of 2014.

[72] Chief has another property called Burgin Complex. At one time Enirgi was apparently interested in this specific property. A Technical Report, dated December 2, 2011, shows an expected cash flow of $483,000,000 in today's metal prices.

[73] By way of a summary, publicly available financial statements in March 2013 report that Andover had $42.5 million in assets and $9.1 of liabilities.

[74] Enirgi generally minimizes the asset value of Andover but it does not dispute the specific numbers above. In my view these are impressive numbers and they reflect a strong asset base for Andover. I accept that they do not demonstrate the cash at hand to pay the first promissory note and at this time Andover remains asset

rich and cash poor. But it is not "trying to box with a ghost" (as in *Cumberland*) to conclude that the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a $3,000,000 cash loan from Ophir and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen.

[75] Enirgi points out that it holds the largest portion of unsecured debt of Andover (more than 80%) and it submits that this gives them a veto over any proposal. That may take place but thus far there is no proposal and Enirgi will have to make a business decision about its response in the event one is presented. Again, as an issue under s. 50.4(9), a proposal does not have to be acceptable to Enirgi. As well, I also note comments from the Court of Appeal, in the context of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, that questioned the legal basis of a creditor forestalling an application for a stay and whether the court's jurisdiction could be "neutralized" in that way: *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, cited in *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775, at paras. 40-41.

[76] The third requirement under s. 50.4(9) is that no creditor should be materially prejudiced if an extension is granted. As emphasized in *Cantrail* at para. 21 the test is not prejudice but material prejudice. It is also an objective test: *Cumberland* at para. 11. In the subject case there is no evidence that the security in the first promissory note would be less if an extension was granted. Enirgi asserts that Andover is restructuring its assets but there is no evidence of that and, in the event it occurs, remedies are available on short notice. Unlike in *Cumberland,* the debtor here is not converting inventory into cash. It is true that the note (or notes) is non-interest bearing but Enirgi knew that when it became an assignee in March 2013 and the note had not been unpaid since October 2012. I conclude that there is some prejudice to Enirgi but not material prejudice.

[77] Finally, I note in *Cantrail* and *N.W.T.* that the objective of the *BIA* is rehabilitation rather than liquidation. Andover has a nominal payroll but liquidation of Andover and its assets would obviously affect a number of other companies and be a complicated and protracted affair. It may come to that but on the basis of the evidence available at this time I conclude that an extension of Andover's proposal should be granted.

[78] Since Andover has met the requirements of s. 50.4(9) I find that its application under that provision must be allowed. It should be given the opportunity to make a proposal and an extension of time of 45 days is granted to do so.

Summary and conclusion

[79] In cases such as this where there are competing applications under s. 50.4(9) and s. 50.4(11) the debtor is entitled to present a proposal under the former provision if it is likely a viable proposal can be presented and the other requirements of s. 50.4(9) are met. In that event the debtor should have the opportunity to present a proposal. A creditor has the ability under s. 50.4(11) to decide whether a proposal is acceptable but does not have that right under s. 50.4(9).

[80] In this case Andover has significant assets and it is likely that it will be able to present a viable proposal. As well, there is no evidence of the part of Andover of bad faith, it has acted generally in good faith, it has acted with due diligence in attempting to construct a proposal and there is no material prejudice to Enirgi if an extension is granted. In the event that Andover presents a proposal Enirgi will have then have the opportunity to decide what its position will be on it. This will be a business decision rather than a matter under s. 50.4(11).

[81] The application by Andover under s. 50.4(9) is allowed. It is entitled to an Order extending the time for filing a proposal under Part III of the *BIA* for a period of 45 days to give it an opportunity to present a proposal.

[82] The application of Enirgi under s. 50.4(11) is dismissed with leave to reapply.

[83] I considered the alternate application of Enirgi to appoint a receiver under section 47.1 of the *BIA.* I note that there is a trustee appointed as part of the notice of intention. He apparently disagreed with Enirgi about what should be in a proof of claim document but for defensible reasons. There is otherwise no evidence that something more than a trustee is warranted at this time.

[84] I remain seized of this matter and any subsequent applications related to the insolvency of Andover. I am available on short notice if there is a need to move expeditiously. Costs will be in the cause.

"Steeves J."

TAB 6

COURT FILE NO.: CV-09-8247-00CL
DATE: 20090811

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 Grant Forest Products Inc., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Applicants

BEFORE: Justice Newbould

COUNSEL: A. Duncan Grace for GE Canada Leasing Services Company

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank

Stuart Brotman for the Independent Directors

DATE HEARD: August 6, 2009

E N D O R S E M E N T

[1] KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was

made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

[2] GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

[3] The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

[4] The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

[5] Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

[6] Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

[7] The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

[8] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

[9] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. … Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by

> the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

[10] I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

[11] The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

[12] Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

[13] It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that

case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from Re *Warehouse Drug Store Ltd.*, [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

[14] I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp*. [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

[15] In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

[16] It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

[17] It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

[18] A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

[19] The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

[20] The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

[21] With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be

any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

[22] In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

[23] In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

[24] I have been referred to the case of *Re MEI Computer Technology Group Inc*. (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are

necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

[25] The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

NEWBOULD J.

DATE: August 11, 2009

TAB 7

1993 CarswellOnt 210
Ontario Court of Justice (General Division), In Bankruptcy

High Street Construction Ltd., Re

1993 CarswellOnt 210, [1993] O.J. No. 394, 19 C.B.R. (3d) 213, 38 A.C.W.S. (3d) 669

Re proposal of HIGH STREET CONSTRUCTION LIMITED

Leitch J.

Judgment: February 2, 1993
Docket: Doc. London 35-045487

Counsel: *A. Grace*, for High Street Construction Ltd.
B. Dawe, for Toronto Dominion Bank.

Subject: Corporate and Commercial; Insolvency

Application for extension of time to file proposal under s. 50.4(9) of *Bankruptcy and Insolvency Act*.

***Leitch J.*:**

1 High Street Construction Limited ("High Street") has applied to extend its time to file a proposal with the official receiver to March 1, 1993 pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* (the "Act"). To permit the extension I must be satisfied that High Street has and is acting in good faith and with due diligence, that no creditor is prejudiced by an extension and that the extension will permit High Street to make a viable proposal.

2 High Street directly and by guarantees of the indebtedness of two related companies Sweetie Developments Limited ("Sweetie") and 518463 Ontario Limited ("518463") owes approximately 5 million dollars to the Toronto Dominion Bank ("T.D."). Repayment of the debt was demanded by T.D. in December 1990. The debt was acknowledged and High Street agreed to satisfy its outstanding obligations by February, 1991. T.D. extended this repayment date to April 3, 1991. Further extensions were granted by T.D. from time to time apparently on an informal basis until November 1992. The High Street account then came under the jurisdiction of a new manager who, according to counsel for T.D., took the position that "enough was enough". Formal demand for repayment was made December 2, 1992. High Street responded with a notice of intent to file a proposal which brings us to this application. T.D. is the most significant unrelated creditor of High Street and is the only creditor to oppose this application.

