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CLERK OF THE COURT
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JUDICIAL CENTRE OF CALGARY

MATTER	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF TARTAN COMPLETION SYSTEMS INC.
APPLICANT	TARTAN COMPLETION SYSTEMS INC.
DOCUMENT	**BRIEF OF LAW AND ARGUMENT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**STIKEMAN ELLIOTT LLP** 4300 Bankers Hall West 888 – 3rd Street S.W. T2P 5C5 Solicitors: Nathalie Nouvet / Jakub Maslowski / Gordon Masson Phone Number: (514) 397-3128 / (403) 724-9465 / (403) 266-9043 Email: NNouvet@stikeman.com / JMaslowski@stikeman.com / GOMasson@stikeman.com Fax Number: (403) 266-9034 File No.: 147292.1001

Counsel for the Applicant, Tartan Completion Systems Inc.

PART I - INTRODUCTION

1. This Brief is submitted by the Applicant, Tartan Completion Systems Inc. ("**Tartan**" or the "**Applicant**"), in support of the issuance by this Court of an order (the "**Interim Financing Facility Order**") pursuant to Subsection 50.6(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), permitting Tartan Energy Group Inc. ("**TEGI**") to provide interim financing in the amount of $538,000 (the "**Updated Interim Financing Facility**") to ensure Tartan's continued operations while (a) Tartan seeks resolution of Rapid Design Group Inc.'s ("Rapid") claim to Patents owned by Tartan; and (b)the Trustee, in consultation with Tartan, finalizes and initiates a proposed sale, refinancing and/or investment solicitation process ("**SISP**"). Tartan is seeking a first-ranking priority charge, at this time, in the limited amount of $200,000, being the maximum amount that will be disbursed until the parties return on April 3, 2020.

2. All capitalized terms used but not defined herein shall have the meanings given to them in the affidavit of Bill Chu filed March 11, 2020 (the "**First Chu Affidavit**").

3. The factual background for this relief is set forth in the First Chu Affidavit, as amended by the requests put forward in the supplemental affidavit of Bill Chu filed March 12, 2020 (the "**Second Chu Affidavit**").

LAW AND ARGUMENTS

4. On February 14, 2020, the Applicant filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, 1985, c B-3 (the "**BIA**").

5. The NOI was originally filed with a view of initiating, under the supervision of this Court and the Trustee, a SISP to maintain and maximize the value associated with Tartan's assets in response to a Notice of Intention to Enforce filed by Tartan's senior secured creditor, Liquid Capital Exchange Corp. ("**Liquid**"), on February 6, 2020. Indeed, given Tartan's financial difficulties, a different secured creditor, Rapid, purported to terminate the Consulting Agreement without notice and to exercise an option to repossess one of Tartan's most valuable assets, being the Patents. As a result of these actions, Tartan believed that the filing of the NOI and initialization of a SISP constituted, at that time, the best option available for the realization of its assets for the benefit of its stakeholders.

6. On March 10, 2020, after discussions and negotiations, Tartan executed a commitment letter (the "**Commitment Letter**) with Tartan Energy Group Inc. ("**TEGI**") to establish an Interim Financing Facility pursuant to which TEGI agreed to provide interim financing to Tartan up to $850,000 in order to allow Tartan to:

   a) repay $130,000 of the amounts owed to Liquid by Tartan Completion Systems Corp., a U.S. based subsidiary of Tartan;

b) continue to fund the ongoing operations of Tartan, including by relocating misappropriated and dispersed property located across Western Canada, paying employment wages and salaries, short-term real estate lease payments, leases on trucks and other equipment, insurance and fuel costs; and

c) fund Tartan's working capital expenditure.

7. Although the amount agreed to in the Commitment Letter and the amount listed in the First Report of the Trustee are not in agreement, this is due to the urgency which Tartan and the Trustee faced in filing documents in advance of hearing, and with time to provide Tartan's secured creditors an opportunity to consider the amounts sought and confirm their position. Tartan otherwise agrees with the Trustee that the amount required to fund Tartan's operations until April 30, 2020 would be $538,000, which amount is now reflected in an updated commitment letter which remains subject to review and approval by the Trustee (the "**Updated Commitment Letter**").

8. During discussions on March 11, 2020, Liquid and other creditors raised concerns about the potential prejudice which might result to their secured positions should the Court order a super-priority charge to TEGI for the full amount of the Interim Financing Facility, many of which therefore asked for an adjournment of the within Application with respect to approval of the Interim Financing

9. As a result of these concerns, on March 11, 2020, Tartan worked diligently with TEGI and the Trustee contacting its creditors in order to identify and minimize any potential prejudice being raised. As set out in the Second Chu Affidavit, Tartan now seeks interim financing, with a preliminary charge in the amount of $200,000. The amount of the charge will allow Tartan to continue funding its operations for a period of approximately three weeks, during which time, it can continue its ongoing discussions with its creditors, while ensuring that it is able to maintain its value as a going concern, in order to launch a SISP. In addition, Tartan has reduced the length of the Stay Period it is requesting from forty-five (45) days to eighteen (18) days, such that the Stay Period will now expire on April 3, 2020.

10. TEGI also intends to directly compensate Liquid for the amount of $130,000, by March 13, 2020, as it is a co-guarantor with Tartan for certain debt amounts.

11. Pursuant to the Updated Commitment Letter, the Interim Financing Facility is conditional upon the approval by this Court of a super-priority charge in the amount of $200,000 plus interest at the rate of 6% (the "**Updated Interim Financing Charge**") on the universality of all of Tartan's present and after-acquired property (the "**Property**").

12. For the reasons set forth below, Tartan respectfully submits that the Updated Interim Financing Facility and the Updated Interim Financing Charge should be approved by this Court.

THE EXTENSION OF THE STAY PERIOD

13. Subsection 50.4(9) of the BIA authorizes the Court to approve an extension of a stay period pursuant to notice of intention to make a 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 b, 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.*

14. To date, Tartan has taken the following steps to organize and initiate a SISP and otherwise return to profitability for the purpose of eventually making a proposal:

a) removed problematic employees, officers and directors that may have otherwise frustrated the protection of Tartan's assets and successful completion of a proposal;

b) installed new management with a limited retainer in order to ensure continued operations;

c) taken steps to locate and secure assets which have been dispersed across Western Canada;

d) re-hired employees who were previously terminated in its United States operations in order to resume operations and maintain profitability;

e) worked directly with the Trustee to determine its cash flows, secured a willing emergency lender to stabilize its balance sheet (TEGI) and sought to put together interim plans which do not materially prejudice its

creditors' positions while putting together a litigation strategy to determine ownership of its Patents;

f) directly discussed the possibility of proposals to certain creditors in order to secure support for its proposal; and

g) located and commenced introductory discussions with potentially interested parties that may be willing to engage in the SISP, once it has been initiated.

15. Additionally, to date Tartan has been informed by certain of its secured creditors that they are not in opposition of its application for an extension of the Stay Period, which may be taken to indicate possible support in an eventual proposal.

16. To the extent any of Tartan's secured creditors continue to express opposition to an extension of the Stay Period, it has been held that in circumstances where the primary secured creditor opposed an extension due to a lack of confidence and trust in current management and ownership and that any proposal would be doomed to fail, such statements are not determinative. Rather, what is determinative is whether a reasonable level of effort dictated by the circumstances was made that gives *some* indication of the likelihood that a viable proposal will be advanced.[1]

17. In the present matter, it is submitted that Tartan has made reasonable efforts to organize and initiate a SISP and making an eventual proposal by, inter alia, reducing its expenses, overhauling its management and staff, locating and securing its assets such that an extension of the Stay Period should be granted notwithstanding any concern or opposition voiced by Tartan's secured creditors, particularly since these steps are the only current option on the table that will allow the company to continue as a going concern, thereby maintain employment, contracts with other unsecured creditors, and eventually leading to filing a proposal for approval by each of Tartan's secured and unsecured creditors.

THE APPROVAL OF THE UPDATED INTERIM FINANCING FACILITY AND THE UPDATED INTERIM FINANCING CHARGE

18. Section 50.6 of the BIA expressly authorizes the Court to approve interim financing and order a priority charge as security for amounts advanced to a debtor pursuant to said 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*

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1 *Kocken Energy Systems Inc., Re*, 2017 NSSC 80, at paras 21 – 24, citing *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (**Tab 1**).

> *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.*

19. Section 50.6(5) of the BIA sets out the factors to be considered by the Court in deciding whether to grant an order approving interim financing and an interim financing charge:

> *50.6(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.*

20. Section 50.6 of the BIA constitutes a codification of case law on interim financing developed in the context of insolvency proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**").[2]

21. Indeed, prior to section 50.6 of the BIA coming into force, it was already well established that the court could rely on its inherent jurisdiction to permit interim financing and provide that it be secured by a charge on the debtor company's assets, ranking either ahead or subordinate (*pari passu*) to all prior-existing security interest.[3]

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2 *Wendigo Studios inc. (Avis d'intention de)*, 2011 QCCS 2336 at para 5 (**Tab 2**).

3 *Skydome Corp.* v. *Ontario* (1998), 16 C.B.R. (46) 118 (Ont. Gen. Div.) at para 9 (**Tab 3**); *Re Stomp Pork Ltd.*, 2008 SKCA 73, at para 28 (**Tab 4**).

22. The approval of such interim financings and interim charges was based on the fact that the benefits to a debtor company and its general body of creditors, employees and shareholders resulting from such interim financing clearly outweighed any potential prejudice to creditors whose security might have be subordinated.[4]

23. In *Re Canwest Communications Corp.*,[5] Pepall J. approved, under a CCAA restructuring, a debtor-in-possession ("**DIP**") facility pursuant to section 11.2 of the CCAA (which is almost identical to section 50.6 of the BIA) mentioning that, in addition to the factors enumerated in s. 11.2(4), the Court should also consider the following factors when evaluating a request for a DIP charge:

(a) whether notice has been given to secured creditors likely to be affected by the security or charge;

(b) whether the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the Order was made (which it should not).

24. More recently, under a NOI process scenario, Kershman J., in *OVG Inc (Re)*, approved a DIP facility under section 50.6 of the BIA noting that even if certain creditors might be affected or prejudiced by the DIP facility and the DIP charge, the benefit to all stakeholders significantly outweighed any prejudice caused to such creditors[6]:

> "*[34] Like any DIP financing, the Interim Financing Charge will impact all of the creditors' positions to some degree and will potentially reduce the amount recoverable by the RBC. In the event that OVG's business would close because of the failure to approve the DIP financing and the Interim Financing Charge, on balance, the benefit to stakeholders of the proposed DIP facility significantly outweighs any prejudice to the Bank.*"

25. In *CFG Construction inc. (Proposition de)*, also under a NOI process scenario, the Court found that the criterion in s. 50.5(5)(d) of the BIA did not require that the debtor demonstrate that a viable proposal will be accepted by its creditors. The interim financing must simply favour the making of such a proposal.[7]

26. In *Bearcat Explorations Ltd., Re*,[8] the Alberta Court of Queen's Bench noted that the most important factor to consider with respect to approving a limited interim

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4 *Federal Gypsum Company (Re)*, 2007 NSSC 347 (CanLII), at para 39 (**Tab 5**); *InterTan Canada Ltd. (Re)*, [2008] O.J. No. 5692, at para 69 (**Tab 6**).

