

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF

MCCAWE NORTH DRILLING & BLASTING LTD.

Applicant

NOTICE OF MOTION

TAKE NOTICE THAT an application will be brought on behalf of the Applicant, McCaw North Drilling & Blasting Ltd., before the presiding Judge in Chambers at the Courthouse, in the City of Yellowknife, in the Northwest Territories, on Friday, February 21, 2020, at the hour of 10:00 o'clock in the morning or so soon thereafter as counsel may be heard for the following Orders:

1. The Proposal of McCaw North Drilling & Blasting Ltd. (the “**Company**”) filed December 4, 2019 is hereby accepted.
2. Without the need for shareholder approval, the sales transactions as set out in the following:
  - (a) the Asset Purchase Agreement between Nuna West Mining Ltd. (“**Nuna**”) and the Company, attached as Appendix C to the Proposal Trustee’s Report to Creditors dated December 6, 2019; and
  - (b) the Asset Purchase Agreement between McCaw Drilling and Blasting Ltd. (“**McCaw**”) and the Company, attached as Appendix D to the Proposal Trustee’s Report to Creditors dated December 6, 2019;

are hereby approved, and the Company is authorized to sell the assets of the Company referenced therein (the “**Assets**”), and execute any Bills of Sale to effect transfer of title as required to close the transaction, and upon delivery of such closing documents, title

shall vest in accordance with the terms of the transaction documents in the purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, claims, trusts or deemed trusts (whether contractual, statutory, or otherwise), assignments, actions, levies, taxes, writes, options, agreements, disputes, debts, liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise or other rights, limitations or restrictions of any nature whatsoever including, without limiting the generality of the foregoing, all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act*, SNWT 1994, c 8 of the Northwest Territories, or any other personal property registry system as may be applicable; and for greater certainty, this Court orders that all of the encumbrances affecting or relating to the assets are hereby expunged and discharged as against them (the “**Claims**”); and

3. The Company be authorized, with the consent of the Proposal Trustee, to enter into an agreement to sell its equipment and assets currently located in Newfoundland by way of public auction, and that the auctioneer be authorized to sell such assets, and vest title to its purchasers, free and clear from all of the Claims.

AND FURTHER TAKE NOTICE that in support of this application will be read:

1. the Affidavit of Kathryn Emeneau sworn on January 22, 2020;
2. the Report of Trustee on Proposal dated January 22, 2020; and
3. such further and other materials as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE that the Applicant relies upon the following:

1. Sections 58, 59, 60, 65.13 and 187(11) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

## FACTUAL BASIS

### *Background to Proceedings*

2. The Applicant, McCaw North Drilling & Blasting Ltd. (the “**Company**”), operates out of Yellowknife, in the Northwest Territories and specializes in many areas of drilling, blasting, and welding. The Company also operates in remote locations in Nunavut and Newfoundland and Labrador. The Company previously employed 28 people but has since downsized and currently employs two people.
3. The Company ran into financial difficulty due to insufficient working capital and was unable to continue operating.
4. On September 20, 2019, the Company filed a Notice of Intention (the “**NOI**”) to make a Proposal with the Office of the Superintendent of Bankruptcy with The Bowra Group Inc. (the “**Proposal Trustee**”) being named as Proposal Trustee. Specifically, the Company is seeking to liquidate its machinery and equipment, which would allow for repayment of the secured debt and enable the Company to make a Proposal to its unsecured creditors.
5. The Company believed a sales process for the machinery and equipment run by the Company would allow for increased realization over a bankruptcy and/or receivership, and undertook that process. In addition, it was awaiting results of litigation. While those issues were being resolved, the Company sought one extension to file its Proposal, with such extension being granted by the Honourable Justice Smallwood on October 18, 2019.