3 Since April 1991, $300,000 has been paid to T.D., loans of $83,000 to one of the shareholders has been repaid and one parcel of property has been sold with a mortgage back from the purchaser assigned to T.D. However, interest on the outstanding indebtedness and the realty taxes have not been kept current. T.D. alleges that the fact that interest and realty tax arrears will accrue during an extension is evidence that it will be prejudiced by such extension. The assets of High Street available to satisfy the indebtedness to T.D. consist entirely of three parcels of vacant land in Kitchener, Ontario owned by High Street and two parcels of vacant land in Mississauga, Ontario owned by Sweetie and 518463. These assets are non-depreciating and cannot be dissipated. There is no suggestion by T.D. that the management of High Street will overlook or decline an opportunity to sell its assets. The fact that realty tax and interest arrears will continue to accrue during an extension period is not sufficient evidence of prejudice to T.D. to disentitle High Street to an extension. Further, the fact that at the request of T.D. and without opposition from High Street I ordered that s. 69 of the Act shall not operate to prevent T.D. from issuing its notice of sale with respect to its mortgages on the High Street property will alleviate the prejudice to T.D. which it has complained of.

4 The president of High Street, Larry Wolynetz, has worked without compensation during the last two years and has endeavoured to sell all of the vacant land owned by High Street and its affiliates. While it is apparent that he has not been successful, there is no evidence that the lack of success has resulted from anything other than the recessionary times. There is no evidence that detracts from his assertions that all of his efforts have been in good faith and that he has diligently pursued all opportunities for sale. There is no evidence that Mr. Wolynetz is "grossly exaggerating" the value of the assets, thereby discouraging a possible sale as was the case in *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.). I find therefore that High Street has and is acting in good faith and with due diligence.

5 The requirement that the extension will permit High Street to make a viable proposal is the most difficult requirement for it to meet. The decisions relating to applications for extensions under the *Companies' Creditors Arrangement Act* suggest that in assessing whether a proposal will be viable you must consider whether such proposal has a probable chance of acceptance. (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) and *Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151 (Ont. Gen. Div.)). In this case, T.D. basically has taken the position that "enough is enough". It was acknowledged by counsel for T.D. that there is no question as to the honesty or integrity of Mr. Wolynetz but its concern is simply whether he can get the job done. Its contention is that given the failure to effect a sale of one or more of the parcels of land to this point in time, it is unlikely that a sale will be accomplished within the extension period. There is a distinction between that contention and a conclusion that High Street cannot put forward within the requested extension period a plan that has a probable chance of acceptance by a majority of the creditors. I find that High Street has a plan outline for its proposal — that is, the immediate sale of the parcels of land owned by Sweetie and 518463 which have been developed to the point that there is site plan approval, building permit availability and offers to lease for 60% of the proposed building. Mr. Wolynetz has determined that these parcels are the most saleable and has sworn in his affidavit that he expects an unconditional offer to purchase these parcels within the extension period. With this offer High Street can quantify the debt due to T.D. subsequent to the sale of this property and can provide a detailed and specific proposal to T.D. It cannot now be said that T.D. will not accept this proposal. I find therefore that the requested extension will permit High Street to make a viable proposal.

6 At the conclusion of this application counsel for T.D. noted that I must be cautious in granting this extension. I have made my decision based on the particular facts of this application and my findings that High Street has satisfied the three prerequisites for an extension under s. 50.4(9) of the Act.

Application allowed.

TAB 8

Lockhart Saw Limited (Re), 2007 NBQB 093
Court Number: 12795
Estate Number: 51-919744

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

IN THE MATTER OF the Proposal of Lockhart Saw Limited

BEFORE: **Justice Peter S. Glennie**

AT: **Saint John, N.B.**

DATE OF HEARING: **February 2, 2007**

DATE OF REASONS: **February 9, 2007**

COUNSEL:

R. Gary Faloon, Q.C., on behalf of Lockhart Saw Limited

D E C I S I O N

GLENNIE, J. (Orally)

[1] Lockhart Saw Limited, ("Lockhart"), seeks an order pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, R.C.S. 1985, c.B-3 ("BIA") extending the time for filing a Proposal.

Overview

[2] Lockhart filed a Notice of Intention to Make a Proposal under s. 50.4(1) of the BIA on January 3, 2007, (the "Notice of intention"). The Notice of Intention provided that A.C. Poirier & Associates Inc., ("ACP"), had consented to act as Trustee under a Proposal.

[3] Since the filing of the proposal, Lockhart says it has been canvassing the market in an effort to find a purchaser of its real property situate in the City of Saint John. At present, based on continued customer support and discussions with certain stakeholders, it appears that there is a reasonable opportunity to complete the successful reorganization and sale of Lockhart's real property.

[4] ACP is of the opinion that the creditors of Lockhart will not be materially prejudiced by the requested extension. No creditor has demonstrated material prejudice or attempted to quantify its supposed losses if an extension is granted.

Analysis

[5] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forward a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: *Re Doaktown Lumber Ltd.* (1996), 39

C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

[6] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See *Re Cantrail Coach Lines Ltd.* (2005), 10 C.B.R. (5th) 164 and *Re Convergix Inc.* [2006] N.B.J. No. 354 (Q.B.)

Acting in Good Faith and with Due Diligence

[7] Lockhart has been diligently working on a restructuring for over a year. It has retained the professional services of ACP to assist it in restructuring, has successfully reduced its overall indebtedness and is actively attempting to either sell or lease its real property. I am accordingly satisfied that Lockhart has acted, and is acting, in good faith and with due diligence.

Ability to Make a Viable Proposal

[8] The test for whether Lockhart would likely be able to make a viable proposal if granted the extension is whether Lockhart would likely (as opposed to certainly) be able to present a proposal that seems on its face to be reasonable to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Re Baldwin Valley Investors Inc. (1994),* 23 C.B.R. (3d) 219 (Ont. G.D.) Justice Farley was of the opinion that "viable" meant reasonable on its face to a reasonable creditor and that "likely" did not require certainty but meant "might well happen" "probable" "to be reasonably expected". See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S.S.C).

[9] On the evidence before me I find that there appears to be a core business to

form the base of a business enterprise; that management is key to the ongoing viability of the business and that management appears committed to such ongoing viability; and that debts owed to creditors after sale of the real property can likely be serviced by the restructured entity.

[10] Accordingly, I am satisfied that Lockhart would likely be able to make a viable proposal.

Absence of Material Prejudice to Creditors

[11] On the evidence I conclude that Lockhart has honoured all of its post-filing obligations and is in a position to honour these obligations during the extension period. As well, it appears that the position of secured creditors has not and will not be adversely affected for several reasons including, mortgage payments continue to be paid and the building on Lockhart's real property continues to be insured and properly maintained; the book value of the assets forming the security of Royal Bank of Canada, ("RBC"), exceeds the amount owed to RBC by a significant amount; Lockhart continues in operation and made a profit from its operation for the month of January, 2007; Lockhart reduced the amount outstanding on its RBC operating line of credit in January, 2007; Lockhart is actively trying to lease or sell its real property; over the past year Lockhart has reduced its indebtedness to RBC from nearly $800,000 to under $200,000; and Lockhart's real property has an assessed value for real property taxes of $419,700.

[12] The material prejudice referenced in section 69.4(1) of the BIA is an objective prejudice as opposed to a subjective prejudice. In other words, it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. See *Re Cumberland Trading Inc.*

(1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.).

[13] In *Re Acepharm Inc.* (1998), 4 C.B.R. (4th) 19 (Ont. Gen. Div.) the court refused to lift a stay under section 69.4 of the BIA as the moving party pleaded subjective prejudice, which did not constitute material prejudice. At paragraph 10 the court cited with approval the following passage from *Honsberger, Debt Restructuring* at section 8-44:

> "what amounts to material prejudice must be decided on a case-by-case basis. It is a broad concept…the Bankruptcy Court being a court of equity must consider the impact of a stay on the parties. This will involve a weighing of the interest of the debtor against the hardship incurred on the creditor. This has been referred to as the "balance of hurt" test."

