



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

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

THE HONOURABLE MR.)
JUSTICE HAINEY)
FRIDAY, THE 1st
DAY OF MAY, 2020

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

ORDER

THIS MOTION, made by KMW Energy Inc. ("**Company**") for an Order:

- (a) abridging the time for service of the Company's notice of motion and motion record so that the motion is properly returnable on May 1, 2020;
- (b) authorizing the Company to enter into the DIP Term Sheet¹ with the DIP Lender, approving the DIP Term Sheet, and granting the DIP Charge as security for the Company's obligations to the DIP Lender under the DIP Term Sheet;
- (c) authorizing the Company to execute the Stalking Horse Agreement with the Stalking Horse Bidder, and approving the Stalking Horse Agreement;
- (d) authorizing the Proposal Trustee to conduct the Sale Process;

¹ Capitalized terms used in the preamble shall have the meanings ascribed to such terms in the body of the Order.

- (e) approving the Administration Charge;
- (f) approving the D&O Charge; and
- (g) extending the time for filing a proposal by the Company to June 25, 2020,

was heard this day via videoconference due to the COVID-19 crisis.

ON READING the Motion Record of the Company, including the Affidavit of Eric Bertil Rosen sworn April 24, 2020 (the "**Rosen Affidavit**"), and the exhibits thereto, and the First Report of MNP Ltd. in its capacity as proposal trustee (the "**Proposal Trustee**") dated April 29, 2020, and on hearing the submissions of counsel for the Company, the Proposal Trustee, 2751602 Ontario Inc. ("**2751**"), Liberty Mutual Insurance Company, and Georges River Energy, LLC,

SERVICE

1. **THIS COURT ORDERS** that the time for and manner of service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

DIP FINANCING

2. **THIS COURT ORDERS** that the Company is hereby authorized and empowered to obtain and borrow under a credit facility with 2751 in its capacity as lender (the "**DIP Lender**") in order to enable the Company to carry on business during this proceeding and fund the Sale Process (as defined below), working capital and the costs of this proceeding, provided that borrowings under such credit facility shall not exceed \$500,000 unless permitted by further Order of this Court.

3. **THIS COURT ORDERS** that such facility shall be on the terms and subject to the conditions set forth in the interim financing term sheet dated April 24, 2020 (the "**DIP Term Sheet**") which is hereby approved, *nunc pro tunc*.

4. **THIS COURT ORDERS** that the Company is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

5. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Charge**") on all assets, rights, undertakings and properties of the Company, of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (the "**Property**"), which DIP Charge shall not secure an obligation that exists before this Order is made. The DIP Charge shall have the priority set out in paragraphs 17 and 19 of this Order.

6. **THIS COURT ORDERS** that, notwithstanding any other provisions of this Order and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"):

- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Charge or any of the Definitive Documents;

- (b) upon the occurrence of an event of default under the DIP Term Sheet, the Definitive Documents or the DIP Charge, the DIP Lender may, with leave of the Court, exercise any and all of its rights and remedies against the Company and the Property under or pursuant to the DIP Term Sheet, the Definitive Documents and the DIP Charge, including without limitation, to cease making advances to the Company and set-off and/or consolidate any amounts owing by the DIP Lender to the Company against the obligations of the Company to the DIP Lender under the DIP Term Sheet, the Definitive Documents or the DIP Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim manager, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and
- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or manager and manager of the Company or the Property.

7. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any proposal filed by the Company under the BIA, or any plan of arrangement or compromise filed by the Company under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"), with respect to any advances made under the DIP Term Sheet and the Definitive Documents.

SALE PROCESS AND STALKING HORSE AGREEMENT

8. **THIS COURT ORDERS** that the sale process set out in paragraph 43 of the Rosen Affidavit (the "**Sale Process**") be and hereby is approved.

9. **THIS COURT ORDERS** that the Company and the Proposal Trustee be and are hereby authorized and empowered to take such steps as are necessary or desirable to carry out and perform their obligations under the Sale Process, provided that any definitive agreement to be executed by the Company in respect of the sale of all or part of the Property shall require further approval of the Court.

10. **THIS COURT ORDERS** that the Company is hereby authorized and directed, *nunc pro tunc*, to enter into the 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**"), and the Stalking Horse Agreement is hereby approved and accepted for the purpose of conducting the Sale Process.