### *Company’s Financial Status*

6. The Company’s assets include accounts receivable, machinery and equipment. The machinery and equipment are dispersed throughout the various locations in the Northwest Territories, Nunavut and Newfoundland and Labrador.
7. The Company’s major secured creditors, Business Development Bank of Canada (“**BDC**”), The Toronto Dominion Bank (“**TD**”), Maynbridge Capital Inc. (“**Maynbridge**”), and Komatsu International (Canada) Inc. (“**Komatsu**”), (collectively,

the “Secured Creditors”) hold general security agreements and/or specific equipment security as registered in the Personal Property Registry. The amounts owed are estimated as follows:

Creditor	Estimated Claim (\$)
Atlas Copco Canada Inc.	Unknown
Business Development Bank of Canada	1,431,206
GM Financial Canada Leasing Ltd.	Unknown
Komatsu International (Canada) Inc.	50,480
Maynbridge Capital Inc.	268,073
Sissons Enterprises Corp.	Unknown
The Toronto Dominion Bank	691,378
Xerox Canada Ltd.	Unknown

8. Based on the Company’s books and records, the total debt to unsecured creditors is estimated at \$1.5 million, for a total of:

(b) Secured Debt (estimated)	\$2,441,137
(c) Unsecured Debt (estimate)	\$1,500,000
Total:	\$3,941,137

9. The Company has approximately \$1 million in accounts receivable as at September 23, 2019. In addition, the Company holds equipment and machinery with an estimated appraised value of \$3.7 million. The Company has a November 29, 2019 Judgment against Clark Builders Ltd., in the amount of \$677,097.52 (the “**Clark Judgment**”), plus tax and interest and costs, which is currently under appeal. The appeal is anticipated to be heard on an expedited basis (April 2020). Clark Builders has agreed to posting a letter of credit to secure the judgment amount (excluding costs).

10. Therefore the assets can be estimated as follows:

(b) Equipment	\$3,700,000
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(c)	Accounts Receivable	\$1,000,000
(d)	Clark Builder's Claim	\$708,000 (plus costs)
	Total:	\$5,408,000

***The Proposal Terms***

11. The general outline of the Proposal is that the Company, upon liquidating its equipment, and realizing on the Clark Judgment, will pay as follows:
- (b) in payment of all costs associated with the sale and disposition of the personal property including, but not limited to, Professional Fees;
  - (c) in respect of any proceeds of sale of the Company's Property over which a Secured Creditor has a valid and perfected security interest in accordance with the *Personal Property Security Act* in force and effect with respect to that portion of the Company's Property over which the security interest has attached;
  - (d) the balance after the foregoing to be paid into and form part of the Proposal Fund, to be distributed as follows and in the following priority:
    - i. in payment in satisfaction of the Professional Fees;
    - ii. in payment in satisfaction of the Wage Claims;
    - iii. in payment in satisfaction of the Preferred Creditors;
    - iv. in payment in satisfaction of the Creditors arising under Article 9 [post filing creditors, if any];
    - v. in payment in satisfaction of the claims of Unsecured Creditors.
12. In considering the terms of the Proposal, the Proposal Trustee was of the opinion that the estimated fair realization value of the assets of the Company would be higher in a proposal process.

**Sales Process**

13. The Company with the assistance of the Proposal Trustee conducted a sales process of the Company’s physical assets.
14. The Company, with the assistance of the Proposal Trustee, prepare a “Request for Offers to Purchase the assets of [the Company]” (“**ROP**”) and distributed the ROP to 42 prospective purchasers, including auctioneers, liquidators, and competitors of the Company on October 2, 2019.
15. The Company advertised in the Canadian Mining Journal (www.canadianminingjournal.com) from October 3, 2019 to October 23, 2019 seeking interested parties to participate in the sales process.
16. The Company contacted 3 liquidators to provide offers under an auction proposal or outright buyout.
17. As a result of that sale process, the Company received 7 offers, two of which were liquidation offers submitted by auctioneers, and 5 cash offers for equipment. A summary of the offers is as follows:

Offer	Amount	Notes	Assets
Maynards	N/A	Liquidation	N/A
Ritchie Bros	N/A	Liquidation	N/A
Colton Moran	5,000	Cash	Specific assets
Kavanaugh Bros.	21,025	Cash	Specific assets
No Limit Drilling	233,000	Cash	Specific assets
Nuna West Mining Ltd.	550,000	Cash	Hope Bay assets
McCaw Drilling & Blasting Ltd.	1,300,000	Cash	Yellowknife assets

18. The Company accepted the offers from Nuna West Mining Ltd. (“**Nuna**”) and McCaw Drilling & Blasting Ltd. (“**McCaw**”), subject to Court approval. McCaw is a related party to the Company.
19. Nuna’s offer includes all assets located in Hope Bay, Nunavut. McCaw’s offer includes all assets located in Yellowknife, Northwest Territories.

20. The sales process did not result in any offers for the Newfoundland assets due to them being in remote locations. Accordingly, the Newfoundland assets will be sold through an auction. The Company estimates the realization from the auction to be approximately \$353,000.

### *The Creditor's Approval of the Proposal*

21. The meeting of creditors to consider the Proposal was called on December 18, 2019, upon proper and full notice being given to the creditors. A motion was passed at that meeting under section 52 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") to adjourn the meeting until January 15, 2020 so as to enable further investigation of the affairs of the Company could be undertaken.
22. Upon the meeting reconvening on January 15, 2020, and the vote being concluded, the Proposal was accepted by the required majority and two thirds in value of creditors. 11 unsecured creditors voted in favor of the Proposal, representing claims totaling \$528,264.99 and 1 unsecured creditor voted against the Proposal, representing claims totaling \$166,976.99.

### *The Proposal Trustee's Position*

23. In its Reports, the Proposal Trustee confirms its conclusions and recommendations as follows with respect to the Proposal:
- (a) The Company ran into a working capital shortfall and was not able to continue operating. The Company determined that a liquidating proposal would be the most effective way to provide the maximum recovery to their creditors. As a result, the Company filed a Notice of Intention to Make a Proposal on September 20, 2019.
  - (b) The Proposal Trustee was of the view that a Proposal will likely result in a greater recovery to the Company's creditors than in a bankruptcy and/or receivership.
  - (c) The conduct of the debtor is not subject to censure.

- (d) In the Proposal Trustee's view, none of the facts mentioned in sections 173 of the *BIA* apply with respect to the debtor.
- (e) The Proposal provides for the payment of all amounts owing to Her Majesty in Right of Canada or a province mentioned in section 60(1.1) of the *BIA*, if any.
- (f) The Company is not in default of any remittance of an amount referred to in section 60(1.1) of the *BIA* that became due after the filing of the NOI.
- (g) The Proposal provides for all payments to employees of the Company pursuant to section 60(1.3) of the *BIA*, if any, and the Company can and will make any and all such payments.
- (h) The Proposal provides for all pension payments pursuant to section 60(1.5) of the *BIA*, if any, and the Company can and will make any and all such payments.
- (i) The Proposal is an advantageous one for the creditors, as it offers all creditors a greater recovery than they would otherwise receive in a bankruptcy and a bankruptcy would result in increased professional fees for the administration of a bankruptcy estate as opposed to completion of the Proposal to creditors.

24. Consequently, the Proposal Trustee recommends acceptance of the Proposal.

25. With respect to the sale of the assets, the Proposal Trustee is satisfied that the process undertaken was fair and reasonable, that the sale of the assets, namely the sales:

- (a) pursuant to the Sale Agreement with Nuna, attached as Appendix C to the Proposal Trustee's Report to Creditors dated December 6, 2019;
- (b) pursuant to the Sale Agreement with McCaw, attached as Appendix D to the Proposal Trustee's Report to Creditors dated December 6, 2019; and
- (c) pursuant to an auction of the Newfoundland assets as referenced in the Proposal Trustee's Report to Creditors dated December 6, 2019;



and distribution of the proceeds of sale from those transaction as required under the terms of the Proposal is more beneficial than had this been done in a bankruptcy, and will result in fair and reasonable consideration being received. No creditors will be prejudiced by these sale transactions.