[14] On the evidence, I conclude that the proposed extension would not materially prejudice Lockhart's creditors.

Disposition

[16] In the result an order will issue pursuant to section 50.4(9) of the BIA extending the time for filing a proposal to March 19, 2007.

_____

Peter S. Glennie
A Judge of the Court of Queen's Bench of New Brunswick

TAB 9

1994 CarswellOnt 257
Ontario Court of Justice (General Division, Commercial List)

Mernick, Re

1994 CarswellOnt 257, [1994] O.J. No. 26, 24 C.B.R. (3d) 8

Re proposal of STEPHEN RANDALL MERNICK, insolvent person

Farley J.

Judgment: January 4, 1994
Docket: Doc. 31-269152

Counsel: *Malcolm M. Mercer*, for Xerox Canada Finance Inc., creditor.
Stephen R. Mernick, in person.

Subject: Corporate and Commercial; Insolvency

Application for approval of proposal.

Farley J. **(Endorsement):**

1 At the beginning of the hearing Stephen R. Mernick ("Mernick") requested an adjournment until January 5, 1994 (or later) to allow his new counsel to attend. Mernick's previous counsel was successful in removing himself from the record on December 22, 1993. Well prior to that time, he had arranged with Mr. Mercer for this matter to be heard today. His new counsel was apparently under the misapprehension that the January 4, 1994 hearing date was only a tentative date; however on his enquiring about shifting the date, Mr. Mercer advised forthwith on December 23, 1993 that the January 4, 1994 date was a fixed one. Mernick's new counsel responded by voice mail that there had been a misunderstanding on new counsel's part. No effort was made, with or without reasons, to change the current date. Counsel should be well aware of the Practice Direction (1993), 13 O.R. (3d) 453 in this regard. The adjournment request was refused.

2 No responding material was filed by Mernick or any of his counsel in response to the request of Xerox Canada Finance Inc. ("Xerox") that the Court refuse to approve Mernick's proposal.

3 On June 9, 1993 Xerox obtained an Order from Registrar Ferron requiring that Mernick answer the undertakings given on his examination held April 26, 1993 and questions reasonably arising therefrom. Up to the date of this hearing no answers, even in piecemeal, were given.

4 Mernick advises that he has fought the bankruptcy petitions over a long period of time in a very vigorous manner as he wishes to avoid what he feels is the automatic stigma of being a bankrupt. While his effort in this respect may be applauded from one point of view, it should be recognized that bankruptcy legislation is intended to be rehabilitative in nature. It has been often remarked that there is nothing untoward in an honest but unfortunate businessman resorting to this legislation so as to enable him to attempt to make a clean start.

5 I note as well that it would appear that the proposal section of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") is aimed at the reorganization of business entities (including individuals) which are insolvent but which generally are expected to be viable in an operational sense once the restructuring of the proposal takes place. Such of course would not be the case in Mernick's situation. He has declared that he has no assets of any value and in particular no business operational assets. Furthermore, he has no income; he apparently depends on his general family to support him, his wife and his children. Aside from this family financial assistance (which apparently would be the source of the $50,000 payment in the proposal), Mernick is also able to obtain loans or credit for emergency and necessary matters. Part of the emergency

matters would seem to include his assisting others with charitable donations. I am given to understand by him that he has been instrumental in assisting some thousands of others who have been in need; in this case the nature of his generosity is quite commendable although one would have to question his means of borrowing from others to in turn lend with no apparent means to ensure repayment.

6 Mernick's proposal disclosed no assets but liabilities totalling $43,125,465. Of this, $40 million was said to be owing to 974846 Ontario Inc., a company owned by Meyer Botnick, which purchased the "Firestone indebtedness" for $100,000. The $100,000 did not come from Botnick's company but rather from Mernick's mother who received a non-interest bearing note due 2017 for $500,000 from Botnick's company. However, this transaction which took place July 23, 1992 was reduced by Registrar Ferron to $7,485,000 in light of a prior settlement; it is this amount plus accruing interest which Botnick's company is able to claim against Mernick. The remaining $3,125,465 was made up of various small claims. These were supplemented by further claims of $13,898,887. Claims amounting to $24,509,382 were made and voted in the proposal.

7 The proposal was for $50,000 payable over time (12 months) without any actual security or designation as to the source of such payments. This would amount to a payout of 1/5 of one cent on the dollar. However, Botnick's company waived payment which would increase the payout to about 1/3 of one cent on the dollar — a payout which no one would suggest was handsome.

8 It is however a rather strange waiver by Botnick's company. The proposal states:

> The trustee will distribute the above-mentioned funds [$50,000] in accordance with the priority set forth above. To the extent that unsecured creditors receive dividends through this proposal, such dividend shall be deemed as full payment, and full settlement of those creditors' outstanding claims.
>
> 974846 Ontario Inc. has agreed that upon the acceptance of this proposal by my creditors and approval by the Court, it will waive its rights to its pro rata share of the dividend contemplated under this proposal, thereby allowing such funds to be distributed among other unsecured creditors.

9 On that basis it would appear that Botnick's company's claim would not be compromised since it would not receive a dividend. On the other hand, the legitimacy of the deal which Mernick advised was to get an independent party in control of the Firestone indebtedness — questionable at best takes on a very rank odour if Botnick's company forgives its claim against Mernick but remains saddled with its debt to his mother. The transaction does not have the air of reality. In any event, Mernick was unfortunately at somewhat of a loss to explain which interpretation should be given to the Botnick company waiver.

10 53 votes were cast in the vote on the proposal — 47 (88%) in favour and 6 against. In dollar terms, of the $24,509,382 of claims, $16,992,529 (69.3%) were in favour and $7,516,852 against. Two thirds value would be $16,339,586 so that the votes exceeded this value requirement by $652,944.

11 The PTL deal was to have been completed by 792929 Ontario Inc. ("79 Company"). Mernick held the shares of this company in trust but he has been vague about the nature of the trust and its beneficiary. He asserts that the beneficiary was never himself although there are a number of agreements in which he recites and warrants that he is sole beneficial owner of the shares. As well, his legal counsel caused to be signed court papers to this effect. Mernick asserts that errors were made and that he did not check the papers before signing. The point in issue in this hearing is the return of the PTL deposit to the 79 Company in late 1990. In 1992, Mernick admitted that a portion of the PTL deposit of about $2.4 million was used to settle claims of Firestone, Bank Leumi and other creditors as well as for legal fees, living expenses and business expenses. Details were not given. One of the April 26, 1993 undertakings to be answered was to give details of the disposition of these funds.

12 Until he settled with MICC, Mernick always claimed that his interest in the Innisfil Site was worth $30 million based on a conditional offer to purchase the site obtained from 901557 Ontario Inc., a company controlled by a Mr. Spier. However, it appears that the $400,000 deposit paid came not from Spier's company but from the 79 Company. One must question the *bona fides* of such a structure which would so give the impression of financial strength.

13 Bank Leumi received $500,000 in early 1991 out of the PTL deposit. Registrar Ferron was of the view that this was a preference. Bank Leumi claimed $5,455,834 and voted in favour of the proposal.

14 Firestone received $428,353 U.S. in the winter of 1991 out of the PTL deposit. It would appear that such has the earmarks of a preference. The Botnick company, as assignee of the Firestone debt, voted $7,484,030 in favour of the proposal.