11. **THIS COURT ORDERS** that in connection with the Sale Process and pursuant to clause 7(3)(c) of the *Personal Information Protection and Documents Act* (Canada), the Company may disclose personal information of identifiable individuals to prospective bidders in the Sale Process and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete a sale of such assets. Each prospective bidder to whom any such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evolution of the said assets and related business, and if it does not complete a purchase thereof, shall return all such information to the Company or in the alternative shall destroy all such information and certify such destruction to the Company. The

purchaser of the Property in the Sale Process shall be entitled to use the personal information provided to it, and related to the purchased assets, in a manner which is in all material respects identical to the prior use of such information by the Company and shall return all other personal information to the Company, or ensure that all other personal information is destroyed.

ADMINISTRATION CHARGE

12. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Company shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements), in each case at their standard rates and charges, by the Company as part of the costs of this proceeding. The Company is hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Company on a bi-weekly basis.

13. **THIS COURT ORDERS** that the Proposal Trustee, counsel for the Proposal Trustee, and counsel for the Company shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which Administration Charge shall not exceed an aggregate amount of \$150,000, as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the making of this Order in respect of this proceeding. The Administration Charge shall have the priority set out in paragraphs 17 and 19 hereof.

D&O CHARGE

14. **THIS COURT ORDERS** that the Company shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Company after the commencement of the within proceeding, except to the extent that, with respect to any

officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

15. **THIS COURT ORDERS** that the directors and officers of the Company shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on the Property, which charge shall not exceed an aggregate amount of \$50,000, as security for the indemnity provided in paragraph 14 of this Order. The D&O Charge shall have the priority set out in paragraph 17 and 19 herein.

16. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the Company's directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 14 of this Order.

VALIDITY AND PRIORITY OF COURT ORDERED CHARGES

17. **THIS COURT ORDERS** that the priority of the Administration Charge, the DIP Charge and the D&O Charge (collectively, the "**Charges**"), as among them, shall be as follows:

- (a) firstly, the Administration Charge to a maximum of \$150,000;
- (b) secondly, the DIP Charge, and
- (c) thirdly, the D&O Charge to a maximum of \$50,000.

18. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register, record or perfect.

19. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the "Encumbrances"), in favour of any individual, firm, corporation, governmental body or agency or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person").

20. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Company also obtains the prior written consent of the Proposal Trustee, the DIP Lender and all other beneficiaries of the Charges, or further Order of this Court.

21. **THIS COURT ORDERS** that the Charges, the DIP Term Sheet and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") thereunder shall not otherwise be limited or impaired in any way by the pendency of this proceeding and the declarations of insolvency made herein; (b) any motion(s) or application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such motions or applications; (c) the filing of any assignments for the general benefit of creditors made or

deemed to have been made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, leases, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Company or the DIP Lender, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Term Sheet or the Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Term Sheet and the Definitive Documents, the creation of the Charges, or the execution, delivery or performance of the DIP Term Sheet and Definitive Documents; and
- (c) the payments made by the Company pursuant to this Order, the DIP Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

EXTENSION OF TIME TO FILE A PROPOSAL

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22. **THIS COURT ORDERS** that the time within which the Company must file a proposal with the Official Receiver be and is hereby extended to June 25, 2020.

SERVICE OF MATERIALS AND NOTICE

23. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL <https://mnpdebt.ca/en/corporate/Engagements/kmw-energy-inc>.

24. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Company and the Proposal Trustee are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Company's creditors or other interested parties at their respective addresses as last shown on the records of the Company and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.


25. **THIS COURT ORDERS** that the Company, the Proposal Trustee and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Company's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

AID AND ASSISTANCE

26. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Company, the Proposal Trustee and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Company, Proposal Trustee and their agents in carrying out the terms of this Order.

27. **THIS COURT ORDERS** that, notwithstanding Rule 59.05, this order is effective from the date it is made, and it is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal order need be entered and filed unless an appeal or motion for leave to appeal is brought to an appellate court. Any party may nonetheless submit a formal

order for original, signing, entry and filing, as the case may be, when the Court returns to regular operations.



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