

Estate File Number: 35-2638322  
Court File No.: 35-2638322

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL  
OF KMW ENERGY INC.**

**FACTUM OF KMW ENERGY INC.**  
(motion returnable May 1, 2020)  
(re approval of DIP Loan, sale process and other relief)

April 30, 2020

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TO: THE SERVICE LIST

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**PART I - NATURE OF MOTION**

1. On April 11, 2020 (the “**Filing Date**”), KMW Energy Inc. (“**KMW**” or the “**Company**”) filed a Notice of Intention to Make a Proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”). MNP Ltd. was named proposal trustee in this proceeding (the “**Proposal Trustee**”).
  
2. The factum is filed by KMW in support of its motion for an order, *inter alia*:
  - (a) authorizing the Company to enter into the DIP Term Sheet<sup>1</sup> and granting the DIP Charge over the Property as security for the Company’s obligations to the DIP Lender under the DIP Term Sheet;
  
  - (b) authorizing the Company to execute the Stalking Horse Agreement with the Stalking Horse Bidder, and approving the Stalking Horse Agreement;
  
  - (c) authorizing the Proposal Trustee to conduct the Sale Process;

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<sup>1</sup> Capitalized terms used and not otherwise defined in Part I shall have the meanings ascribed to such terms in the body of the factum.

- (d) approving the Administration Charge over the Property in favour of the Administrative Professionals to secure payment of their reasonable fees and disbursements;
- (e) approving the D&O Charge in favour of the Company's directors and officers to indemnify them against obligations and liabilities that they may incur after the Filing Date; and
- (f) approving an extension of the time for the Company to make a proposal to its creditors to June 25, 2020.

3. The Company's motion and the relief sought herein are supported by the Company's senior secured creditor and the Proposal Trustee.

## **PART II - FACTS**

### **Background**

4. KMW is a custom designer and supplier of the components of complete biomass boiler systems including fuel handling, combustion systems, heat recovery boilers, and emission control systems. KMW purchases all components from third party suppliers across the globe. KMW manages the assembly and installation of the components on site for its customers. Once assembly is complete, KMW provides training and support to its customers in the operation of the turbines and boilers.

Motion Record of KMW Energy Inc., Tab 2, Affidavit of Eric Bertil Rosen sworn April 24, 2020 (the "**Rosen Affidavit**"), paras. 5-8.

5. KMW carries on business from a leased facility located in London, Ontario. The Company employs 12 non-unionized employees and one independent contractor project manager. KMW does not have an employer-sponsored pension plan for its employees.

Rosen Affidavit, paras. 9-10.

6. KMW currently has six (6) ongoing projects at various stages of completion. KMW's assets are primarily comprised of contracts, accounts receivable, work-in-progress, proprietary engineering designs and software code, and goodwill.

Rosen Affidavit, para. 11.

### **Financial Difficulties**

7. KMW's financial difficulties are primarily attributable to a contract dated December 6, 2016 between KMW and Georges River Energy, LLC ("**GRE**") (the "**GRE Contract**") for the design and supply of a complete biomass energy system to generate 8.5MW of electric power, including turbine, generation and cooling tower (the "**GRE Project**").

Rosen Affidavit, paras. 19 and 28.

8. For the GRE Project, KMW contracted with a company for the supply of a turbine manufactured in India. KMW had no existing relationship with this manufacturer.

Rosen Affidavit, para. 29.

9. The turbine was delivered in April 2018 and the biomass energy system was assembled through the spring, summer and fall of 2018. Notwithstanding that KMW has spent approximately US\$1.688 million of its working capital in attempting to repair the turbine, it does not function

properly. As a result, GRE has threatened litigation against KMW and has not paid to KMW the remaining US\$2,463,907 million owed to it under the GRE Contract.

Rosen Affidavit, paras. 30-31.