15 With respect to many of the claims, it is interesting to note that they date back to 1991 or before, yet they were not previously disclosed in any statement of assets and liabilities affirmed by Mernick. Mernick was quite candid that a fair number of these were owed to persons who were not pressing but expected to be paid if Mernick ever got into position to pay. It was expressed by Mernick that he felt he had a moral (and more) obligation to pay these in full — and it appears that there is a corresponding view in this regard from these creditors. One may well question under these circumstances if the proposal has any meaning vis-à-vis these debts. If the proposal fails, these people expect Mernick to pay 100 cents on the dollar at some time; if the proposal succeeds, they still expect Mernick to pay 100 cents on the dollar. While the morality of such may be very high, one must question whether votes in respect to these claims should be taken into account in binding other creditors; if not, then consideration should be given to the nature of this when considering whether the proposal should be approved.

16 Mernick has admitted that his "mess" began in the fall of 1989 during which time the Napanee mortgages fell due and were not paid. Spider Maple was put into receivership and Bank Leumi called its loans. Since then, at least $2.4 million has been expended which could have been made available to Mernick's creditors generally.

17 Clearly the assets involved are less than 50 cents on the dollar (s. 173(1)(*a*)). Mernick has either failed to keep proper records (s. 173(1)(*b*), s. 200(1)(*a*)) or he has refused to or is unable to answer his undertakings using such records (s. 173(*m*). Mernick has continued to obtain credit after knowing himself to be insolvent and engaged in business deals (s. 173(1)(*c*)). The PTL deposit disposition has not been answered (s. 173(1)(*d*)). In light of the scanty information available (despite great efforts over a long time by Mr. Mercer), it is not possible to determine if Mr. Mernick has infringed s. 173(1)(*e*). Clearly in his dismissal for want of prosecution of appeal of the Xerox claim, Mernick has put Xerox to unnecessary expense (s. 173(1)(*f*)). It appears that there have been preferences within the period in question (s. 173(1)(*h*)). He has also committed a bankruptcy offence in failing to answer questions (s. 198(*c*), s. 173(1)(*l*)).

18 Three interests must be considered on an application to approve a proposal (see *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.)):

(a) the interests of the debtor;

(b) the interests of the creditors generally by ensuring that the proposal is reasonable; and

(c) the interests of the public in the integrity of bankruptcy legislation.

19 The Court must weigh the effect of approving the proposal and not approving the proposal. In order for the proposal to be approved, the creditors must obtain an advantage over bankruptcy: see *Re Allen Theatres Limited* (1922), 3 C.B.R. 147 (Ont. S.C.); *Re Tridont Health Care Inc.* (1991), 4 C.B.R. (3d) 290 (Ont. Bktcy.) and *Re First Toronto Mining Corp.* (1991), 3 C.B.R. (3d) 246 (Ont. Bktcy.). The conduct of the debtor is a factor to be considered and if there is any suggestion of collusion or secret advantage, the matter will be particularly scrutinized: see *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.) and *Re Man With Axe Ltd.* (1961), 2 C.B.R. (N.S.) 8 (Man. Q.B.).

20 Where the facts mentioned in s. 173 BIA are proven, the Court shall refuse to approve the proposal unless the proposal provides reasonable security for the payment of not less than 50 cents on the dollar of unsecured claims or such percentage of these as the Court may direct: see *Re Dolson* (1984), 49 C.B.R. (N.S.) 255 (Ont. S.C.); *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.); *Re Tridont, supra*. The Court may refuse to approve a proposal where offences mentioned in s. 198 and s. 200 have been committed (s. 59(2) BIA).

21 As indicated previously, I am of the view that this type of proposal is an ill fit with the thrust and intention of BIA. It is not a reorganization or restructuring. As such, it should at least receive the strongest scrutiny. There are numerous offences and inappropriate facts which raise problems under s. 173, s. 198 and s. 200. The Botnick company deal smacks of illegitimacy on whatever view is taken of it. It would seem that the creditors may be giving up $50,000 (although it is necessary to note that the source was not disclosed in the proposal and it had to be over time) but that this would be their ticket of admission to determine what happened to at least the PTL deposit and to see if some of this money might be recovered under a preference action. I note that it would be very much in the interests of Bank Leumi and Firestone/Botnick company to vote in favour of the proposal to eliminate the risk of investigation into the preference question. It seems to me that an investigation would have the double barrelled advantage of satisfying the justifiable curiosity of the "outside" claimants and vindication of Mernick if he has in fact made appropriate (even if quite disjointed) disclosure. I note also that even according the in favour votes full dollar credence, the two-thirds' value majority was narrowly obtained; in other words, there was not an overwhelming vote in favour. I am therefore of the view that it would be in the interests of the creditors generally not to approve this proposal since it does not appear reasonable on its face (especially since it is for a fraction of a cent on the dollar and falls below any appropriate threshold in this regard or in regard to s. 173(1)(*a*) and s. 59(3)). For this and other reasons given, I think it in the public interest not to approve this proposal. In essence, the proposal (given the minuscule recovery aspect) was a bankruptcy without the investigative assistance possible in a bankruptcy, all in a situation where there was a demonstrated reluctance to provide information.

22 The non-approval of the proposal would then bring s. 61(2)(*a*)(iii) into play.

Application dismissed.

TAB 10

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

Nortec Colour Graphics Inc., Re

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

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

Deputy Registrar Sproat

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

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

Subject: Insolvency; Civil Practice and Procedure

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

***Deputy Registrar Sproat*:**

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

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

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

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

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

The Motion to Extend the Proposal Period

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

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

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

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

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

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

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

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

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

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

2. Will Nortec likely to make a viable proposal

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

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

3. Will any creditor be materially prejudiced?

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

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

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

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

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

4. Disposition of Nortec's motion

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

The Cross-Motion to Terminate the Proposal Period

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

The Cross-Motion to Lift the Stay of Proceedings

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

Costs

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

Motion granted; cross-motion dismissed.

TAB 11

2016 ONSC 8192
Ontario Superior Court of Justice [Commercial List]

Rizzo, Re

2016 CarswellOnt 21774, 2016 ONSC 8192, 282 A.C.W.S. (3d) 245, 50 C.B.R. (6th) 316

IN THE MATTER OF THE PROPOSAL OF MARCO RIZZO AND ANGELA RIZZO OF THE CITY OF MISSISSAUGA IN THE PROVINCE OF ONTARIO

Penny J.

Judgment: December 14, 2016 *
Docket: 32-2132473, 32-2132474

Proceedings: additional reasons at *Rizzo, Re* (2017), 2017 ONSC 4234, 2017 CarswellOnt 12497, Penny J. (Ont. S.C.J. [Commercial List])

Counsel: P. Gertler, for Trustee
M. Harris, for Rizzos
L. Hansen, for Royal Bank of Canada

Subject: Corporate and Commercial; Estates and Trusts; Insolvency

MOTION by trustee for approval of proposal.

***Penny J.*:**

1 This is a motion by the Trustee for approval of the joint proposal of the debtors, the Rizzos. The motion is opposed by RBC.

2 RBC opposes on the basis that its vote against the proposal was not counted. It is common ground that RBC's vote, if counted, would have defeated the proposal.

3 The Trustee says the "vote" of RBC was not valid, that RBC was advised of this and did nothing to file a valid vote. RBC failed to attend the meeting of creditors. Only one creditor voted; it voted in favour of the proposal.

4 The threshold question is whether the Trustee was right to reject RBC's purported "vote." There is a secondary issue about whether RBC was served with the proposal and notice of meeting.