5 *Re Canwest Global Communications Corp.*, 2009 Carswell 6184, at paras 32, 33 & 34 (**Tab 7**).

6 *OVG Inc. (Re)*, 2013 ONSC 1794, at para 34 (**Tab 8**).

7 *CFG Construction inc. (Proposition de)*, 2009 QCCS 5729, at para 24 (**Tab 9**).

8 *Bearcat Explorations Ltd., Re*, (2005) 3 CBR (5th) 167, at para 14 (**Tab 10**).

financing is whether the benefit of the financing clearly outweighs the prejudice to the creditors being subordinated thereby. These statements were made in an analogous scenario, where the Court faced outstanding litigation claims that otherwise posed a risk to the making of a successful proposal. In those circumstances, the interim lender limited the amount of its financing only to an amount necessary to conduct an expedited litigation to determine rights as between the litigious creditor and the bankrupt. The Court stated:

> *14. I have considered Knox's submission that the funding is only sufficient to take Bearcat and Stampede through the litigation process. While DIP financing orders are normally only made where there is a reasonable prospect of successful restructuring, this is only one of the factors that can be taken into account by a court. In making this decision, I have noted the amount of financing applied for relative to the large amounts owed to creditors. Without this funding, there appears to be a substantial risk that the issues between Knox and the insolvent companies will not be determined. Therefore the benefit of such financing, in this unusual case, outweighs the potential prejudice to creditors.*

27. Additionally, previous decisions have permitted limited interim financing in circumstances where a term sheet otherwise allowed for a higher maximum amount.

28. In *League Assets Corp. (Re)*,[9] the British Columbia Superior Court considered a situation under the CCAA where the bankrupt sought approval of a $31.5 million interim financing facility which was to be used for operating funds for 13 weeks ($5 million), tax arrears, mortgage payments and payout to an existing mortgage lender. Despite the size of the overall facility, the bankrupt only sought a DIP Lender's charge of $1.6 million for emergency funding required to maintain operations until a comeback hearing. Although the secured creditors objected for a variety of reasons, including lack of urgency, insufficient evidentiary basis and prejudice, the Court allowed the emergency interim financing charge, stating:

> *[40] Without the proposed DIP funding, the League Group readily admits that it will be unable to continue. The Monitor states:*
>
> > *... if the financing is not approved, the current liquidity situation is such that League will not be able to fund payroll on Friday, October 25th, which will require an immediate cessation of operations and the accompanying liquidation of its assets in a forced and distressed manner.*
>
> *[41] I am satisfied that the DIP financing sought on this application is urgently needed in order to fund operations within these proceedings until the comeback hearing. Accordingly, I agree that such funding will*

[9] *League Assets Corp. (Re)*, 2013 BCSC 2043 (**Tab 11**).

enhance the prospects of an arrangement by the League Group to its creditors.

29. The Court went on to consider a number of reasons why the allowance of a super-priority emergency interim financing charge made greater sense than allowing the creditors to pursue the assets through a different process:

> *[44] The Monitor points out what might said to be fairly obvious, namely, that such a realization scenario is not in the interests of the creditors, including even these secured creditors, or the numerous other stakeholders in these proceedings:*
>
> > *A forced and distressed liquidation is clearly not in the interests of the creditors or Investors [...] Such lenders will then be compelled to deal with complicated scenarios where their recovery on one property will determine the extent to which they must rely on another property for the recovery of their lands. If a liquidation of League's assets is to occur, it is imperative that such a liquidation should occur on an orderly and controlled basis.*
>
> *[45] In addition, as pointed out by counsel for the League Group, the nature of the assets is such that even if the secured creditors were to take steps to realize on their security, they would inevitably be incurring some of the same types of expenses, including professional fees, as are currently being proposed to be paid in accordance with the cash flow forecast.*
>
> *[...]*
>
> *[59] As the Monitor notes, it is usual in these types of cases that a DIP Lender will advance monies into those proceedings only where the loans are supported by a court ordered priority charge over existing charge holders [...] In* Timminco Ltd. (Re), *2012 ONSC 948, aff'd 2012 ONCA 552, Mr. justice Moawez stated:*
>
> > *[49] in the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entitites having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders...*
>
> *[60] The same considerations discussed in* Timminco Ltd. *are a play here. It is unreasonable to expect that any DIP lender would advance the*

> *required DIP financing, save and except with a charge having priority over existing creditors. As stated by the League Group and as confirmed by the Monitor, this DIP financing is necessary and urgently required to continue the operations of the League Group for a very short period of time until the comeback hearing. Failure to obtain that financing will result in a liquidation scenario – one which, given the different stakeholder groups and the complexity of the assets, will no doubt result in a multiplicity of realization proceedings at great cost. In that liquidation scenario, there will likely be prejudice to those who are said, at this time, to be the stakeholders who have significant equity in the assets.*

30. In *Pacific Shores Resort Spa Ltd. (Re)*, the British Columbia Supreme Court similarly allowed the applicant in a proposal proceeding under the CCAA to acquire an interim financing charge in the amount of $600,000, although the term sheet in question allowed for funding to a maximum of $2.5 million.[10]

31. In the present case, the Updated Interim Financing Facility will provide Tartan with the breathing space it needs to fully consider all available restructuring options, including the reorganization and continuation of its business and affairs.

32. Tartan therefore respectfully submits that this Court should grant the Updated Interim Financing and the Updated Interim Financing Charge for, *inter alia*, the following reasons:

    (a) The Updated Interim Financing Facility will provide Tartan with the breathing space it needs to fully consider all restructuring alternatives and preserve value to the benefit of its creditors, employees and other stakeholders, and to complete the on-going NOI process as quickly as possible;

    (b) During this period, Tartan's business and affairs will be managed by its newly implemented directors and officers, experienced business people who will be advised by restructuring advisors. Also, Tartan's operations will be closely monitored by the Trustee, who will keep all creditors apprised of Tartan's efforts and financial situation;

    (c) Without the Updated Interim Financing Facility, Tartan would be left with no other choice but to enter into bankruptcy proceedings or a receivership process, which would significantly reduce its stakeholders' hope in enhancing their respective recovery;

    (d) The Updated Interim Financing Facility will increase the likelihood of a successful BIA proposal, which would significantly enhance creditor recovery;

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[10] *Pacific Shores Resort Spa Ltd. (Re)*, 2011 BCSC 1775 at paras 45 and 49 (**TAB 12**).

(e) The Updated Interim Financing Charge will allow Tartan to ascertain the value of its assets and the proper ownership of the Patents as against Rapid;

(f) TEGI has indicated that it will not provide the Interim Updated Financing Facility if the Updated Interim Financing Charge is not approved; and

(g) The Updated Interim Financing Charge does not secure any amounts that were owing prior to the filing.

33. No creditor, secured or otherwise, will be materially prejudiced as a result of the Updated Interim Financing Facility or the Updated Interim Financing Charge, as the Updated Interim Financing Charge will not change any of the rankings or have any material adverse effect on any of Tartan's other creditors, whether secured or not, or affect the secured amounts currently owed to TEGI. Following the reimbursement of amounts owed to TEGI under the Updated Interim Financing Facility, TEGI's position *vis-à-vis* Tartan will return to its respective priority in the creditor line.

34. The secured creditors which may be affected by the Updated Interim Financing Charge and the Trustee have been advised of Tartan's intention to secure the Updated Interim Financing Facility under the proposed terms and conditions included in the Commitment Letter.

35. Tartan submits that the Updated Interim Financing Facility will allow the value of its assets to be enhanced, especially if Tartan's business is to continue, the whole to the ultimate benefit of its stakeholders.

36. One of the conditions for obtaining the Updated Interim Financing Facility set forth under the Commitment Letter is that TEGI be granted the Updated Interim Financing Charge. Tartan respectfully submits that the proposed quantum of the Updated Interim Financing Charge is reasonable under the circumstances as Courts have approved similar charges in the context of restructuring proceedings.[11]

37. Simply put, the Updated Interim Financing Facility will be beneficial to Tartan, to the creditor body as a whole and to the larger community of its stakeholders as it will enable Tartan to consider all restructuring options, including the continuation of its business, which could preserve employment and value to the benefits of its creditors and stakeholders.

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11 *CFG Construction inc. (Proposition de)*, 2009 QCCS 5729 (**Tab 9**).

THE ADMINISTRATION CHARGE

Administration Charge

38. As appears from the Application, Tartan seeks a charge and security over all of its assets in priority to all other charges in the maximum and aggregate amount of $200,000 (the "**Administration Charge**"), to secure the payment of the fees and disbursements of the Trustee, legal counsel of the Trustee (if necessary) and Tartan's legal counsel.

39. In any restructuring proceedings, whether it involves the actual restructuring of the debtor company or the sale of its assets, the granting of administration charges has not only become customary, but also a pre-requisite to the restructuring itself, given the debtor company's need for assistance from insolvency professionals in the context of these proceedings.

40. Indeed, administrative charges are consistently approved in insolvency proceedings under the BIA, where, as is the case herein, the involvement of certain professionals is necessary to ensure the success of an arrangement.[12]

41. Section 64.2 of the BIA provides statutory jurisdiction to grant such a charge:

> *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.*

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[12] *Colossus Minerals Inc. (Re)*, 2014 ONSC 514, at paras 11 to 15 **(TAB 13)**.

41. In determining whether the quantum of the administration charge is reasonable under the circumstances, several factors have been identified by the Court, including those listed below:[13]

    (1) the size and complexity of the businesses being restructured;

    (2) the proposed role of the beneficiaries of the charge;

    (3) whether there is an unwarranted duplication of roles;

    (4) whether the quantum of the proposed charge appears to be fair and reasonable;

    (5) whether the position of the secured creditors likely to be affected by the charge; and

    (6) the position of the Monitor or the Trustee to the NOI.

42. In the case at hand, the following factors support the granting of the Administration Charge as requested:

    (1) the beneficiaries of the Administration Charge have discussed and outlined with Tartan the work which is anticipated to be required in order to maximize the chances of having a successful SISP;

    (2) such beneficiaries will provide essential legal and financial advice throughout these proceedings and throughout the SISP;

    (3) there is no unwarranted duplication of roles; and

    (4) the Trustee supports the Administration Charge and its proposed quantum and believes it to be fair and reasonable in view of the anticipated duration and complexity of these proceedings and the services to be provided by the beneficiaries of the Administration Charge.

43. Tartan respectfully submits that it is critical to the success of the SISP to have the Administration Charge in place to ensure that the beneficiaries thereof are protected with respect to their fees and disbursements. Each of the proposed beneficiaries to the Administration Charge have and will continue to play a critical role in the SISP and the current proceedings.

44. Tartan further submits that the Administration Charge sought is reasonable under the circumstances.

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[13] *Canwest Publishing Inc.*, 2010 ONSC 222, at para 54 **(TAB 14).**

RELIEF

45. For the reasons set forth above, Tartan submits that this Honourable Court ought to:

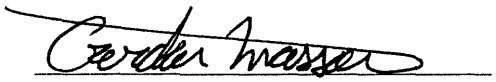
a) extend the Stay Period until April 3, 2020;

b) approve and ratify the Updated Interim Financing Facility in the amount of $538,000 and grant the Updated Interim Financing Charge in the amount of $200,000 (plus interest) over the Property; and

c) approve and ratify the Administration Charge in the amount of $200,000.