### **Secured Creditors**

10. KMW has no operating lender. KMW has two secured creditors, 2751602 Ontario Inc. (“**2751**”), which is a party related to 462673 Ontario Inc. c.o.b. as Nor-Arc Steel Fabricators (“**Nor-Arc**”) that took an assignment of the debt and security owed by KMW to Nor-Arc, and Liberty Mutual Insurance Company (“**Liberty Mutual**”).

Rosen Affidavit, para. 12.

11. Nor-Arc is a supplier of combustion chambers and fabrication services to KMW. As at March 24, 2020, KMW was indebted to Nor-Arc in the amount of \$2,778,084.92, which represents the sum of outstanding invoices and interest owed by KMW to Nor-Arc from the period of April 2010 to March 2020. The amount has been acknowledged by KMW. KMW granted to Nor-Arc a security interest in all of its property, assets and undertaking as security for payment of all present and future debts, liabilities and obligations of KMW to Nor-Arc

Rosen Affidavit, paras. 13-14 and 16.

12. On April 9, 2020, Nor-Arc demanded payment from KMW and served a Notice of Intention to Enforce Security pursuant to section 244(1) of the BIA. Nor-Arc subsequently assigned the indebtedness and security owed to it by the Company to 2751, a related party.

Rosen Affidavit, paras. 18 and 34.

13. Liberty Mutual, as surety, has issued a Performance Bond for Procurement Contracts in the amount of \$6,412,500 in favour of GRE in connection with the GRE Project. (the “**Performance Bond**”). KMW has agreed to indemnify Liberty Mutual with respect to any liabilities it may incur in connection with the Performance Bond, and granted to Liberty Mutual a security interest in all of its property, assets and undertaking.

Rosen Affidavit, paras. 22-24

14. Nor-Arc, which is related to the DIP Lender and the Stalking Horse Bidder, has also agreed to indemnify Liberty Mutual in connection with the Performance Bond.

Rosen Affidavit, paras. 22 and 25.

### **DIP Loan**

15. 2751, in its capacity as the proposed lender (the “**DIP Lender**”), has offered to make available to KMW a debtor-in possession loan in the maximum amount of \$500,000 (the “**DIP Loan**”) pursuant to the terms of an interim financing term sheet dated April 24, 2020 between the Company and the DIP Lender (the “**DIP Term Sheet**”).

Rosen Affidavit, para. 37.

16. It is a fundamental term of the DIP Term Sheet that the Court grant the DIP Lender a second ranking charge over the Company’s property, assets and undertakings (collectively, the “**Property**”) in priority to all other claims and encumbrances (the “**DIP Charge**”) other than the Administration Charge.

Rosen Affidavit, para. 38.

17. Based on cash flow projections prepared by the Company in consultation with the Proposal Trustee, in the absence of the DIP Loan, KMW will not be able to conduct the Sale Process and will be forced to immediately shut down its business and file for bankruptcy.

Rosen Affidavit, para. 39.

18. The terms of the DIP Term Sheet are reasonable in the circumstances, the DIP Loan enhances the Company's prospects of making a viable proposal to its creditors, and no creditor will be materially prejudiced as a result of the granting of the DIP Charge.

Rosen Affidavit, para. 40.

#### **Sale Process and Stalking Horse Agreement**

19. KMW, in consultation with the Proposal Trustee, has developed a sale process to be administered by the Proposal Trustee for the marketing of the Company's business and assets on a going concern basis (the "**Sale Process**"). As part of the Sale Process, KMW will enter into a stalking horse asset purchase agreement dated April 24, 2020 (the "**Stalking Horse Agreement**") between the Company and 2751 in its capacity as stalking horse bidder (the "**Stalking Horse Bidder**").

Rosen Affidavit, para. 40.

20. The Stalking Horse Bidder is prepared to purchase the business the terms of the Stalking Horse Agreement for a purchase price equal to: (i) \$500,000; and (ii) any amounts ranking in priority to the Stalking Horse Bidder's security, including any amounts secured by the DIP Charge, the Administration Charge and the D&O Charge.

Rosen Affidavit, para. 41.