5 Section 53 provides that any creditor with a proven unsecured claim may indicated assent or dissent *from a proposal prior to* the first meeting of creditors.

6 What happened in this case is that the Trustee received a joint NOI from the debtors on June 8, 2016. The Trustee served the NOI on all known creditors by ordinary mail. RBC was served at two addresses: i) legal counsel for RBC; and ii) BankruptcyHighway.com, an agent for RBC. This was sent out on June 9, 2016.

7 In response to the NOI, which did not contain any proposal whatsoever, the Trustee received, from Security Recovery Group Inc., another agent for RBC, two proofs of claim, each in the amount of $438,434.31; one proof for each debtor.

8 SRG also sent a voting letter. It asked the Trustee to count RBC's vote "with respect to the proposal" of the Rizzos "against acceptance of the proposal made as of the 08 th day of June, 2016."

9 As of June 8, or indeed the date of SRG's letter, June 20 and the date of the Trustee's response to SRG on June 22, 2016, There was no proposal filed by the debtors.

10 The Trustee wrote to SRG on June 22, 2016 advising that the Trustee's position was that because no proposal was yet in existence, the RBC/SRG "vote" was invalid and that RBC would have to provide a proper voting letter once the proposal was received. This was also sent to RBC's counsel. The Trustee received no response to this communication.

11 The debtors filed a proposal July 7. The Trustee served the proposal on all creditors. The Evidence is that the Trustee served RBC three ways: i) to RBC's counsel; ii) to SRG; and iii) to BankrputcyHighway.com. This package included not only the proposal by notice of the first meeting of creditors and forms for proof of claim and a voting letter.

12 The Trustee received nothing further from RBC. The meeting provided proceeded on July 27. RBC did not attend. One creditor, with a claim of $278,561.29, attended and voted for the proposal. The Proposal was deemed to have been accepted. Consistent with its position, the Trustee did not count the RBC June 22 "vote".

13 RBC claims its vote was valid and ought to have been counted. While I would not go so far as to say a creditor could never lodge a valid vote against a proposal before receiving it, in this case, I find the vote was not valid. The Trustee was correct in not counting it.

14 Section 53 permits a creditor to assent or dissent "from a proposal" before a meeting. Section 54 says the creditor may accept or refuse "the proposal" at the meeting. The statutory scheme for creditor voting assumes there *is* a proposal.

15 SRG's purported "vote" was on its face defective. It tells the Trustee to lodge RBC's vote "against the proposal of June 8." There was no proposal of June 8.

16 The "vote" was defective. It purports to vote on a proposal that did not exist and which by definition RBC or its agent SRG had never seen. The Trustee was right to reject an obviously defective "vote".

17 The Trustee made its position abundantly clear to RBC's agents. RBC had every opportunity to cure the defect. It failed to do so. This conclusion is consistent with the rehabilitative purpose of the proposal provision of the *BIA*. The Trustee was correct not to record RBC's "vote" against a non-existent proposal.

18 RBC, in the alternative, argues that it was never served with the proposal, notice of meeting or additional voting letters. It argues that it was therefore deprived of the opportunity to review the proposal and lodge a further vote or attend the meeting.

19 I do not thing this argument can be sustained.

20 The Trustee personally swore and affidavit of service which included service on three RBC agents. The Trustee was not cross-examined on his affidavit. A representative of SRG says he did not received this package. He too was not cross-examined. There is no doubt that RBC's lawyers and BankruptcyHighway.com received the proposal etc. as RBC's agents.

21 I do not think RBC's argument affords valid grounds for complaint for three reasons.

1. First, RBC does not dispute that it received the Trustee's rejection of its original June 22 voting letter. It never did anything to follow up on that. It was put on notice there was a problem. It took no action. In the *BIA* system, there is an expectation that parties, especially sophisticated parties, exercise due diligence in the advancement of their interests. Ignoring the Trustee's email was not duly diligent.

2. SRG admits it received every other communication sent to it about this file from the Trustee. It would have to do better than a bald denial, especially in the face of the Trustee's affidavit of service, to convince me that the notice of meeting etc. was never received by SRG.

3. Further, RBC cannot deny that at least two other agents involved in this file received the proposal and the notice.

22 For these reasons, I find that the Trustee was correct in rejecting the June 22 "vote" and that RBC was not denied due process.

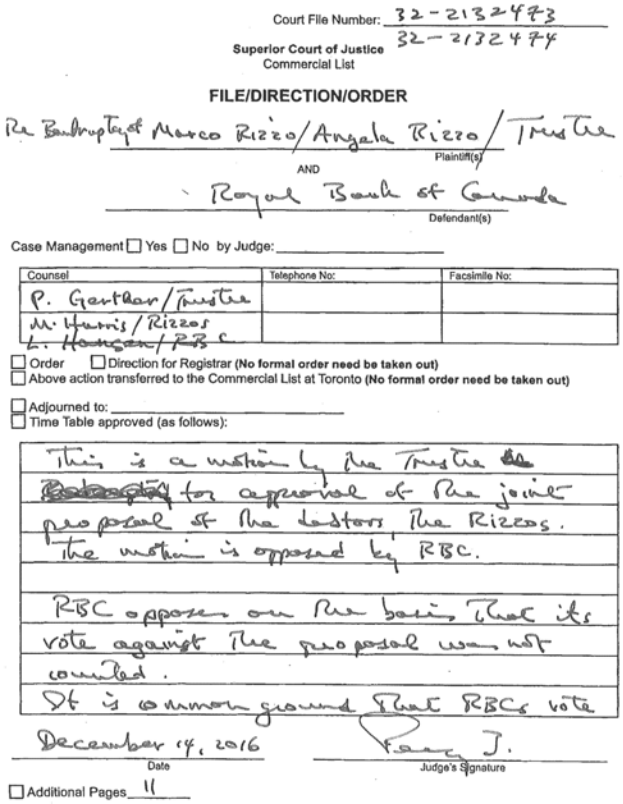
23 The motion for approval of the proposal is granted.

24 In a separate endorsement, I have already dealt with the debtors' request to lift the stay[sic] to enable their house to be sold.

25 The Trustee is entitled to its costs. He may file a brief written submission of no more than two typed double-spaced pages together with a bill of costs within 7 days. RBC may respond with a similar submission, subject to the same limit, within another 7 days.

Motion granted.

Appendix



Court File Number: 32-2132473
32-2132474

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Re Bankrupt(s) Marco Rizzo/Angela Rizzo / Trustee
Plaintiff(s)
AND
Royal Bank of Canada
Defendant(s)

Case Management ☐ Yes ☐ No by Judge:

Counsel	Telephone No:	Facsimile No:
P. Gerthar / Trustee		
M. Harris / Rizzos		
L. Hoegen / RBC		

☐ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

☐ Adjourned to:
☐ Time Table approved (as follows):

This is a motion by the Trustee ~~for~~ for approval of the joint proposal of the debtors, the Rizzos. The motion is opposed by RBC.

RBC opposes on the basis that its vote against the proposal was not counted.