Respectfully submitted in Calgary this 12th day of March, 2020

STIKEMAN ELLIOTT LLP



Nathalie Nouvet / Jakub Maslowski /
Gordon Masson

TABLE OF AUTHORITIES

1. *Kocken Energy Systems Inc., re*, 2017 NSSC 80 at paras 21-24 (**Tab 1**).
2. *Wendigo Studios inc. (Avis d'intention de)*, 2011 QCCS 2336 at para 5, selected excerpts only (**Tab 2**).
3. *Skydome Corp.* v. *Ontario* (1998), 16 C.B.R. (46) 118 (Ont. Gen. Div.) at para 9. (**Tab 3**).
4. *Re Stomp Pork Ltd.*, 2008 SKCA 73, at para 28, selected excerpts only (**Tab 4**).
5. *Federal Gypsum Company (Re)*, 2007 NSSC 347 (CanLII), at para 39, selected excerpts only (**Tab 5**).
6. *InterTan Canada Ltd. (Re)*, [2008] O.J. No. 5692, at para 69 (**Tab 6**).
7. *Re Canwest Global Communications Corp.*, 2009 Carswell 6184, at paras 32, 33 & 34, selected excerpts only (**Tab 7**).
8. *OVG Inc. (Re)*, 2013 ONSC 1794, at para 34 (**Tab 8**).
9. *CFG Construction inc. (Proposition de)*, 2009 QCCS 5729, at para 24 (**Tab 9**).
10. *Bearcat Explorations Ltd., Re*, (2005) 3 CBR (5th) 167 at para 14 (**Tab 10**).
11. *League Assets Corp. (Re)*, 2013 BCSC 2043 at paras 40-41, selected excerpts only (**Tab 11**).
12. *Pacific Shores Resort Spa Ltd. (Re)*, 2011 BCSC 1775 at paras 45, 49, selected excerpts only (**TAB 12**).
13. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 at paras 11-15, selected excerpts only (**Tab 13**).
14. *Canwest Publishing Inc.*, 2010 ONSC 222 at para 54, selected excerpts only (**Tab 14**).

Tab 1

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Kocken Energy Systems Inc. (Re)*, 2017 NSSC 80

Date: 20170110
Docket: Hfx. No. 458774
Bankruptcy No. 40675
Estate No. 51-2097016
Registry: Halifax

In the Matter of the Proposal of Kocken Energy Systems Inc.

Decision

Judge:	The Honourable Justice Gerald R.P. Moir
Heard:	January 5, 2017, in Halifax, Nova Scotia
Decided:	January 10, 2017
Transcribed and edited:	March 22, 2017
Counsel:	Tim Hill, Q.C., for Kocken Energy Systems Incorporated Gavin MacDonald, for Bank of Montreal

Moir, J. (orally):

Introduction

[1] Kocken Energy Systems Incorporated filed a notice of intention to make a proposal on December 7, 2016. It moves to extend the deadline for filing the proposal by the maximum allowed under the *Bankruptcy and Insolvency Act*, forty five days. Its major secured creditor, the Bank of Montreal, opposes the extension. It says that the stay should end and Kocken should be bankrupt. Alternatively, the extension should be no more than thirty days.

Facts

[2] Kocken manufacturers specialized process equipment for the oil and gas industry. The company's predecessor did business in Alberta since about 2005. By 2007, it had just two shareholders, William Famulak and Arthur Sager. In 2011, they decided to move manufacturing to Eastern Canada. In 2015, Kocken acquired a plant at St. Antoine, New Brunswick.

[3] The Bank of Montreal provided financing to purchase the plant as well as current financing. Kocken also had a relationship with the Royal Bank of Canada.

[4] On Tuesday, November 8, 2016 the Bank of Montreal stopped extending current credit. Kocken reverted to the Royal Bank. The Bank of Montreal invited

PricewaterhouseCoopers to review Kocken's performance and make recommendations. PricewaterhouseCoopers prepared, and Bank of Montreal and Kocken endorsed, an engagement letter dated November 14. Mr. David Boyd took charge of the assignment. (I have an affidavit from him.)

[5] PricewaterhouseCoopers studied the St. Antoine plant, read accounting records, and interviewed Kocken operatives until about November 21, 2015. After that, it reported to the Bank of Montreal. The bank issued a notice of intention to enforce security on November 25.

Kocken and Bank of Montreal Breakdown

[6] I have the affidavit of Ms. Anna Graham for the bank. She swears to a debt well over $3 million dollars and security in the St. Antoine plant, personal property, accounts receivable, and inventory. She also swears to these defaults at para. 9 of her affidavit:

> Based on the information available to BMO, the Borrower has breached its obligations to BMO including the following: insufficient working capital to meet financial covenants, inability to fund current operations, entering into the Reorganization, as defined in the Boyd Affidavit, failing to provide financial statements and information, ceasing to conduct its banking with BMO and disposing of assets subject to the Security.

[7] In para. 10, Ms. Graham swears that these defaults continue. She adds that Kocken failed to respond to requests for basic information. She offers her opinion that Kocken is deliberately hiding information.

[8] At the heart of Ms. Graham's concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transferred to a related company recently incorporated in Barbados. That company is Kocken Energy Systems International Incorporated.

[9] That this is the fundamental concern underlying the bank's decisions to suspend current financing, to enforce security, and to oppose the proposal is apparent from para. 16 of Mr. Boyd's affidavit as well as Ms. Graham's affidavit as a whole.

[10] According to Mr. Sager, Kocken was simply a manufacturer. Most contracts for the sale of manufactured equipment and the intellectual property behind the equipment were with Mr. Famulak independently. Mr. Sager retained Mr. Rick Ormston, an accountant and consultant of Halifax about establishing a company that would be the design and engineering base for Mr. Famulak. That consultation lead to the Barbados company I mentioned, which I shall refer to as Kocken Barbados.

[11] Mr. Ormston developed a plan, the details of which were unknown to the Bank of Montreal or PricewaterhouseCoopers. There are numerous contradictions between Mr. Boyd's affidavit and Mr. Sager's second affidavit, which responded to Mr. Boyd's. The contradictions concern what one said to the other, what Mr. Sager informed Mr. Boyd, and the subjects on which information was withheld or unavailable.

[12] No one was cross-examined and I am in no position to resolve the evidentiary contradictions. The conflicting evidence is therefore unhelpful for making findings. Similarly, Ms. Graham's affidavit contains many generalized opinions without the raw facts required for findings on her subjects. I am, however, satisfied on three points.

[13] Firstly, neither the Bank of Montreal nor PricewaterhouseCoopers knew the details of the Ormston plan. The absence of information left the bank and the insolvency practitioners with serious questions, itemized at para. 18 of Mr. Boyd's affidavit. Secondly, these questions were relevant to the bank's interest in Kocken inventory and receivables. Thirdly, the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment, compromising the bank's interest in inventory and receivables.

Recent Developments

[14] In the last three working days, Kocken made some disclosure to the bank and PricewaterhouseCoopers. Most importantly, Kocken delivered a copy of the Ormston plan. It referred to draft documents that had not been disclosed yet, but the bank and the trustee must now know what the plan was really about.

Disposition

[15] Subsection 50.4(9) provides three thresholds that the insolvent must prove before the court has any discretion to grant an extension:

> (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.

[16] I am not prepared to embrace the generalized allegations made in Ms. Graham's affidavit because this court makes findings on evidence of raw fact. Nor can I resolve the evidentiary contradictions between Mr. Sager and Mr. Boyd. What is left suggests good faith and due diligence.

[17] I reject the submission that Kocken's initial evidence failed to disclose material facts. This submission is premised on the PricewaterhouseCoopers characterization of the relationship between Kocken and Kocken Barbados. As I

said, the contradictions between the evidence of Mr. Boyd and Mr. Sager are irresolvable at present. The rest of the evidence supports good faith and due diligence.

[18] I am satisfied on the first threshold.

[19] Next is the requirement that a viable proposal is likely to be made.

[20] Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.

[21] Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.

[22] I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha Ltd. v. Cogent Fibre Inc.* 2015 ONSC 5139, which suggests that

s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.

[23] The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd. (Re)* 2005 NSSC 346, when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

[24] The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

[25] Finally, I have only one reservation about “no creditor would be materially prejudiced”. The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices. They purport to be conditional on resolving issues between Kocken and the Bank of Montreal.

[26] By virtue of its s. 178 security, the bank owns the inventory. The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first.

[27] I can diminish my concern by exercising my inherent jurisdiction to control this proceeding and the parties to it. I will order that Kocken give four business days’ notice to the bank before it ships anything out of Canada and, along with the notice, advise the bank of the amount to be paid and the arrangements for payment. In view of my willingness to make such an order, I find that no creditor will be prejudiced by the order extending time.

[28] I am prepared to extend the period for filing a proposal by the full 45 days, counting from last Thursday.

Moir, J.

Tab 2

Unofficial English Translation

14-B
Wendigo Studios inc. (Avis d'intention de) **2011 QCCS 2336**

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF CHICOUTIMI

No.: 150-11-003711-116

DATE: June 15, 2011

THE HONOURABLE MARTIN DALLAIRE, J.S.C.,
SITTING IN CHAMBERS

IN THE MATTER OF THE NOTICE OF INTENT OF WENDIGO STUDIOS INC.

WENDIGO STUDIOS INC., a body corporate legally incorporated, having its head office at 270 de l'Hôtel-de-Ville Street, Chicoutimi, province of Quebec, G7H 4W7
The Debtor
-and-
SAMSON BÉLAIR/DELOITTE & TOUCHE INC., trustees and managers, legally incorporated, having a place of business at 901 Talbot Boulevard, Suite 400, Chicoutimi, province of Quebec, G7H 0A1
The Trustee
-and-
HSBC BANK CANADA, a bank incorporated under the *Bank Act*, having a place of business at 1444 Talbot Boulevard, Chicoutimi, province of Quebec, G7H 4W7
The Bank
-and-
INVESTISSEMENT QUÉBEC, a body corporate legally incorporated, having its head office at 1200 de l'Église Road, Suite 500, Quebec City, province of Quebec, G1V 5A3
IQ
-and-
GESTION DU FIER SAGUENAY/LAC-SAINT-JEAN INC., having its head office at 326 des Saguenéens Street, 2nd floor, Chicoutimi, province of Quebec, G7H 6N6;
Fier

CORRECTED JUDGEMENT

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.

[5] The provisions in question are new and, according to the Honourable Paul Chaput, J.S.C., in fact represent [TRANSLATION] "a codification of the case law on interim financing developed in the framework of the turnaround procedure under the *Companies' Creditors Arrangements Act* (CCAA)".[2] In this same decision, he continued as follows, referring to comments made by Gascon J.:

> [TRANSLATION]
>
> While there is no doubt more to be said on the subject, generally speaking, the following criteria, without being exhaustive, will be retained as important guides in deciding to create a prior charge to support Interim Financing:
>
> (a) This is an exceptional measure that must be used sparingly and only in situations that clearly require it;
>
> (b) It is not enough for the Interim Financing and the prior charge to simply be beneficial for the debtors. Instead, it must be established that the charge is essential to permit operations to continue and make an effective restructuring of the debtors' affairs;
>
> (c) From this perspective, the court must be convinced that there is a reasonable expectation of a fruitful conclusion to the restructuring process undertaken;
>
> (d) The evidence must establish that the benefit of the Interim Financing and the prior charge for all the creditors, shareholders or employees of the debtors will exceed the potential prejudice for certain creditors, particularly those with lower-ranking security;
>
> e) Being an exceptional measure, any Interim Financing or prior charge must be limited to the period and amounts actually required in light of the evidence; in short, to only what is necessary to enable the debtors to maintain their operations.
>
> (f) In any event, the court must be convinced that it is just and fair to grant the Interim Financing and create the prior charge under the conditions sought.

