Court File No. 31-2295766

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C., 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE BANKRUPTCY OF
DIGITAL UNDERGROUND MEDIA INC.,
A COMPANY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO,
WITH A HEAD OFFICE IN THE CITY OF VANCOUVER,
IN THE PROVINCE OF BRITISH COLUMBIA

SUPPLEMENTAL FACTUM OF FORWARD DIMENSION CAPITAL 1 LLP
(Application returnable November 14, 2017)

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PART I - INTRODUCTION

1. The Trustee and DUMI have raised the question of whether FDC has standing to object to the Proposal.[1] Accordingly, FDC delivers this supplemental factum in response to the Trustee's and DUMI's facta. As set forth below, FDC has standing to object to the Proposal on numerous grounds.

(1) FDC Has Standing to Object to the Proposal

2. FDC has standing to object to the Proposal as a "creditor" within the meaning of the BIA. Section 59(1) of the BIA provides as follows:

> **Court to hear report of trustee, etc.**
> **59 (1)** The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall

[1] Capitalized terms used herein and not otherwise defined have the meaning given to them in FDC's Factum dated November 13, 2017.

> hear the trustee, the debtor, the person making the proposal, *any opposing, objecting or dissenting creditor and such further evidence as the court may require*.
>
> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 59(1).

3. "Creditor" is defined in the BIA as follows:

> ***creditor*** means a person having a claim provable as a claim under this Act.
>
> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 2.

4. On November 14, 2017, FDC filed a proof of claim with the Trustee.

> Affidavit of Christopher Armstrong sworn November 14, 2017.

5. Even assuming FDC is only the holder of an "equity claim" [2] within the meaning of the BIA, the BIA expressly refers, in a number of instances, to equity claimants constituting creditors within the meaning of the BIA:

> **Vote on proposal by creditors**
> **54 (1)** The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.
>
> **Voting system**
> **54(2)** For the purpose of subsection (1)…
>
> > **(d)** the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, *a class of creditors having equity claims* — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution. [emphasis added]
>
> **Class — creditors having equity claims**
> **54.1** Despite paragraphs 54(2)(a) and (b), *creditors having equity claims* are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise. [emphasis added]
>
> **Postponement of equity claims**
> **140.1** *A creditor is not entitled to a dividend in respect of an equity claim* until all claims that are not equity claims have been satisfied. [emphasis added]

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[2] In its factum, the Trustee characterizes any claim FDC may hold against DUMI as an "equity claim", which is not admitted by FDC. FDC continues to review all of its claims and rights vis-à-vis DUMI and its directors as well as the nature and basis of such claims and reserves the right to assert additional claims.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 54(1)-54(2), 54.1 and 140.1.

6. As such, even if FDC holds only equity claims, on a plain language reading of the BIA the term "creditor" as used in Section 59(1) of the BIA must be taken to include equity claimants.

(2) Section 59(1) Does not Preclude the Court from Hearing Shareholders

7. Further and in any event, on a plain language reading Section 59(1) does not preclude shareholders (or any other person) from having standing to oppose a proposal.

8. First, the language of Section 59(1) does not restrict the Court from hearing from any person; rather, it states that the Court *shall* hear from certain classes of persons. In this regard, it is noteworthy to contrast the language of 59(2) with, for instance, Section 54.1 of the BIA, which expressly prohibits creditors having equity claims from voting at a meeting to approve a proposal unless the court orders otherwise. Where Parliament has intended to restrict the rights of equity claimants, it has done so plainly. Had Parliament intended to restrict shareholders from having standing to object to a proposal, it would have said as much.

9. Second, the closing words of Section 59(2) which permit the Court to hear "such further evidence as the court may require" demonstrate that Parliament intended for the Court to have discretion and flexibility to determine what evidence to hear. In cases such as this, where the equity holder is a significant investor and is the one stakeholder who stands to lose far more than any other stakeholder under the Proposal, it has key evidence with respect to the debtor and the Proposal that can assist the Court in determining whether or not is appropriate to grant approval of this Proposal, particularly where, as here, a central feature of the Proposal is the elimination of the company's equity.

10. Courts sitting in bankruptcy have previously confirmed that even where parties lack formal standing, they may nevertheless be heard in the discretion of the court if the circumstances warrant, particularly where (as here) the interested party is able to draw attention to conduct of the debtor of which the court ought to be aware of in order to protect the integrity of the BIA.

Reference Re Cadillac Explorations Ltd. (No. 2) (1984), 51 C.B.R. (N.S.) 178 (B.C.S.C.) at para. 46, aff'd on other grounds 52 C.B.R. (N.S.) 37 (B.C.C.A.); Supplemental Book of Authorities, Tab 1.

Re Goldman (1982), 43 C.B.R. (N.S.) 30 (Ont. S.C.J.) at para. 8; Supplemental Book of Authorities, Tab 2.

11. Given the circumstances of the Proposal as outlined in FDC's factum as well as the significant impact the Proposal, if approved, would have on FDC's legal rights (the extinguishment of its shareholdings and the possible release of certain claims against both DUMI and its directors), the circumstances clearly warrant the Court hearing from FDC. Indeed, were shareholders simply denied standing to oppose a proposal as a matter of course, there would be free reign for an unscrupulous debtor to oppress its shareholders under the guise of a proposal and release itself and its directors from any claims arising from such conduct, all without the shareholders having any recourse.