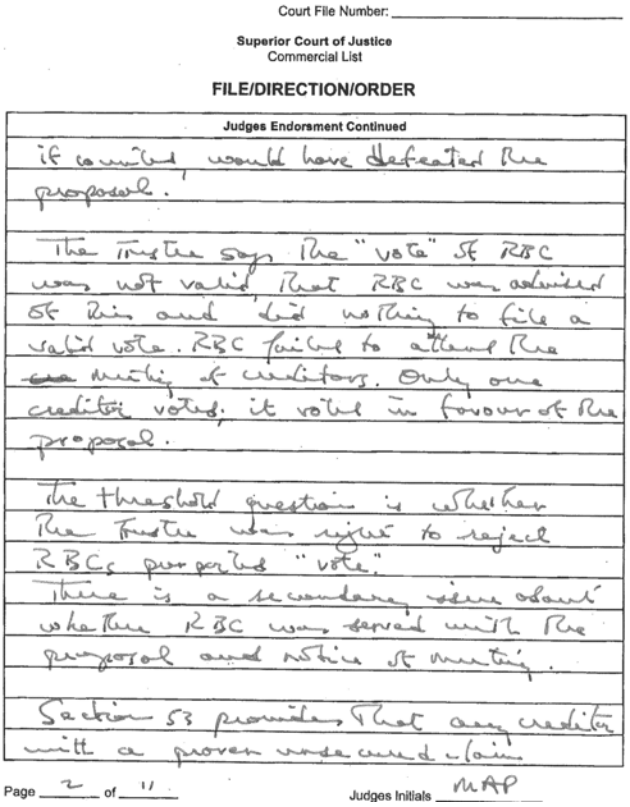
It is common ground that RBC's vote

December 14, 2016
Date

Judge's Signature

☐ Additional Pages 11

Graphic 1



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Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

if carried, would have defeated the proposal.

The Trustee says the "vote" of RBC was not valid that RBC was advised of this and did nothing to file a valid vote. RBC failed to attend the meeting of creditors. Only one creditor voted; it voted in favour of the proposal.

The threshold question is whether the Trustee was right to reject RBC's purported "vote."

There is a secondary issue about whether RBC was served with the proposal and notice of meeting.

Section 53 provides that any creditor with a proven unsecured claim

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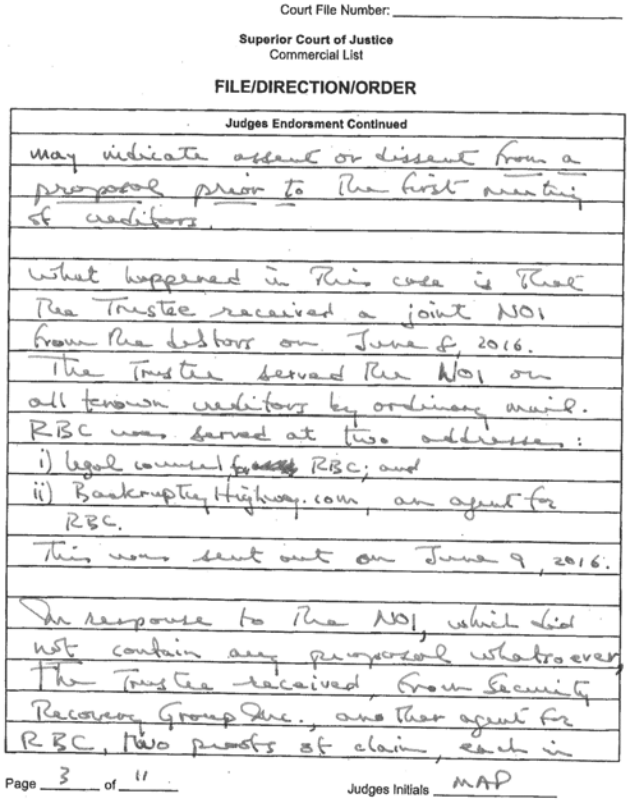
Graphic 2



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Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

may indicate assent or dissent from a proposal prior to the first meeting of creditors.

What happened in this case is that the Trustee received a joint NOI from the debtors on June 6, 2016. The Trustee served the NOI on all known creditors by ordinary mail. RBC was served at two addresses:

i) legal counsel for RBC; and
ii) Bankruptcy Highway.com, an agent for RBC.

This was sent out on June 9, 2016.

In response to the NOI, which did not contain any proposal whatsoever, the Trustee received, from Security Recovery Group Inc., one that agent for RBC, two proofs of claim, each in

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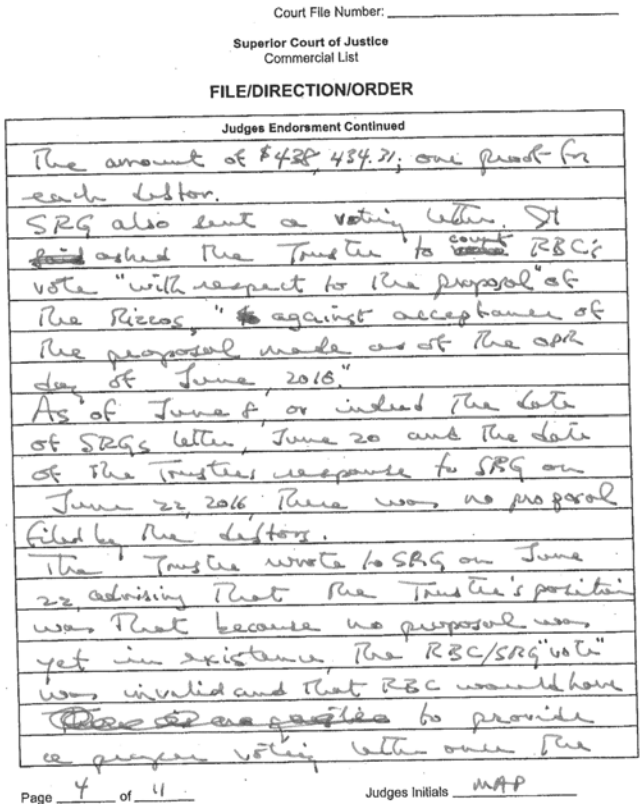
Graphic 3



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Superior Court of Justice
Commercial List

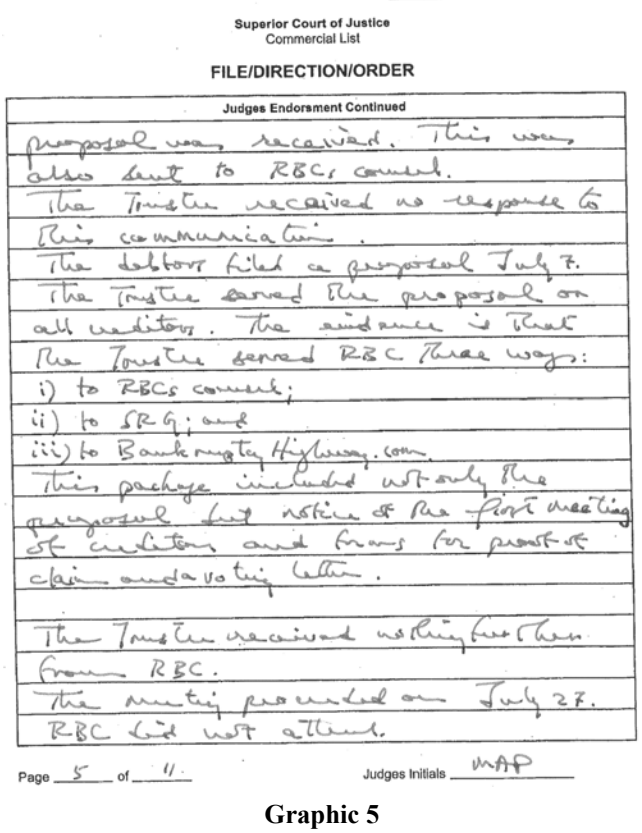
FILE/DIRECTION/ORDER

Judges Endorsment Continued

The amount of $428,434.71; one proof for each debtor.
SRG also sent a voting letter. It ~~filed~~ asked the Trustee to ~~count~~ RBC's vote "with respect to the proposal of the Rizzos," ~~to~~ against acceptance of the proposal made as of the 6th day of June, 2016."
As of June 8, or indeed the date of SRG's letter, June 20 and the date of the Trustee's response to SRG on June 22, 2016 there was no proposal filed by the debtors.
The Trustee wrote to SRG on June 22, advising that the Trustee's position was that because no proposal was yet in existence, the RBC/SRG "vote" was invalid and that RBC would have ~~the opportunity~~ to provide a proper voting letter once the