---

[2] *Dans l'affaire de l'avis d'intention de : Dessert & Passion inc.*, EYB 2009-165059, at para. 34

> [32] In analyzing these criteria, the court must normally ensure that the restructuring being contemplated by the debtors will receive solid backing from the major creditors and that its board of directors has their confidence. Otherwise, the prospect of a successful restructuring is greatly reduced.

[6] Finally, it should be remembered that in this matter, the judge intervened to set a reasonable interest rate, fixing it at 5.25% rather than 20%. It seems clear that the Court has broad discretion to weigh the application and its conditions.

[7] Furthermore, commentary reminds us of this in *the 2011 Annotated Bankruptcy and Insolvency Act*:[3]

> …While there were a few cases that found that the court had the authority to order such financing under its general authority (*see Re Bearcat Explorations Ltd.* (2004), 2004 CarswellAlta 1183, 3 C.B.R. (5th) 167 (Alta Q.B.), the amendments clarify that authority and align provisions with those in the *CCAA.*

CLAIMS OF THE PARTIES

The debtor

[8] For the applicant, the factors to be considered are all present and the financing requested is essential. It has the support of Fier, which proposes to finance the applicant.

Investissement Québec (IQ)

[9] For IQ, $100,000 of the financing is justified. The sum of $150,000 is not required because of amended table R-11. In addition, in fairness, it should keep its rank for the tax credit generated before the proposal.

HSBC Bank

[10] The Bank also maintains that the sum required is too high and must be reduced to $100,000. Furthermore, the budgeted statement should include payment of the secured creditors' principal. Finally, the professional fees should not be awarded.

THE EVIDENCE

[11] A brief review of the facts and the evidence is necessary:

[12] The debtor is a business that specializes in the creation, development, marketing and sale of video games.

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[3] Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2011 Annotated Bankruptcy and Insolvency Act*, at 228.

Tab 3

Skydome Corp. v. Ontario, [1998] O.J. No. 6547

Ontario Judgments

Ontario Court of Justice (General Division)

Commercial List

Blair J.

November 27, 1998.

Docket No. 98-CL-3179

[1998] O.J. No. 6547 | 16 C.B.R. (4th) 118 | 1998 CarswellOnt 5922

IN THE MATTER OF Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc. AND IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 as Amended AND IN THE MATTER OF the Business Corporations Act, R.S.O. 1990, c. B.16, as Amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.

(18 paras.)

Case Summary

Insolvency law — Legislation — Companies Creditors Arrangement Act — Voluntary assignment into bankruptcy — Acts of bankruptcy — Ceasing to meet liabilities — Receivers, managers and monitors — Appointment of.

Application by the Skydome Corp. for protection of the court under the CCAA. The Skydome was a major sports facility located in a large city with a contract with a Major League Baseball team, many employees and related sports and entertainment enterprises. No one submitted it would be in the best interest of the city to shut down its operations. It had insufficient sources of funds to meet its ongoing liabilities.

HELD: Application allowed.

The Skydome was granted protection and a monitor appointed. It was permitted to use its funds in its capital reserve to preserve stability. A stay was imposed, prohibiting the continuation or commencement of proceedings against the Skydome.

Statutes, Regulations and Rules Cited:

Business Corporations Act, *R.S.O. 1990, c. B.16*, as Amended.

Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36* as Amended, s. 11, 11(6).

Counsel

David E. Baird, Michael B. Rotsztain and Richard A. Conway, for Applicants.

R.G. Marantz, Q.C., and Andrew Diamond, for Respondents Province of Ontario and Stadium Corporation.

Derrick Tay and John Porter, for Trustee for Bondholders and Bondholder.

James Dub e and Craig Thornburn, for Respondents The Toronto Blue Jays Baseball Club.

Alex Ilchenko, for Respondent Ticketmaster Canada Ltd.

Ronald Slaght, for Respondent McDonald's Restaurants.

Endorsement

BLAIR J.

1 Skydome Corporation, Skydome Food Services and SAI Subco Inc. all related and presently insolvent companies - apply for the protection of the Court available in appropriate circumstances under the provisions of the Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36*, as amended (the "CCAA").

2 Once considered to be the Crown Jewel of the sports and entertainment facility world the Skydome, it seems, has developed a few financial fissures. It has insufficient funds or sources of funds to meet all of its ongoing liabilities as they become due. The same is true for all 3 Applicants, which I shall refer to generically in this endorsement as "The Skydome" unless the context requires otherwise. Various reasons are put forward for this in the materials, but in summary they are the following:

1. Changes in the sporting, entertainment and economic environment in recent years have place financial strains on the operations of the facility. These changes include, but are not limited to, declining revenues as a result of a significant downturn in attendance at Blue Jays games since the halcyon World Series days of the early 1990's, and the cost of competing for entertainment providers in an environment where the entertainers must be paid in U.S. dollars but the revenue is received in weakened Canadian dollars.
2. Non-payment of Municipal taxes of approximately $3.6 million (Skydome contests its liability for such taxes in the sense that it has been engaged in a lengthy battle with the taxing authorities over the proper assessment base for its municipal taxes);
3. The Skydome now faces competition from other entertainment facilities in this City and elsewhere.
4. The Applicants carry a very heavy debt load, which is the legacy of the construction of the domed stadium and the initial development and marketing of the Skydome.
5. In connection with the latter, there are various outstanding executory contracts which provide benefits to those who were involved in supporting the initial Skydome venture, in continuing consideration of that support, but which as a result reduce the benefits provided by revenues that can be generated by the Skydome now.
6. Because renters of Skyboxes were called upon to pay first and last years rent in advance, there are no revenues coming in for the last year of the 10 year leases which are now about to expire; and,

7. The Skydome faces a major negotiating battle with its primary source of financial life, the Blue Jays, over the Blue Jays sub-lease (or, more accurately, license) of the premises.

3 This latter problem has been resolved, subject to approval and granting of CCAA protection, through the execution of an Interim Licensing Agreement (which I will call the Interim Lease, since everyone else does), under which the Blue Jays will remain in the Skydome for a further one year period (subject to a right to renew for a further one year period) on the same terms as those contained in the present lease which expires at the end of this year. There is also an agreement in principal only between Skydome and the Baseball Club with respect to a long-term 10 year arrangement; but this arrangement has not yet been finalized and, indeed, its negotiation and acceptance is proposed to be made the subject of the Plan of Arrangement which the Applicants are hoping to be able to put forward.

4 The Applicants seek the usual declaratory relief that is sought on these applications; namely, an order declaring that they are corporations to which the Act applies; and a broad stay order which, although there are quibbles with certain provisions in it, is more or less of the sort generally sought and granted when Initial Orders are made under s. 11 of the CCAA. They also ask for the appointment of Pricewaterhouse Coopers Inc. as monitor. In addition, however, and as part of the package, the Applicants ask the Court to approve the Interim Lease and authorize the parties to enter into it, and they ask the Court to authorize a "Super Priority" loan of up to $3.5 million from the Blue Jays in order to finance their necessary operating expenses, and certain capital expenditures which they say are essential, and as well the costs of restructuring. Finally, they seek additional authorization to withdraw the sum of $1,260,000 from a capital reserve account with Montreal Trust Company of Canada-which reserve fund is held as part of the security arrangements regarding $58 million of outstanding indebtedness to a group of Skydome Bondholders. The withdrawal would be for the purpose of making necessary capital expenditures with respect to YK2 compliance enhancements, improvements to the Skydome sound system and renovation regarding the Skydome Hotel.

5 No one seriously submits that it is in anyone's interests for the Skydome to be shut down or, indeed, for the Blue Jays not to continue to play ball from that facility. It would be folly to suggest otherwise, at least for the moment. The Skydome is a popular facility which draws about 4 million people to its various functions throughout the year-there have been 270 such events in 1998. It has 160 full-time employees and 1100 part-time employees who work there during the baseball season. Without going into to them in detail, there are very substantial economic and financial ripple effects for merchants, suppliers, entertainers, people working and employed in the tourist industry in Toronto, and Governments in the form of tax revenues of various sorts from the continued operation of the Skydome. It is said, for instance, that Skydome related activities generate $326 million in revenues for the economy of the GTA and $45 million in sales taxes for the Province of Ontario.

6 Thus there is a broader public dimension which must be considered and weighed in the balance on this Application as well as the interests of those most directly affected: see Re Anvil Range Mining Corp., unreported decision of Ontario Court of Justice General Division August 20, 1998 [reported at (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.). As was stated in that case:

> The Court in its supervisory capacity has a broader mandate. In a receivership such as this one which works well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must he weighed in the balance as the process works its way through.

7 The Anvil Range case concerned a CCAA proceeding which had been turned into a receivership, but the same principles apply in my view to a case such as this. While it may be engaging a trifle in hyperbole to raise the interests of Blue Jays fans to the level of "the social and economic fabric" of the region, they too can't be ignored altogether and the true economic ramifications of a failed Skydome are surely something that must be considered.

8 The two issues that raised the most concern were those dealing with the "Super Priority" loan and with the use of

the capital reserve fund for the purposes requested. What is at stake here is protection of the Bondholders (who say their outstanding loan, with default ramifications taken into account is about $70 million) and the Province of Ontario (which has secured loans behind that of the Bondholders totalling about $24 million) with regard to a potential $3.5 million loan and the reduction of the Bondholders' security by less than $1.3 million. While these numbers are large numbers to the ordinary person they are really not very significant numbers relevant to the overall numbers involved.

9 There is ample authority in previous decisions of the Court for the granting of a Super Priority in CCAA situations -even to shareholders who are advancing funds - and I see no reason in principle why such a Super Priority should not be approved here. Although the Bondholders oppose the Interim Lease - indeed it is really at the heart of their objections - the Province does not. The two are so closely integrated in the proposal being put forward by the Applicants that I do not see how one can be approved (the Interim Lease) and the other (the Super Priority Loan) not.

10 The Interim Lease is key to the ability of the Skydome to pursue its attempt to put forward a Plan that will be acceptable to its creditors, including the Bondholders who will have the opportunity to vote and to approve or reject that Plan. The proposed Plan, as 1 have indicated, will include a Long-Term Lease component. The Bondholders main complaint, it seems to me, is that they have been excluded from the negotiation process - as they see it - to this point, and that their consent was not sought with respect to the Interim Lease. Mr. Tay did not say what the response would have been had the consent been sought. The Bondholders are also suspicious that the object of this exercise is to solidify the position of the major shareholders of the Skydome - Labatts and the CIBC - who are also part owners of the Blue Jays, by putting in place an Interim Lease that will be binding for up to two years regardless of whether the CCAA proceedings succeed or not, and which will in any event put them under subtle pressures to approve a final Plan with a final lease that they might otherwise have been able to resist.

11 There is no evidence to support such a suggestion. Whether there is anything in it or not I do not know, but one of the characteristics of a CCAA restructuring is that by nature, it leaves the debtor company in possession and in charge of the show while it attempts to work out an acceptable arrangement with its creditors. If there are underlying business agenda in that process, they are not precluded; whether they ultimately succeed or fail will depend upon the dynamics of the negotiating game that will follow.