26. In addition, and specifically in reference to the sale of the assets to McCaw, as a related party the Company, the Proposal Trustee is satisfied that:
- (a) through the tender process, good faith efforts were made to sell or otherwise dispose of the assets to person who are not related; and
  - (b) the consideration that will be received will be superior to the consideration that was offered by any other party for those same assets.

## LEGAL BASIS

### *Approval of Proposal*

27. Section 58 of the *BIA* provides that upon acceptance of a proposal by the creditors, the trustee shall apply to the court for approval of the order, on at least 15 days' notice to the proven creditors.
28. Under section 59 of the *BIA*:
- a. **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 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.
  - b. **Court may refuse to approve the proposal**

**(2)** 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.

c. **Reasonable security**

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

d. **Court may order amendment**

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

29. As noted above, the Proposal Trustee has filed a report confirming acceptance of the proposal by a majority of creditors, that there are no facts arising from section 173 of the *BIA*, that the Proposal is advantageous for the creditors, and that all priority and Crown claims have been provided for in accordance with sections 60(1) to 60(1.7) of the *BIA* and distribution provided for consistent and in the manner required under sections 60(2) to (4) of the *BIA*.
30. Under section 60(5) of the *BIA*, the Court may approve or refuse to approve the Proposal.
31. The Company submits that there are no facts on which approval ought to be refused, particularly given the creditors' views and approval of the Proposal, which as noted by the Proposal Trustee, is more advantageous than a bankruptcy.

***Approval of Sale of Assets Outside the Ordinary Course and to Related Party***

32. As noted above, the Proposal is a liquidating one, with offers being entered into by the Company, subject to court approval, given that, under section 65.13 of the *BIA*, a company under a proposal must not sell or dispose of assets outside of the ordinary course of business unless authorized to do so by the Court.
33. The Court may approve a sale or disposition of assets outside of the ordinary course of business after considering the following factors:
- (a) whether the process leading to the proposed sale was reasonable in the circumstances;

- (b) whether the trustee approved the process leading to the proposed sale;
  - (c) whether the trustee has filed a report to the court stating that the sale or disposition will be more beneficial to the creditors than a sale under the bankruptcy;
  - (d) the extent to which the creditors were consulted;
  - (e) the effects of the proposal sale or disposition on the creditors and other interested parties; and
  - (f) whether the consideration is reasonable and fair, taking into account their market value.
34. In addition, as the sale to McCaw is to a related party, under section 65.13(5) of the *BIA*, the further factors are to be considered:
- (a) whether 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) whether 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.
35. Applying those factors to the facts herein, the Company submits that the offers before the court, and a future auction of the Newfoundland Assets, ought to be approved in the circumstances. In particular, the Proposal Trustee has prepared a report by which the Proposal Trustee confirms that:
- (a) the sales process was reasonable;
  - (b) the Proposal Trustee approved the process leading to the sale;
  - (c) the sale is more beneficial to the creditors than a liquidation sale in a bankruptcy;

- (d) the effect of the sale of the Assets was to provide further funds, that being the sales proceeds, into the fund payable to the unsecured creditors as part of the Proposal, and no creditors will be materially prejudiced by the sale;
- (e) the consideration for the Assets is fair and reasonable; and
- (f) the Company has acted and continues to act in good faith;

And, with respect to McCaw, that

- (g) good faith efforts were made to sell those particular assets to parties not related to the Company; and
- (h) consideration for those assets is superior to the offers received by non-arm's length purchasers through the tender process.

36. The Company submits that it is appropriate to grant the orders sought in Part 1 above, on the basis set out herein, and will rely upon sections 58, 59, 60, 65.13 and 187(11) of the *BIA*.

DATED at the City of Yellowknife, in the Northwest Territories, this 22<sup>nd</sup> day of January, 2020.

**Lawson Lundell LLP**



Kai Niu  
Solicitor for the Applicant

TO: Clerk of the Court

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy

  
CLERK OF THE SUPREME COURT

S-1-BK2019-000 029  
Estate No.: 24-2561006  
Yellowknife Court Registry

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