Page 4 of 11 Judges Initials MAP

Graphic 4



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Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

proposal was received. This was also sent to RBC's counsel.
The Trustee received no response to this communication.
The debtors filed a proposal July 7.
The Trustee served the proposal on all creditors. The evidence is that the Trustee served RBC three ways:
i) to RBC's counsel;
ii) to SRG; and
iii) to Bankruptcy Highway.com.
This package included not only the proposal but notice of the first meeting of creditors and forms for proof of claim and a voting letter.
The Trustee received nothing further from RBC.
The meeting proceeded on July 27. RBC did not attend.

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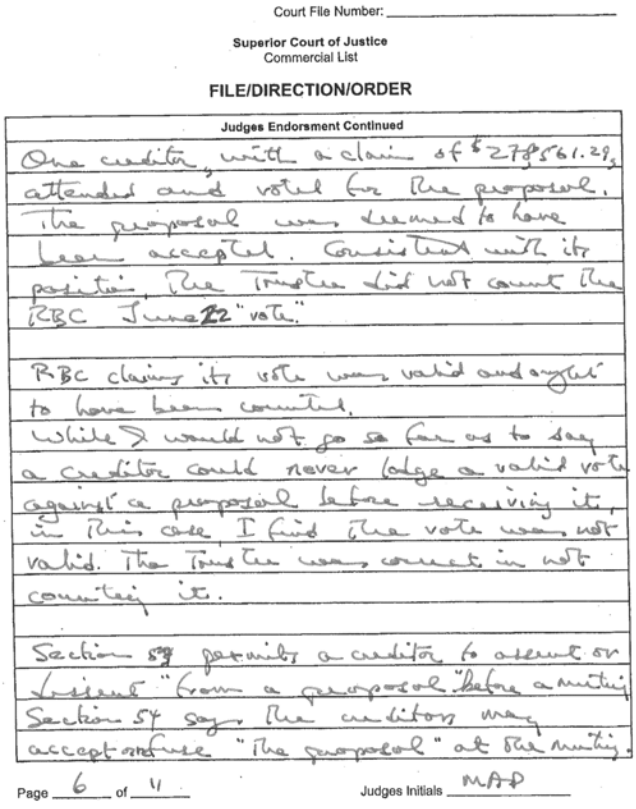
Graphic 5



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Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

One creditor, with a claim of $278561.29, attended and voted for the proposal. The proposal was deemed to have been accepted. Consistent with its position, the Trustee did not count the RBC June 22 "vote."

RBC claims its vote was valid and ought to have been counted.

While I would not go so far as to say a creditor could never lodge a valid vote against a proposal before receiving it, in this case, I find the vote was not valid. The Trustee was correct in not counting it.

Section 84 permits a creditor to assent or dissent "from a proposal" before a meeting. Section 54 says the creditors may accept or refuse "the proposal" at the meeting.

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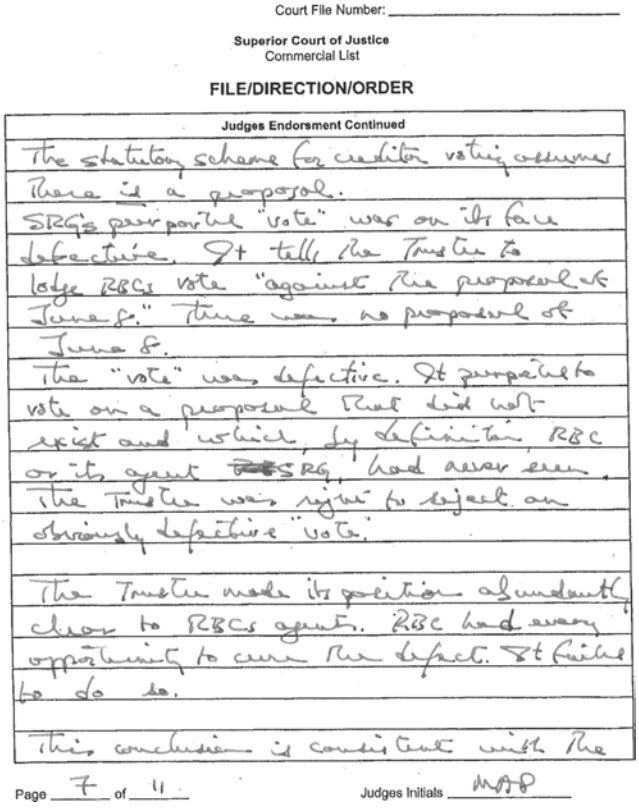
Graphic 6



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Superior Court of Justice
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Judges Endorsment Continued

The statutory scheme for creditor voting assumes there is a proposal.

SRG's purported "vote" was on its face defective. It tells the Trustee to lodge RBC's vote "against the proposal of June 8." There was no proposal of June 8.

The "vote" was defective. It purported to vote on a proposal that did not exist and which, by definition, RBC or its agent ~~RBC~~ SRG, had never seen. The Trustee was right to reject an obviously defective "vote."

The Trustee made its position abundantly clear to RBC's agents. RBC had every opportunity to cure the defect. It failed to do so.

This conclusion is consistent with the

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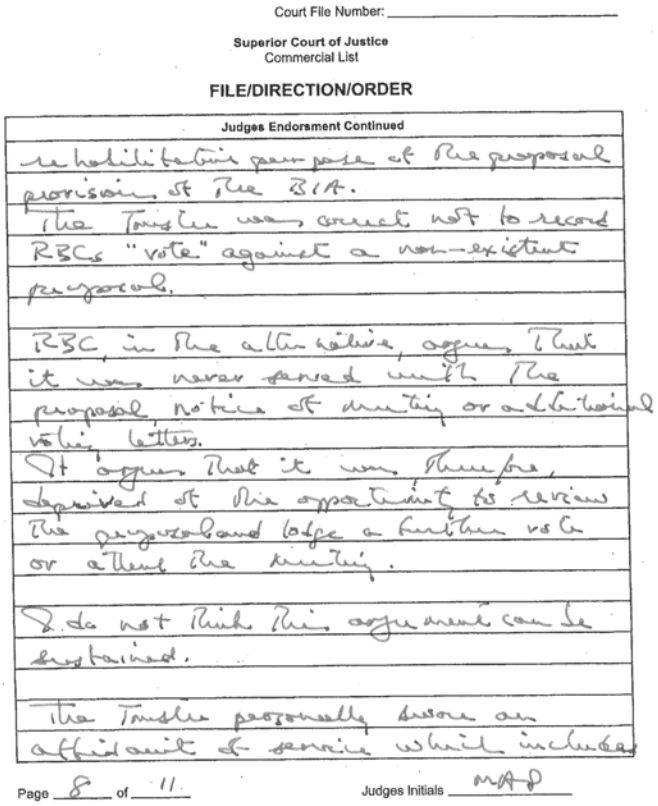
Graphic 7



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Superior Court of Justice
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Judges Endorsment Continued

re habilitation's purpose of the proposal provision of the BIA.
The Trustee was correct not to record RBC's "vote" against a non-existent proposal.