### **Administration Charge**

21. In order to protect the fees and expenses of each of Company's legal counsel, the Proposal Trustee, and the Proposal Trustee's legal counsel (collectively, the "**Administrative Professionals**"), KMW seeks a first ranking charge on the Property in an amount of \$150,000 (the "**Administration Charge**"), ranking in priority to all claims and encumbrances. No creditor will be materially prejudiced as a result of the granting of the Administration Charge.

Rosen Affidavit, paras. 44-45.

### **D&O Charge**

22. The Company does not have an existing insurance policy with respect to directors' and officers' liabilities. KMW is seeking a third ranking charge on the Property in favour of their directors and officers in the amount not to exceed \$50,000 (the "**D&O Charge**") ranking in priority to all other claims and encumbrances, with the exception of the Administration Charge and the DIP Charge, as security for the possible liabilities that may be incurred by the directors and officers of the Company after the Filing Date, including wages, vacation pay, and source deductions.

Rosen Affidavit, para. 46-47.

23. There is a risk that without the D&O Charge, KMW's directors and officers might resign from their positions, which would jeopardize the NOI proceeding. The Company, in consultation with the Proposal Trustee, believes that the quantum of the proposed D&O Charge is reasonable given the circumstances. No creditor will be materially prejudiced as a result of the granting of the D&O Charge

Rosen Affidavit, paras. 47-49.



**Stay Extension**

24. The period for KMW to file a proposal will expire on May 11, 2020. The Company is acting in good faith and with due diligence in seeking to preserve its business on a going concern basis for the benefit of all of its stakeholders.

Rosen Affidavit, para. 50.

25. In order to commence and advance the Sale Process, KMW is seeking an extension of time to file a proposal for 45 days or until June 25, 2020.

Rosen Affidavit, para. 51.

26. Without the extension, KMW will not be in a position to make a viable proposal to its creditors and will become bankrupt to the detriment of its stakeholders. In contrast, no creditor will be materially prejudiced if the extension applied for is granted. The extension is supported by the Proposal Trustee. If the extension applied for is granted, KMW would likely be able to make a viable proposal to its creditors following the completion of the Sale Process.

Rosen Affidavit, para. 52.

**PART III - ISSUES**

27. The issues on this motion are as follows:
- (a) Should the Court approve the DIP Term Sheet and the DIP Charge?
  - (b) Should the Court approve the Stalking Horse Agreement and the Sale Process?
  - (c) Should the Court grant the Administration Charge?
  - (d) Should the Court grant the D&O Charge?

- (e) Should the Court approve the extension of time for KMW to file a proposal?

#### **PART IV - LAW AND ANALYSIS**

##### **(a) The DIP Term Sheet and the DIP Charge should be approved**

28. The Company seeks approval of the DIP Term Sheet and the DIP Charge to secure payment of the advances by the DIP Lender under the DIP Loan over all of the Property, to rank ahead of existing security interests and other encumbrances except for the Administration Charge.

29. Section 50.6 of the BIA confers on the Court the statutory jurisdiction to grant a debtor-in-possession (“**DIP**”) financing charge:

**50.6(1) Interim Financing:** 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 security or charge, a court may make an order declaring that all or part of the debtor’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor’s cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

**50.6(3) Priority:** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

30. Section 50.6(5) of the BIA sets out a non-exhaustive list of factors to be considered by the Court in deciding whether to grant DIP financing:

**50.6(5) Factors to be considered:** In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor’s business and financial affairs are to be managed during the proceedings;

- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

31. Where it is evident that absent approval of interim financing the debtor would close its doors, the DIP facility was supported by the proposal trustee and on balance the benefit of the granting of the priority charge outweighed the prejudice to the various creditors, interim financing and a charge should be approved.

*Mustang GP Ltd. (Re)*, 2015 ONSC 6562 [*“Mustang”*], paras. 26-31.