12 In weighing all of these factors, I am satisfied that the importance of stability in the situation at the Skydome for the next year or two in connection with not only the Blue Jays presence but also the ability to attract other revenue generating functions, outweighs other concerns that may arise in relation to the negotiation and execution of the Interim Lease.

13 As to the use of the funds in the capital reserve held by Montreal Trust, it makes sense in my view for them to be used for the purposes suggested by the Applicants. The Capital reserve fund withdrawal will be used for the YK2 enhancements, the improvements in the sound system, and the Hotel renovation -all of which will preserve the overall security. A significant portion of the total funds to be advanced, including the super-priority loan - which were deposited in the first place in order to - will be used to pay Municipal taxes and Rent which are matters that have priority over the Bondholders in any event. Thus there is little overall prejudice in that regard. I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the patties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as Re Westar Mining Ltd. *(1992), 14 C.B.R. (3d) 88* (B.C. S.C.) are examples of the flexibility which courts bring to situations such as this. See also Re Lehndorff General Partner Ltd. *(1993), 17 C.B.R. (3d) 24* (Ont. Gen. Div.); Olympia & York Developments Ltd. v. Royal Trust Co. *(1993), 17 C.B.R. (3d) 1* (Ont. Gen. Div.).

14 What subsection 11(6) of the CCAA requires for purposes of an Initial Order is that the applicant satisfy the court "that circumstances exist that make such an order appropriate". I am satisfied that such circumstances exist

here and that it is fair and reasonable to grant the Order requested, although the detailed terms of the Order may require further clarification which the lateness of the day precludes for the present.

15 Mr. Tay raised a substantial issue when he pointed out that the Order as presently drafted, when read in conjunction with the Term Sheet reflecting the agreement between the Skydome and the Blue Jays for the Super Priority loan, could lead to a situation where, if the CCAA proceeding fails, the Blue Jays (called in that context "the CCAA Lender") could move to put in a receiver and to realize upon their security without further court order. I would not have approved such a provision in the circumstances, but it is not necessary to make such a determination because Mr. Dube undertook to the Court on behalf of the Blue Jays that they would not seek to do so without approval of the Court.

16 Mr. Slaght argued on behalf of Macdonalds that the super priority should not extend to his client's lease regarding the food outlets. While I agree that the position of Macdonalds is somewhat different than that of other secured creditors - because Macdonalds must continue to pay a percentage of revenue as rent, and thus pour new monies in - I don't think that that circumstance is in itself sufficient to make distinctions from the position of other secured creditors.

17 As to other matters respecting the form of the Order, I will make the change suggested by Mr. Marantz and accepted by Mr. Baird regarding the necessity of consent of all secured creditors to any out of ordinary course disposition by the Skydome during the CCAA period. Other details I leave to counsel to agree to and to come back for a variation of the Order at a later date.

18 Accordingly, an Initial Order is granted as sought, subject to the foregoing.

Tab 4

THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2008 SKCA 73 Date: 20080522

Between: Docket: 1627

National Bank of Canada

Appellant

- and -

Stomp Pork Farm Ltd.

Respondent

- and –

Farm Credit Canada, Cargill Limited
and Meyers Norris Penny Limited, Monitor

Respondents

Coram:
Sherstobitoff, Lane & Jackson JJ.A.

Counsel:
Jeffrey Lee and Linda Widdup for National Bank of Canada
Kim Anderson for Stomp Pork Farm Ltd.
Joel Hesje, Q.C. for Farm Credit Canada
Ian Sutherland for Cargill Limited
Gary Meschishnick for Meyers Norris Penny Limited

Appeal:

From:	2008 SKQB 152, 2008 SKQB 179
Heard:	May 13, 2008
Disposition:	Appeal Decided May 13 and May 22, 2008 (orally)
Written Reasons:	June 5, 2008
By:	The Honourable Madam Justice Jackson
In Concurrence:	The Honourable Mr. Justice Sherstobitoff
	The Honourable Mr. Justice Lane

> wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]
>
> (See also *Harelkin v. University of Regina* [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)[25] [Emphasis added]

[28] It is now well established that a superior court supervising the restructuring of an insolvent corporation under the *CCAA* may confer upon a lender, providing DIP financing to the insolvent corporation, the benefit of a court-ordered "super-priority" charge on the assets of the insolvent corporation and that, in certain circumstances, the DIP lender's charge may rank in priority to the existing security held by secured creditors of the insolvent corporation. It is sufficient to cite as an example in support of this proposition the most recent decision on point: *Re: Temple City Housing Inc.*[26]

[29] While the above aspect of the law appears settled, few reported decisions consider the question of the appropriate allocation of DIP financing as between major secured creditors of the corporate debtor. Some principles

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[25] *New Skeena, supra* note 23.

[26] 2007 ABQB 786, affirmed *Temple, supra* note 17. The Court also notes that Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2d Session, 2007, received Royal Assent on December 14, 2007, but it is not in force as the *Act* it amends, being *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 is not yet in force. When these amendments come into effect, they will confirm an authority that the courts have been exercising for some time.

Tab 5

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Federal Gypsum Company (Re), 2007 NSSC 347

Date: 2007/11/05
Docket: S. H. No. 285667
Registry: Halifax

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 the Applicant, Federal Gypsum Company

Judge: The Honourable Justice A. David MacAdam

Heard: November 5, 2007, Orally, in Halifax, Nova Scotia

Written Decision: January 29, 2008

Counsel: Maurice P. Chaisson/Graham Lindfield, for the Federal Gypsum Company
Carl Holm, Q.C. for BDO Dunwoody Goodman Rosen Inc.
Thomas Boyne, Q.C. for the Royal Bank of Canada
Robert Sampson/Robert Risk for Enterprise Cape Breton Corporation and Cape Breton Growth Fund Corporation
Michael Pugsley for Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development) and Nova Scotia Business Incorporated
Michael Ryan, Q.C./Michael Schweiger for Black & McDonald Limited

> noted above, the Monitor has verified the reasonableness of the Company's cash flow projections. All of the above circumstances suggest, contrary to those facing Wachowich J. in *Hunters* (2000) (*supra)*, that additional DIP financing will benefit the Company and its creditors in the long run, as those funds will allow the Company to take advantage of the opportunities presented, and thereby ultimately bolster its efforts to finalize and present a viable restructuring plan. It is submitted that none of the myriad reasons by Wachowich J. for denying further DIP financing are present in the current situation.

[39] Counsel suggests the additional DIP financing is a necessary cost of ensuring there can be a meaningful discussion between the stakeholders about the restructuring plan. Counsel recognizes that any protection afforded by the CCAA, with its attended super-priority, will necessarily have a prejudicial effect on the Company's creditors. As counsel suggests, what must be examined is whether such prejudice is more than outweighed by the prejudice to the Company and its stakeholders should the requested DIP financing be denied, given that, as counsel suggests, "it would most likely have to cease operations in that instance." Counsel suggests the Affidavit filed in support of the Application "provides clear evidence of improving prospects for the Company, as well as considerable effort on its part to build a sustainable business, the ultimate goal of the *CCAA* restructuring process". Having considered the Monitor's reports and filed documents, including affidavits, together with the representations of Counsel, I am satisfied it is appropriate to continue CCAA protection to enable the Company to finalize preparation of the Plan and its presentation to the creditors. In view of the need for

additional DIP financing to enable the Company to continue in operation, while the Plan is considered and voted upon by the creditors, the Company is granted approval for additional DIP financing.

Payout of the Royal Bank

[40] Counsel for the Company's submission recognized the possibility that some of the secured creditors would object to the application and, in particular, to the proposed buy-out of the Royal Bank's operating line of credit. Counsel referenced the comments of Farley, J. in *Re Dylex Limited* (1995), 31 C.B.R. (3d) 106, to the effect that the mere fact a significant secured creditor objects to such financing should in no way preclude the Court's ability to approve DIP financing. Counsel then references *Hunters Trailer Marine Ltd., Re,* (2000), 295 A.R. 113, at para 32, where the Court stated that "if super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases."

[41] Counsel's submission continues:

Tab 6

2008 CarswellOnt 8040
Ontario Superior Court of Justice [Commercial List]

InterTAN Canada Ltd., Re

2008 CarswellOnt 8040, 49 C.B.R. (5th) 248

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, As Amended

In the Matter of a Plan of Compromise and Arrangement of InterTAN Canada Ltd. and Tourmalet Corporation

Morawetz J.

Heard: November 26, 2008
Oral reasons: November 26, 2008 *
Docket: Toronto CV-0800007841-00 CL

Proceedings: additional reasons at *InterTan Canada Ltd., Re* (2009), 2009 CarswellOnt 687 (Ont. S.C.J. [Commercial List])

Counsel: E. Sellers, J. Dacks, J. MacDonald for Applicants
M. Forte for Bank of America, N.A.
J. Carfagnini, L.J. Latham for Alvarez and Marsal Canada Inc.

***Morawetz J.*:**

1 The applicants, InterTAN Canada Ltd., ("InterTAN"), and Tourmalet Corporation, ("Tourmalet"), brought this application on November 10, 2008. At the conclusion of argument, an order was granted providing the applicants with protection under the Companies' Creditors Arrangement Act, ("CCAA"), with reasons to follow. The following are those reasons.

2 InterTAN is incorporated under the laws of the Province of Ontario. It is a leading speciality retailer of consumer electronics in Canada and is the operating Canadian subsidiary of the major United States based electronics retailer, Circuit City Stores, Inc., ("Circuit City").

3 InterTAN is a privately held Ontario corporation and sole direct subsidiary of InterTAN Inc., which is owned by the Delaware corporation Ventoux International Inc., and Tourmalet, a Nova Scotia unlimited liability company. Tourmalet is in turn wholly owned by Ventoux, which is wholly owned by Circuit City. As such, InterTAN is an indirect wholly-owned subsidiary of Circuit City. Tourmalet is an affiliated non-operating, holding company whose sole asset is the preferred stock of InterTAN, Inc. which has sought insolvency protection.

4 InterTAN operates retail stores and licences dealer-operated stores selling brand name and private label consumer electronics throughout Canada under the trade name, "The Source by Circuit City", ("The Source").

5 InterTAN currently has 772 retail stores in Canada and employs approximately 3,130 people.

6 InterTAN's sole credit facility is through an agreement between Circuit City, certain U.S. affiliates, InterTAN and Bank of America N.A. as agent, together with other loan parties, (the "Secured Credit Facility"). InterTAN has historically relied on the Secured Credit Facility to maintain a consistent cash flow for its operations.

7 Circuit City and certain of its affiliates filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia on November 10, 2008.

8 As a result of the Chapter 11 proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into a Debtor-in-Possession loan facility, (the "DIP Facility"), that replaced the Secured Credit Facility.

9 Counsel to InterTAN advised that the lenders providing the DIP Facility would only extend credit to InterTAN if it was a borrower under the DIP Facility and an initial order was obtained from this court, in the CCAA proceedings, providing for a super priority charge on all of the assets and property of InterTAN (subject only to certain court ordered charges) as security for the DIP Facility.

10 Counsel for InterTAN also advised that witout the DIP Facility, InterTAN was insolvent as it was not able to:

(a) access operating credit;

(b) operate as a going concern; or

(c) satisfy all of its ongoing obligations to its employees, dealers, landlords, suppliers and other stakeholders.