RBC in the alternative, argues that it was never served with the proposal, notice of meeting or additional voting letters.
It argues that it was therefore, deprived of the opportunity to review the proposal and lodge a further vote or attend the meeting.

I do not think this argument can be sustained.

The Trustee personally swore an affidavit of service which includes

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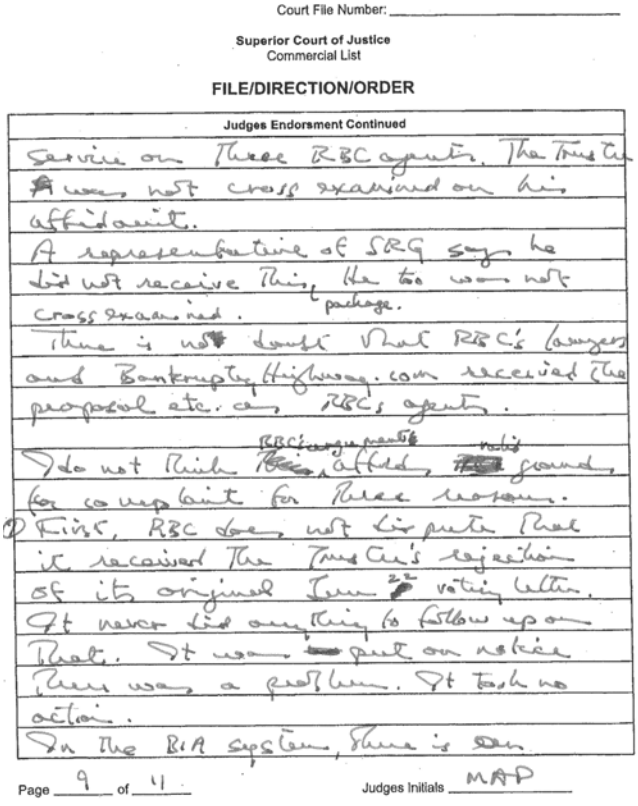
Graphic 8



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Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

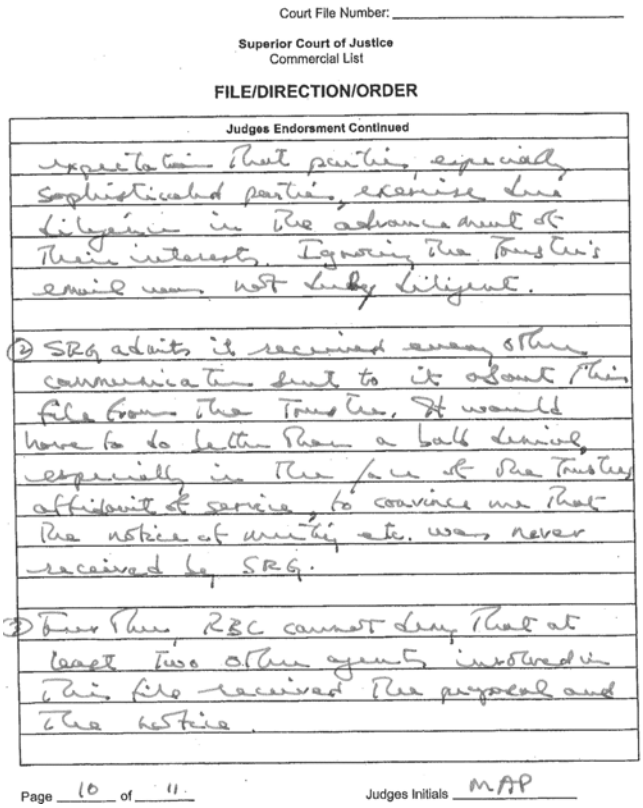
Judges Endorsment Continued

service on three RBC agents. The Trustee was not cross examined on his affidavit.
A representative of SRC says he did not receive this, he too was not cross examined. package.
There is no doubt that RBC's lawyers and Bankruptcy Highway.com received the proposal etc. as RBC's agents.

I do not think RBC's argument, affidavit, notice grounds for complaint for three reasons.
1) First, RBC does not dispute that it received the Trustee's rejection of its original Form 2 voting letter. It never did anything to follow up on that. It was put on notice there was a problem. It took no action.
In the BIA system, there is

Page 9 of 11 Judges Initials MAP

Graphic 9



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Superior Court of Justice
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Judges Endorsment Continued

reputation that parties, especially sophisticated parties, exercise due diligence in the advancement of their interests. Ignoring the Trustee's email was not duly diligent.

(2) SRG admits it received many other communications sent to its agent this file from the Trustee. It would have to do better than a bald denial, especially in the face of the Trustee's affidavit of service, to convince me that the notice of motion etc. was never received by SRG.

(3) Further, RBC cannot deny that at least two other agents involved in this file received the proposal and the notice.

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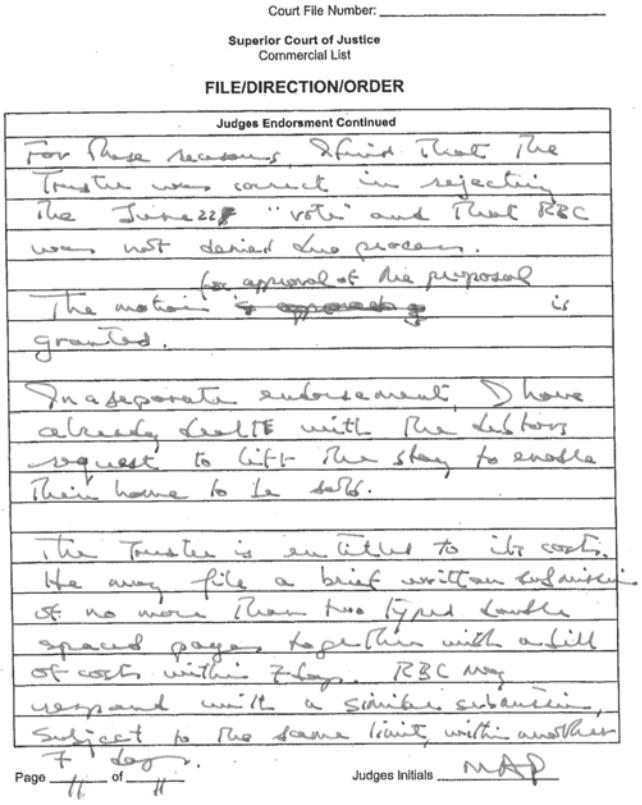
Graphic 10



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Superior Court of Justice
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Judges Endorsment Continued

For those reasons, I find that the Trustee was correct in rejecting the June 22nd "vote" and that RBC was not denied due process.

The motion for approval of the proposal is granted.

In a separate endorsement, I have already dealt with the debtors request to lift the stay to enable their home to be sold.

The Trustee is entitled to its costs. He may file a brief written submission of no more than two typed double spaced pages, together with a bill of costs within 7 days. RBC may respond with a similar submission, subject to the same limit, within another 7 days.

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Graphic 11

Footnotes

* Additional reasons at *Rizzo, Re* (2017), 2017 CarswellOnt 12497, 2017 ONSC 4234, 50 C.B.R. (6th) 332 (Ont. S.C.J. [Commercial List]).