32. It is submitted that the Court should approve the DIP Term Sheet together with the DIP Charge. The DIP Loan is essential to provide the Company with the financing it requires to continue to operate its business and carry out the Sale Process. The following additional factors support the approval of the DIP Term Sheet and the granting of the DIP Charge:

- (a) the availability of the DIP Loan is contingent on the order of this Court approving the DIP Term Sheet and the DIP Charge being granted to secure any advances made thereunder;
- (b) the necessity of the DIP Loan is demonstrated and supported by the cash flow projections;

- (c) in the absence of the DIP Loan, the Company will not be able to continue to carry on business or make a proposal to its creditors and will be forced to immediately shut down its operations to the detriment of all stakeholders;
- (d) no creditor should be materially prejudiced as a result of the DIP Loan and the DIP Charge; and
- (e) the Proposal Trustee is supportive of the DIP Loan, the DIP Term Sheet and the DIP Charge.

**(b) The Stalking Horse Agreement and the Sale Process should be approved**

33. 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 debtor's sale of assets outside the ordinary course of business. However, section 65.13 of the BIA does not address the factors a court should consider when deciding whether to approve a sale process.

Section 65.13 of the BIA.

34. In *Mustang GP Ltd. (Re)* ("**Mustang**"), this Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a proposal proceeding. The Court reviewed the decisions in *Re Brainhunter* and *Nortel* for stalking horse sales processes under the *Companies' Creditors Arrangement Act* ("CCAA") and the application of section 36 of the CCAA, which mirrors the provisions of section 65.13 of the BIA. In *Mustang*, the Court accepted the following four factors from *Re Brainhunter* and *Nortel* to be applicable in proposal proceedings in determining if the proposed sale process should be approved:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole “economic community”?
- (c) Do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?

*Mustang*, para. 36-38.

35. Stalking horse offers are commonly used in insolvency proceedings to facilitate sales of businesses and assets. The Stalking Horse Agreement is intended to establish a baseline price and transactional structure for any potential superior bids from interested parties.

*Mustang*, para. 39.

36. The Company submits that the Sale Process and the Stalking Horse APA should be approved for the following reasons:

- (a) the Sale Process represents the best value for the Debtors’ economic community as a whole as it permits the sale of the Company’s business as a going concern and the preservation of jobs, contracts and business relationships;
- (b) the Stalking Horse Agreement will establish the floor price for the Company’s assets thereby maximizing recovery for all of the Company’s economic stakeholders;

- (c) the Stalking Horse Agreement does not feature a break fee or any other compensation for the Stalking Horse Bidder if a superior offer is received. Accordingly, any superior bid put forward will benefit only the stakeholders of the Company and not the Stalking Horse Bidder; and
- (d) the Proposal Trustee has advised that the Sale Process and the Stalking Horse Agreement are reasonable in the circumstances.

**(c) The Administration Charge should be approved**

37. The Company also seeks the Administration Charge to secure the fees of the Administrative Professionals, whose services are critical to this proceeding. This charge is to rank in priority to all other security interests in the Property, including the DIP Charge and the D&O Charge.

38. As in the case of DIP financing, the BIA confers on the court the statutory jurisdiction to grant an administration charge. Specifically, section 64.2 provides as follows:

**64.2 (1) *Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

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

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

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

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

39. Administrative charges have previously been approved in BIA proposal proceedings, where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful proceeding under the BIA as well as for the conduct of a sale process.

*Mustang*, paras. 32-33.

40. The Company submits that this is an appropriate circumstance for the Court to grant the Administration Charge with priority over pre-existing security interests and other encumbrances. The quantum of the proposed Administration Charge is both fair and reasonable given the size and complexity of KMW's business and the Sale Process. Each of the professionals 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 Sale Process. The Company has very limited cash and the Administration Charge is necessary to secure the full and complete payment of the reasonable fees and expenses of the beneficiaries, incurred in connection with these proceedings.

**(d) The D&O Charge should be approved**

41. The Company seeks approval of the D&O Charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the Filing Date. It is proposed that the D&O Charge be in the amount of \$50,000 and rank after the Administration Charge and the DIP Charge.