11 Counsel submitted that the applicants required a stay of proceedings and other relief sought in order to permit InterTAN to continue operating as it pursues restructuring options, which include the potential sale of the business, in order to maximize enterprise value. The applicants took the position that it was necessary and in the best interests of the applicants and their stakeholders, and in light of the Chapter 11 proceedings, that the applicants be afforded the protection provided by the CCAA as they attempt to restructure their affairs.

12 Counsel also submitted given the current economic situation, it was not practical for InterTAN to find a replacement to the Secured Credit Facility.

13 The applicants proposed Alvarez & Marsal Canada ULC, ("A & M"), as the Monitor in these proceedings and a consent to act was filed by A & M.

14 The application was supported by the affidavit of Mark J. Wong, Vice President, General Counsel and Secretary of InterTAN as well as a report filed by A & M in its capacity as proposed Monitor, (the "Report").

15 The purpose of the Report was to provide the court with information concerning:

(a) background on InterTAN's business;

(b) the financial position of InterTAN;

(c) the current Secured Credit Facility in place for InterTAN;

(d) recent action by InterTAN's trade creditors that have impacted its cash flow;

(e) the proposed restructuring of InterTAN and the proposed restructuring alternatives;

(f) the terms of the proposed DIP Facility;

(g) the implications of the DIP Facility for InterTAN's Canadian creditors; and

(h) A & M's summary comments.

16 A & M was retained by InterTAN on October 31, 2008, as the proposed Monitor. In the ten days prior to the bringing of this application, A & M has been reviewing InterTAN's available financial information in an attempt to gain knowledge of the business and financial affairs of InterTAN and has been preparing for this anticipated CCAA application.

17 A & M commented on the Secured Credit Facility which consists of a U.S. $1.25 billion commitment to Circuit City and certain of its affiliates, (the "U.S. Debtors"), and a U.S. $50 million commitment to InterTAN.

18 InterTAN has not guaranteed and is not liable for the borrowings of the U.S. Debtor under the Secured Credit Facility. Tourmalet is not a party to the Secured Credit Facility but it has guaranteed InterTAN's obligations thereunder. A & M is of the understanding that this guarantee is unsecured.

19 As a result of the commencement of the Chapter 11 proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into the DIP Facility. A & M is of the understanding that, unlike the Secured Credit Facility, the DIP Facility provides that credit would only be advanced to Circuit City on the condition that InterTAN agreed to become a joint and several borrower for all advances and a guarantor for the entire facility, including existing advances to the U.S. Debtors and to have all of InterTAN's assets pledged as security for those obligations. Further, A & M was of the understanding that the lenders providing the DIP Facility would only extend credit to InterTAN if the Dip Facility was approved by an order of this court with a charge over all of the assets and property of InterTAN.

20 As of September 30, 2008, InterTAN had total assets of approximately $370 million. According to its internal, unaudited financial statements as at September 30, 2008, InterTAN's current assets represented in excess of $218 million of it total assets, including $148 million of inventory, nearly $50 million of current accounts and notes receivable and $5.8 million in cash. Non-current assets were comprised primarily of property, plant and equipment of $45 million, notes receivable of $91 million (representing promissory notes from InterTAN, Inc, and Tourmalet) and goodwill of $8.7 million.

21 As at September 30, 2008, InterTAN's total liabilities were approximately $110 million which consisted of current liabilities of approximately $90 million, miscellaneous long-term liabilities of approximately $20 million and a small inter-company payable of $250,000. Current liabilities as at September 30, 2008 included nearly $50 million of trade accounts payable, accrued expenses of $22.2 million, deferred service contract revenue of $9.8 million and short-term bank borrowings of $7.5 million.

22 In preparation for this application, a 17-week Cash Flow Forecast, (the "Cash Flow Forecast"), was prepared by InterTAN, with the assistance of its financial advisor, FTI Consulting. A & M reviewed the Cash Flow Forecast and noted that InterTAN's borrowings under the Secured Credit Facility were projected to be approximately $43.3 million through November 9, 2008. The Cash Flow Forecast projects that InterTAN will require further incremental funding during the cash flow period of up to $19.8 million, such that cumulative credit requirements to fund its operations are projected to peak at approximately $63 million during the week ending November 30, 2008, $43.3 million of borrowings under the Secured Credit Facility plus approximately $19.8 million of incremental borrowings under the DIP Facility.

23 As a result of the seasonal nature of InterTAN's business, cash requirements decrease as a result of Christmas sales such that the expected borrowings under the DIP Facility are projected to be reduced to approximately $1 million by January 4, 2009. From that time forward, the Cash Flow Forecast indicates that borrowings under the DIP Facility will range from approximately $600,000 to $8.6 million through the week ending March 1, 2009.

24 A & M is of the understanding that the portion of the DIP Facility available to InterTAN will remain fully drawn, with the funds not needed to fund InterTAN's operations being advanced by InterTAN to the U.S. Debtors. A & M notes that there is presently no mechanism to ensure repayment of the amounts advanced by InterTAN to the U.S. Debtors and no mechanism to ensure that sufficient funds would be repaid to service InterTAN's liquidity needs.

25 The Secured Credit Facility is in default as a result of the Chapter 11 proceedings. The result of this default is the termination of the Secured Credit Facility, which causes all obligations under the Canadian Facility to become automatically due and payable. As of November 9, 2008, InterTAN had outstanding borrowings under the Secured Credit Facility of approximately $43.3 million.

26 A & M specifally points out that InterTAN's obligations under the credit agreement are limited to the amounts borrowed by InterTAN. As security for the obligations, InterTAN executed both a general security agreement and a deed of hypothec on moveable property in favour of the secured lenders.

27 A & M has received a preliminary opinion from its independent counsel that Bank of America holds valid and perfected security in Ontario over the inventory, receivables and intangible assets of InterTAN described in the security documents.

28 Over the past few months, as a result of public reports concerning potential liquidity concerns at Circuit City, several of InterTAN's significant suppliers have shortened their credit terms, requiring cash in advance or on delivery, which has had the effect of increasing the exposure of the secured lenders and decreasing trade payable. A & M is of the view that it is essential that InterTAN's suppliers continue to supply InterTAN throughout the crucial holiday sales period and while InterTAN has access to sufficient credit to obtain holiday season levels of inventory.

29 In order to ensure the continuity of InterTAN's supply chain from outside North America where the stay of proceedings will not apply, InterTAN is proposing to continue to pay foreign trade creditors and suppliers in the ordinary course both before and after the date of filing.

30 With respect to North American suppliers, InterTAN proposes to freeze all pre-filing trade claims until further order of the court, subject to the Monitor having discretion

> (i) to authorize critical supplier payments for pre-filing amounts not to exceed $2 million (subject to further order of the court); and
>
> (ii) to authorize the payment of any other costs and expenses that are deemed necessary for the preservation of InterTAN's property and business.

31 InterTAN has also advised A & M that it has agreed to enter into a Key Employee Retention Plan, the ("KERP"), with certain of its key management employees. A & M is of the understanding that the maximum amount payable under the KERP will not exceed $838,000.

32 It is clear that the financing of InterTAN's Canadian operations are intertwined with the financing of Circuit City's U.S. operations as the Canadian and U.S. entities are parties to the same credit agreement. The result of the commencement of the Chapter 11 proceedings is that InterTAN no longer has access to financing under the Secured Credit Facility and would be unable to purchase inventory and discharge its obligations in the ordinary course.

33 A & M has acknowledged that it has not been a party to the negotiations between InterTAN and the secured lenders. A & M is of the understanding that the secured lenders have advised InterTAN that they are only willing to continue to extend credit to InterTAN under the DIP Facility as part of the CCAA filing co-ordinated with the Chapter 11 proceedings. The total amount of the DIP Facility will be U.S. $1.1 billion including a maximum Canadian commitment of U.S. $50 million for InterTAN, which could, in certain circumstances, escalate to U.S. $60 million.

34 The borrowers, including InterTAN, will be jointly and severally liable for the amounts outstanding under the DIP Facility, meaning that the obligations under the DIP Facility will be cross-guaranteed and cross-collateralized and that InterTAN and Tourmalet will be liable for the amounts drawn under the DIP Facility by the U.S. Debtors and will pledge their assets as security for the U.S. Debtor's obligations.

35 The applicants will grant the DIP lenders security, evidenced by a court ordered charge on the applicants' assets and property, (the "DIP Charge"), such that the security over the applicants' property and assets will rank as follows:

> (i) the administrative charge in the amount of $2 million;
>
> (ii) the directors' charge in the amount of $19.3 million;

(iii) the KERP charge in the amount of $838,000.

(iv) the DIP Charge to the maximum amount borrowed by InterTAN under the DIP Facility;

(v) a $25 milllion charge, (the "Unsecured Creditors Charge"), to secure payment of the claims of Canadian pre-filing unsecured creditors;

(vi) the remainder of the DIP Charge pertaining to the guaranteed liabilities of the applicants to the DIP lenders over and above the amount borrowed by InterTAN under the DIP Facility.

36 InterTAN has advised A & M that the proposed DIP Facility, while not perfect, represents the only alternative available to the company, emphasizing that the Dip Facility will ensure the continuation of operations and employment for all of the current employees. In addition, because the approval of the DIP Facility is a condition precedent to all lending, the entire enterprise and all business and jobs in the North America operations would be at risk if the DIP Facility was not approved.

37 Pursuant to the proposed initial order, InterTAN is entitled, but not required to pay certain expenses payable on or after the date of the initial order, as well as amounts owing for certain goods and services supplied prior to the date of the initial order. These expenses and obligations include employee claims, amounts due to logistics or supply-chain providers and certain customs brokers, trade vendors and suppliers outside of North America and amounts related to servicing warranties and honouring gift cards and reward and loyalty programmes. As such, a significant portion of InterTAN's liabilities will not be affected by the CCAA stay of proceedings.

38 It is estimated that liabilities of approximately $26.8 million, made up of $22.5 million of trade accounts payable, net of estimated potential set-offs, and $4.3 million of joint venture partner deposits and other smaller accrued liabilities, would be stayed by the initial order. In addition, management estimates that there will be $5 million of outstanding cheques that may also be stayed. Therefore, the estimated total trade creditors that may be stayed by the initial order are in the magnitude of between $26.8 and $31.8 million net of estimated potential set-offs.

39 A & M has also been provided with an extract of a report prepared on behalf of the secured lenders to estimate the net orderly liquidation value of InterTAN's inventory. This extract has been filed with the court but due to the sensitive information contained therein, it is the subject of a sealing order.

40 In addition to inventory assets addressed in the report extract, InterTAN also has accounts receivable, and property, plant and equipment. These assets have a combined net book value of approximately $80 million.

41 A & M has not conducted a detailed review of the realizable value of the assets but, the view of A & M, when considered together with the net orderly liquidation value of the inventory, the value of InterTAN's combined assets in an orderly wind down of the business far exceeds the current borrowing under the Secured Credit Facility.

42 Prior to the cross-collateralization in enhanced security provided for under the DIP Facility, A & M is of the view that it is likely that the trade creditor claims of $26.8 million to $31.8 million discussed above, would receive a meaningful recovery in an orderly wind down of the business.