12. In its factum, the Trustee cites *Re Can-Mar Precast Corp.* ("***Can-Mar***"), a decision of a registrar, for the proposition that shareholders do not have status to oppose approval of a proposal. The Trustee's reading of *Can-Mar* is incorrect. The objecting party in that case – 643837 Ontario Limited – was <u>not</u> a shareholder of the debtor, but rather a shareholder of a company named Coral Precast Limited, who was a creditor of the debtor. Accordingly, *Can-Mar* cannot be taken to stand for the proposition that shareholders do not have standing to object to a proposal. Rather, it was a case where the objecting party had no direct interest or relationship with the debtor.

13. The Trustee's and DUMI's reliance on *Re Canadian Airlines Corp* ("***Canadian***") is similarly misplaced. First, *Canadian* (a CCAA case) in no way deals with the question of the standing of shareholders to oppose a CCAA plan. To the contrary, the very fact that Paperny J. recites at length the objections of the shareholders to the sanctioning of the CCAA plan in *Canadian* shows they had standing to oppose the plan.

14. Further, the facts of *Canadian* – the last chance for the survival of a national airline following a decade long attempt at solving its financial problems – could not be more different than the facts at hand. In *Canadian*, there was a month's long process to explore strategic options, an express finding of insolvency by the Court (upon the granting of the initial order),

and a formal liquidation analysis that was prepared by the Monitor. None of those things exist in this case.

> *Re Canadian Airlines Corp.*, 2000 ABQB 442 at paras. 1, 21-49 and 111-114;
> Brief of Authorities of Digital Underground Media Inc., Tab 2.

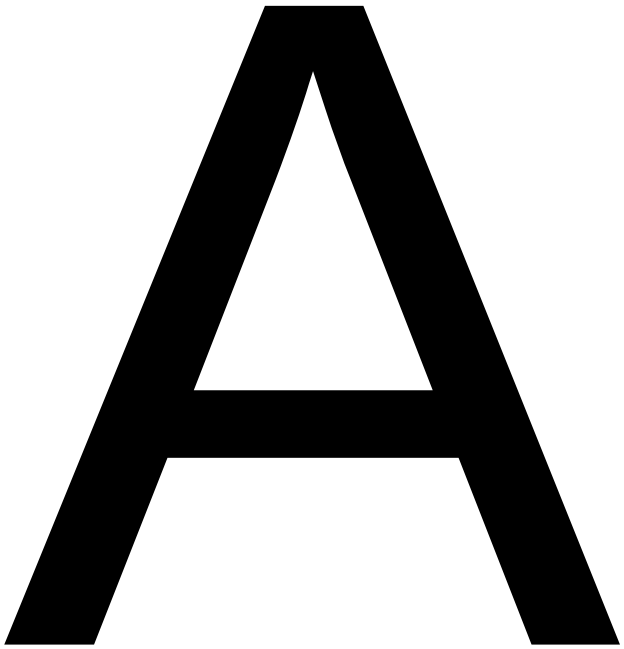
15. The Company also cites Justice Farley's decision in *Re Stelco* for the proposition that the Court can approve the extinguishment of equity in CCAA or BIA proposal. However, Justice Farley held that the Court should only do so where it is "fair and reasonable" to do so. It is axiomatic that where the Court must consider whether or not it is "fair and reasonable" to extinguish a person's property right, that person has a right to be heard by the Court. To suggest that a shareholder would not even have standing to object to a process that would purport to eliminate its interests and compromise its rights is an ill-conceived attempt to draw attention from what should be the key focus: namely whether or not the debtor's proposal should be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 14, 2017

Goodmans LLP

Goodmans LLP



SCHEDULE A - LIST OF AUTHORITIES

1. *Reference Re Cadillac Explorations Ltd. (No. 2)* (1984), 51 C.B.R. (N.S.) 178 (B.C.S.C.), aff'd on other grounds 52 C.B.R. (N.S.) 37 (B.C.C.A.).
2. *Re Goldman* (1982), 43 C.B.R. (N.S.) 30 (Ont. S.C.J.).

B

SCHEDULE B – STATUTORY REFERENCES

BANKRUPTCY AND INSOLVENCY ACT
R.S.C., 1985, c. B-3, as amended

s. 2 ("creditor")

"creditor" means a person having a claim provable as a claim under this Act.

s. 54(1)

Vote on proposal by creditors – The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

s. 54(2)

Voting system – For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

s. 54.1

Class — creditors having equity claims – Despite paragraphs 54(2)(a) and (b), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

s. 59(1)

Court to hear report of trustee, etc. – The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

s. 59(2)

Court may refuse to approve the proposal – Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

s. 140.1

Postponement of equity claims – A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF DIGITAL UNDERGROUND MEDIA INC a company incorporated pursuant to the laws of the Province of Ontario, with a head office in the City of Vancouver, in the Province of British Columbia

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Proceeding commenced at Toronto

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