42. The BIA confers on the court the statutory jurisdiction to grant an administration charge. Specifically, section 64.1 provides as follows:

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

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

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

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

43. In *Mustang*, this Court approved a D&O Charge in circumstances similar to the case at hand where the directors and officers may not continue to provide their services without the protection of the D&O Charge and the continued involvement of the remaining directors and officers is critical to a successful Sale Process or any proposal under the BIA.

*Mustang*, paras. 34-35.

44. The Company submits that the Court should approve the D&O Charge for the following reasons:

- (a) the Company's directors and officers may not continue their involvement with the Company without the protection of the D&O Charge; the continued involvement of the directors and officers is critical to the Sale Process and these proposal proceedings; and



- (b) the Proposal Trustee believes the D&O Charge is reasonable and supports the D&O Charge.

**(e) Extension of time to file a proposal**

45. The Debtors filed its NOI on April 11, 2020. By operation of section 50.4(8) of the BIA, the Company is required to file a proposal within 30 days of April 11, 2020 unless it otherwise obtains an extension of time from the Court within that 30-day period. The Company seeking to extend the time within which a proposal must be filed to and including June 25, 2020.

46. Pursuant to section 50.4(9) of the BIA, a debtor in a proposal proceeding may, before the expiry of the time to file a proposal, apply to the court for an order extending the time to file a proposal, by a maximum of 45 days, and the court may extend the time if it 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.

S. 50.4(8) of the BIA.

47. In order to commence and advance the Sale Process, the Company is seeking an extension of time to file a proposal for 45 days until June 25, 2020. The Company respectfully submits that the extension sought ought to be approved for, *inter alia*, the following reasons:

- (a) the Company is acting in good faith and with due diligence;

- (b) an extension of time is required in order to commence and carry out the Sale Process for the benefit of all of the Company's economic stakeholders;
- (c) without the extension, the Company will not be in a position to make a viable proposal to its creditors and will become bankrupt to the detriment of its stakeholders. In contrast, no creditor will be materially prejudiced if the extension applied for is granted.
- (d) the proposed extension is supported by the Proposal Trustee and 2751.

**PART V - ORDER REQUESTED**

48. The Company seeks an order of the Court approving the relief set out in paragraph 2 of this factum.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 30<sup>th</sup> day of April, 2020.



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**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *Mustang GP Ltd. (Re)*, 2015 ONSC 6562

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

#### Section 50.4(8) and (9) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

##### Where assignment deemed to have been made

**50.4 (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.

##### 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

(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.

## **Section 50.6 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended**

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

### **Individuals**

(2) In the case of an individual,

- (a) they may not make an application under subsection (1) unless they are carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

### **Priority**

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

### **Priority — previous orders**

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

### **Factors to be considered**

- (5) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
  - (b) how the debtor's business and financial affairs are to be managed during the proceedings;
  - (c) whether the debtor's management has the confidence of its major creditors;
  - (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
  - (e) the nature and value of the debtor's property;

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

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

**Section 64.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended****Security or charge relating to director's indemnification**

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

**Priority**

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

**Restriction — indemnification insurance**

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

**Negligence, misconduct or fault**

**(4)** The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

**Section 64.2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended****Court may order security or charge to cover certain costs**

**64.2 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

**Priority**

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

**Individual**

(3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.



**Section 65.13 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended**

**Restriction on disposition of assets**

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

**Individuals**

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

**Notice to secured creditors**

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

**Factors to be considered**

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

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

**Additional factors — related persons**

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

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

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

### **Related persons**

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

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

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

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

### **Assets may be disposed of free and clear**

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

### **Restriction — employers**

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

### **Restriction — intellectual property**

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KMW ENERGY INC.**

Estate File Number: 35-2638322

Court File No.: 35-2638322

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY AND INSOLVENCY)  
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF KMW ENERGY INC.**  
(returnable May 1, 2020)  
(re approval of DIP Loan. sale process and other relief)

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