43 InterTAN had reported EBITDA of $33.1 million for the fiscal year ended February 28, 2008 and, depending on the outcome of the critical holiday sales period, it is expecting EBITDA for fiscal 2009 to be approximately $26 million. Although A & M has not conducted any type of enterprise valuation of InterTAN and has not had the opportunity to engage in any discussions with the investment banking advisors, InterTAN's projected EBITDA results would ordinarily auger well for a potential going concern solution.

44 In summary, A & M is of the view that:

(i) the liquidation and wind down of InterTAN would eliminate over 3,000 jobs; and

(ii) would detrimentally affect dealers, joint-venture partners and other stakeholders.

45 In these circumstances, A & M is supportive of InterTAN's efforts to obtain interim financing, so as to avoid a liquidation, and to facilitate a restructuring or a going concern sale under the CCAA.

46 A & M also points out that the DIP lenders have agreed to the creation of the $25 million Unsecured Creditors Charge for the payment of pre-filing unsecured creditors. This charge provides some measure of protection for the unsecured creditors during a going concern restructuring of InterTAN. It is acknowledged that, if InterTAN achieves a going concern sale and provided that InterTAN or a buyer pays or honours certain other pre-filing claims as contemplated by the initial order, the result of the Unsecured Creditors Charge would appear to be positive. However, if no going concern outcome is achieved and there is a wind down after the initial order, those unsecured creditors may well receive a less meaningful recovery than they might receive in an immediate liquidation of InterTAN.

47 Having reviewed the record and having heard submissions, I am satisfied that InterTAN is a qualifying debtor corporation and Tourmalet is a qualifying affiliated debtor company within the meaning of the CCAA.

48 Both have obligations in excess of the $5 million qualifying limit and as a result of default in the Secured Credit Facility, the applicants are insolvent.

49 The jurisdiction of this court to receive the CCAA application has been established.

50 The applicants sought an initial order under s.11 of the CCAA. The required statement of projected cash flow and other financial documents required under ss. 11(2) have been filed. The application was not opposed by any party appearing.

51 The only real significant issue on the initial application was the requirement for approval of the DIP Facility.

52 It is clear that the DIP Facility results in a substantial change to the status quo. The use of the assets of InterTAN as a basis for obtaining finance for Circuit City raises a number of questions, especially when the approval of the DIP Facility could very well affect InterTAN's ability to honor its current obligations.

53 The parties come to court, having negotiated the DIP Facility. They insist that this court make an immediate order, which approves the DIP Facility. If the DIP facility did not receive such approval, InterTAN indicated that there would be no credit facilities available and the enterprise would collapse.

54 It is recognized that in order to maintain its business activities InterTAN must have access to funds to enable it to continue to pay for inventory as well as all other costs associated with the running of the business. If there are no credit facilities, there is very little prospect of reorganizing or restructuring InterTAN.

55 The issue is whether it is appropriate in the circumstances for InterTAN to provide support for its indirect parent, Circuit City.

56 On a motion such as this, it is necessary for the court to consider the approval of the DIP Facility in light of the alternatives. In this case, InterTAN says there are no alternatives and no further time to consider alternatives. However, the parties who could be detrimentally affected by the implementation of the DIP Facility, namely North American trade creditors, are not before the court, and it is open to speculate as to what this group would have to say on the issue. On the one hand, they could view the proposal favourably, as it could result in the continuation of InterTAN's business and thereby provide an outlet for ongoing sales. On the other hand, they could very well take the position that in a liquidation, they would get paid, and that this would be the preferred economic alternative, as opposed to the risk associated with the impaired ability of InterTAN to pay its obligations if the DIP Facility is approved.

57 This application was essentially brought on an ex-parte basis. The only other parties attending in court were the secured lenders and the proposed monitor. Timing was dictated to a degree by the applicant and the secured lenders. They had negotiated

their financing and had applied for Chapter 11 protection. The relief being sought on this initial application was unusual, and I have no doubt that this was recognized by all parties.

58 In my view, the court has the jurisdiction to grant the requested relief. However, in situations such as this, it is up to the applicant to convince the court that it should exercise its discretion to grant this extraordinary relief. In this case, and as a general principle, it is up to the applicants to present sufficient evidence that would enable the court to conclude that such an order is appropriate, not only on factual grounds but also on the basis of the broad remedial purpose of and the flexibility inherent in the CCAA and the broad power of the court to stay proceedings under section 11 of the CCAA.

59 It must be recognized that if debtors and secured lenders are going to continue with the practice of requesting such extreme relief on an initial application, with little or no notice, the quid pro quo is that the applicant must establish the evidentiary basis for the requested relief. In the absence of such evidence, parties should have no expectation that the court will grant such extraordinary relief. The alternatives open to the court are clear. In certain circumstances, the motion could be adjourned until such time as the matter could be considered on a full record, or, alternatively, motions could be dismissed. Evidence can be provided by a representative of the applicants, as well as other sources such as the secured lenders or the proposed monitor or in some cases, representatives of key creditor groups.

60 This is not the first time that an issue like this has come before the court in recent weeks. No doubt the situation has been exacerbated by the current economic situation and the accompanying liquidity crisis. The record in this case indicates that there is a liquidity crisis.

61 By way of example, the CCAA proceedings of A & M Cookie Company Canada, came before this court on Friday, October 10, 2008 with a request to approve a ratification agreement under which it was conceivable that U.S. $5 million of assets of the debtor would not be available to the current creditors of the debtor. I deferred consideration of that matter until the following Tuesday so that the parties could provide additional evidence to support the request. The debtor did file additional material and an order was made approving the ratification agreement.

62 In my reasons, I noted the following: "Counsel to the proposed monitor advise that the monitor had not been in a position to comment on the liquidation analysis and was not in a position to provide any meaningful report on the potential impact of the ratification agreement. It would have been helpful if the monitor had been involved in the process at an earlier stage. The court certainly would have benefitted from an analysis of this situation."

63 In this case, the proposed monitor did become involved some 10 days before the application. A & M was in a position to provide a report which I found to be of great assistance. In fact, in the absence of such a report, it is questionable as to whether the court would have been in a position to consider whether it was appropriate to approve the DIP Facility.

64 However, it seems to me that the A & M report could have been more comprehensive. I do not intend this statement to be in any way critical of A & M. On the contreary, under the circumstances, I commend them for their outstanding effort. A & M was retained 10 days before the application, and they did not have the time nor the mandate to review the affairs of InterTAN in great detail. A & M was not party to the negotiations between InterTAN and the secured lenders. The effectiveness of A & M was to some degree compromised by a lack of information. For example, A & M did not see documentation relating to the DIP Facility until the day before the application.

65 Had Circuit City and InterTAN provided the proposed monitor with relevant and verifiable information pertaining to the initial application on a timely basis, I have no doubt that a more comprehensive report could have been issued.

66 A party, who is being nominated as a court officer can, in the circumstances, play a pivotal role on an initial application. Generally speaking, the process can be enhanced if the debtor applicants take timely steps to involve the proposed monitor in the events leading up to an initial application.

67 It is recognized that debtor companies in distress face certain practical realities. They may be required to keep their status and intentions confidential, but if such debtors and their secured lenders have expectations and/or requirements of wide

sweeping relief on initial applications, it is incumbent upon the applicants to present the evidentiary case for such relief. In doing so, such applicants have to take into consideration the benefits of having supporting evidence filed by a proposed court officer, who can be looked to by the court to provide a degree of objectivity to the proceedings.

68 The benefits of having such evidence coming from the proposed monitor cannot be underestimated, especially in circumstances where the volume of documentation that is being relied upon by the parties at the initial application is such that it creates additional practical difficulties for the judge to read and digest the information in an extremely short period of time.

69 In this case, however, I concluded, having considered and balanced the alternatives, that the DIP Facility should be approved. In my view, the potential upside of a going concern operation was preferable to a liquidation, notwithstanding the provisions of the DIP Facility which effectively transfers assets from InterTAN to another member of the enterprise group. It was in my view, appropriate to approve the DIP Facility, taking into account the prospects of a continued going concern operation, the continued employment of over 3000 individuals and the benefits of a continued operation for other third party stakeholders. I also took into account that certain creditor groups would be largely unaffected by the CCAA proceeding and that the creation of the Unsecured Creditors Charge provides in theory, a degree of protection to this group of creditors, who could otherwise be detrimentally affected by the DIP Facility.

70 My endorsement of November 10, 2008 provided that an order was to issue in the form submitted, as amended, which order granted initial protection under the CCAA to the applicants, and it also approved the DIP Facility. I understand that this order has been issued and entered.

Application granted.

Footnotes

* Additional reasons at *InterTan Canada Ltd., Re* (2009), 2009 CarswellOnt 687, 49 C.B.R. (5th) XXX (Ont. S.C.J. [Commercial List]).

Tab 7

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

(3) 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.

(4) In deciding whether to make an order, the court is to consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

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

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

Tab 8

CITATION: OVG Inc. (Re), 2013 ONSC 1794
COURT FILE NO.: BK-33-1718184
DATE: 2013/03/25

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY and INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
OVG INC.
OF THE TOWN OF RENFREW
IN THE PROVINCE OF ONTARIO

BEFORE: Mr. Justice Stanley J. Kershman

HEARD IN OTTAWA: March 12, 2013

APPEARANCE: J. Fogarty and P. Masic for the Debtor
M. Rouleau for the Proposal Trustee
C. Peddle for the Royal Bank of Canada

REASONS FOR DECISION

Introduction

[1] OVG Inc., ("Company" or "OVG") is a glazing and glass manufacturing company that was established in 1978. The Company filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") on February 22, 2013. Doyle Salewski Inc. ("DSI") was appointed as the proposal trustee. OVG moves under section 50.6 of the BIA for authorization to borrow under a credit facility from Waygar Capital Inc. ("Waygar") as well as the granting of an Interim Financing Charge ("IFC") against its property in favour of Waygar .

[2] It also seeks an order to extend the time to file its Proposal to May 8, 2013.

[3] The motion was brought on short notice. Based on the affidavit of service filed, the Court is satisfied that notice was given to the interested parties.

Debtor and its Creditors

[4] The Company was established 1978 and is located in Renfrew, Ontario and employs approximately 60 people.

[5] According to the affidavit of Shawn McHale, president of OVG Inc., the Company has struggled to maintain workflow while financing 10% construction lien holdbacks on larger projects.

[6] In addition, the Company has suffered significant losses on 2 projects in the fiscal years 2011 and 2012, further constraining cash flow. These constraints in cash flow have caused the Company difficulty in maintaining sufficient levels of materials to complete work in process.

[7] OVG has one secured creditor namely the Royal Bank of Canada ("RBC") which is owed in the range of between $3,200,000.00 and $3,400,000.00. The Bank opposes the granting of a DIP lending facility. It does not oppose the extension of time for filing for the proposal.

[8] Based on the creditor list prepared by DSI, secured creditors are owed in excess of $3,400,000.00. CRA is owed approximately $55,000.00 for source deductions. In addition, CRA is owed other monies for HST of approximately $250,000.00. The claims of unsecured creditors, while not totaled on the list of creditors, are approximately $6,800,000.00.

[9] The Company has prepared cash flow statements for the period of February 25, 2013 to May 24, 2013, in conjunction with Welch and Co. Business Advisors.

The Proposed DIP Facility

[10] The RBC is no longer providing credit to OVG. The Company's account was transferred to the Special Loans Division on May 1, 2012. On May 24, 2012 the Bank entered into a letter agreement wherein it changed the rate of interest on the operating and demand loans to RBC Prime + 4.5%. On September 21, 2012 the Bank retained the services of Ernst and Young Inc. to assist in the analysis of the viability of the Company.

[11] In his affidavit, Peter Gordon of the Bank states that he met and spoke with representatives of the Company numerous times to discuss its financial difficulties. According to the Bank, financial reporting provided by the Company shows that it is losing substantial amounts of money and is projected to lose even more money in the future.

[12] On February 12, 2013 demand letters and Notices of Intent to Enforce Security were sent by email to counsel for the Company and the guarantors. As of that date, the Company was indebted to RBC in the amount of $3,454,155.81.

[13] The Bank claims that based on the information provided by Ernst and Young Inc., that there will be a substantial shortfall to the Bank after collection of the accounts receivable and sale of the assets. The Court notes that the document of the estimate of realizable assets provided by Ernst and Young Inc. in the motion of record did not include the accompanying notes and assumptions mentioned therein.

[14] The Bank does not believe that the Company can be viably restructured.

The Proposed DIP Facility

[15] By a letter dated March 11, 2013 prepared by Waygar to OVG and signed by OVG, there is an offer of DIP financing. The Court notes that the letter specifically states that it is not a commitment letter. It has not been signed by Waygar. The Court believes that it has not been signed by Waygar due to the short timeframes involved. The letter includes a primary lending facility of $250,000.00 including $100,000.00 to "fund payroll this Thursday March 14, 2013."

[16] The letter also provides for a secondary lending facility of $250,000.00 as necessary to finance additional working capital requirements.

[17] The interest rate for the primary facility is 18%. The standby rate for the secondary facility is 9%, which increases to 18% once it is drawn down. There is a closing fee of $25,000 payable when the first funds are drawn down.

[18] Furthermore, two deposits are required to be paid by the Company to Waygar. The first is for $12,500.00 and is chargeable against the lender's field examination, financial analysis and appraisal expenses.

[19] The second deposit is for $12,500.00 which will be required to apply against legal and closing expenses.

[20] At the hearing of the motion, Company counsel indicated that $12,500.00 worth of the deposit was already in hand. This would mean that out of the initial $100,000.00 advance, $25,000.00 would be held back for the closing fee and $12,500.00 would be held back for the deposit described above. This would mean that there would be $62,500.00 available to the Company ($100,000.00 - $25,000.00 - $12,500.00),

[21] The Court is aware that the March 11, 2013 letter is not a commitment letter but it is satisfied that on the basis of the oral representations made by Mr. Fogarty at the motion, that Waygar is committed to the DIP Facility.

[22] As to the primary DIP amount, it is set up for two tranches, one for $100,000.00 and the second for $150,000.00. The Court notes that the purpose for the money set out in the letter is for payroll. In reality, based on the information provided at the hearing, $42,000.00 is for payroll and the balance is for purchase of equipment. The Court has advised of a case in Ontario dealing with DIP financing: *(Re) P.J. Wallbank Manufacturing Co.,* [2011] ONSC 7641 (Ont. Comm. List).

[23] The case has been reviewed by the Court and the Court bases its analysis in part on the *Wallbank* case.

Analysis

Statutory provisions

[24] Section 50.6 of the BIA, in part, provides as follows :

> 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.

(…)

Priority

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

(…)

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.

Consideration of the Various Factors

1) Likely Duration of the NOI Proceedings

[25] The evidence does not show when the Proposal will be filed. The Court has been asked for an extension of the Proposal to May 8, 2013. The Company requires the DIP facility to continue operating.

2) Management of OVG's Affairs

[26] The current management will continue to operate OVG.

[27] There are 60 employees at OVG in Renfrew, Ontario which is an economically depressed area.

3) Report of the Proposal Trustee

[28] In its March 8, 2013 report, the Proposal Trustee stated that it was satisfied that OVG is proceeding in good faith with its proposal, and supported the need for DIP financing.

4) Would the Loan Enhance the Prospects of a Viable Proposal

[29] According to the Proposal Trustee, OVG is developing a restructuring plan which may either involve :

1) identifying a strategic partner,

2) restructuring its debts, or

3) an orderly liquidation of its assets.

[30] OVG has filed cash flow projections for the period ending May 24, 2013. The cash flow projections support Mr. McHale's statement that without the proposed DIP financing, the

Company will not be able to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with this assessment saying as follows:

> "In the event that the DIP loan is not approved by the Court, the Proposal Trustee is of the view that this may result in a material adverse change and furthermore, that the Company may be required to cease operations which will severely compromise the Company's ability to complete its proposal to its Creditors."

[31] The evidence is clear that if the DIP financing is not approved, OVG will close its doors.

4) Nature and Value of OVG's Property

[32] While OVG filed evidence about its current indebtedness, it did not file any detailed historical evidence about its balance sheet or profit and loss position. The current value of its assets is unclear. The evidence suggests that OVG has been operating at a loss for at least 2011-2012.

5) Confidence of Major Creditors

[33] The only major creditor in attendance at the motion was the Bank who opposed the DIP financing. There is no evidence that any other creditors either opposed or approved of the DIP financing request. The Court notes that only 4 or 5 creditors were advised of the motion.

6) Prejudice to Creditors as a Result of the Interim Financing Charge

[34] Like any DIP financing, the Interim Financing Charge will impact all of the creditors' positions to some degree and will potentially reduce the amount recoverable by the RBC. In the event that OVG's business would close because of the failure to approve the DIP financing and the Interim Financing Charge, on balance, the benefit to stake holders of the proposed DIP facility significantly outweighs any prejudice to the Bank.

[35] While the Bank would be prejudiced by the advance of $100,000.00, the Court considers the prejudice to be minimal.

Conclusion

[36] Having considered all of the factors involved with the DIP financing, the Court is satisfied that it is appropriate to authorize OVG to enter into the DIP Facility with Waygar

Capital Inc. to the extent of the first tranche of $100,000.00 and to grant the proposed Interim Financing Charge to the extent of $100,000.00.

[37] This Court orders that the closing fee of $25,000.00 should be payable as follows:

1) $15,000.00 upon the drawdown of the first tranche of $100,000.00;

2) $10,000.00 if there is a second tranche under the primary facility and provided that the second tranche drawdown is allowed by the Court.

[38] The authority for dividing the payment of the closing fee is the case of Dessert & Passion Inc. (Proposition de) c. Banque Nationale du Canada, 2009 QCCS 4669, 58 C.B.R. (5th) 224.

[39] In addition, in the event that there would be a drawdown of the secondary facility of $250,000.00 as contemplated by the March 11, 2013 letter, Court approval would have to be obtained.

[40] The time to file the Proposal is extended to May 8, 2013 based on the information contained in the Proposal Trustee's report and based on the submissions made at the motion.

[41] The following documents will be sealed as they contain information prepared by Ernst and Young Inc. that may be prejudicial to the Company if it becomes public record.

1) Affidavit of Peter Gordon Sworn, paras 18-21;

2) Exhibit P of the Affidavit of Peter Gordon Sworn, March 5, 2013;

3) Respondent's Factum dated March 8, 2013, paras 10-12.

[42] I will remain seized of this matter.

[43] The matter will be brought back on next week on a date, time and place to be advised.

[44] Motion materials for the motion next week are to be served on all of the parties set out in the notice of motion brought by the Company.

[45] Order accordingly.

Mr. Justice Stanley J. Kershman

Date: March 25, 2013

CITATION: OVG (Re), 2013 ONSC 1794
COURT FILE NO.: BK-33-1718184
DATE: 2013/03/25

ONTARIO

SUPERIOR COURT OF JUSTICE

IN BANKRUPTCY and INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF OVG Inc.
OF THE TOWN OF RENFREW
IN THE PROVINCE OF ONTARIO

BEFORE: Mr. Justice Stanley J. Kershman

HEARD IN OTTAWA: March 12, 2013

APPEARANCE: J. Fogarty and P. Masic for the Debtor
M. Rouleau for the Proposal Trustee
C. Peddle for the Royal Bank of Canada

REASONS FOR DECISION

Kershman J.

Released: March 25, 2013

Tab 9

Unofficial English Translation

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC CITY

No.: 200-11-018928-096

DATE: December 9, 2009

PRESIDING: THE HONOURABLE ÉTIENNE PARENT, J.S.C. (JP1892)

In the matter of the notice of intention of:

C.F.G. CONSTRUCTION INC., 990 Philippe-Paradis Street, Quebec City, Quebec G1N 4E4

Debtor-Petitioner
and

ROY MÉTIVIER ROBERGE INC.
and
JOSÉ ROBERGE, in their capacity as trustee under the notice of intention of C.F.G. Construction Inc., Iberville III, 2960 Boulevard Laurier, suite 210, Quebec City, Quebec G1V 4S1

Trustee and Interim receiver
and

JEVCO INSURANCE COMPANY, 5250 Boulevard Décarie, suite 100, Montreal, Quebec H2X 2H9

and

AXA ASSURANCE INC., 2020 University, suite 700, Montreal, Quebec H3A 2A5

and

COMMISSION DE LA SANTÉ ET DE LA SÉCURITÉ AU TRAVAIL, 524 Bourdages Street, suite 240, Quebec City, Quebec G1K 7E2

and

COMMISSION DE LA CONSTRUCTION DU QUEBEC, 700 Boulevard Lebourgneuf, 2nd floor, Quebec City, Quebec G2J 1E2

and

NATIONAL BANK OF CANADA, having its head office at 600 De la Gauchetière West, 9th floor, Montreal, Quebec H3B 4L2 and a place of business at 450 St-Jean-Baptiste Street, suite 110, Quebec City, Quebec G2E 6H5

and

G.E. CANADA EQUIPMENT FINANCING G.P., 90 Burnhamthorpe Road West, suite 500, Mississauga, Ontario L5B 3C3

and

REVENU QUEBEC, 1265 Boulevard Charest West, district C65-6E, Quebec City, Quebec G1N 4V5

and

CANADA REVENUE AGENCY, 165 Pointe aux Lièvres, Quebec City, Quebec G1K 7L3

Respondents

JUDGMENT

[1] On December 2, 2009, the debtor C.F.G. Construction Inc. (CFG) filed a notice of intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act ("BIA").*[1]

[2] The same day, the trustee under the proposal, Roy Métivier Roberge Inc. (the trustee), was appointed interim receiver under s. 47.1 *BIA*.

[3] The trustee and CFG jointly presented a three-pronged motion:

- Order respecting priority fees (s. 47.2 *BIA*)
- Order respecting guaranteed interim financing (s. 50.6 *BIA*)
- Order respecting a stay of proceedings (s. 69.3(2), 79, 248 *BIA*)

[4] The third prong of the motion was the subject of an agreement between the parties at the start of the second day of the hearing. The Court acknowledges this agreement and states this consent in the conclusions of this judgment.

Background

[5] CFG works in the construction industry. Many of its contracts must be secured by customers. The respondents Jevco Insurance Company ("Jevco") and Axa Assurance Inc. ("Axa") provided performance bonds to guarantee the payment of CFG's labour and materials.

[6] Jevco and Axa hold movable hypothecs on all of CFG's property to secure their bonds.

[7] On August 31, 2009, Jevco gave CFG notice of its intention to enforce its security[2] under s. 244 *BIA*. Axa gave notice of its intention to the same effect on November 9, 2009.[3]

[8] Jevco and Axa also issued notices of withdrawal of authorization to collect debts.[4]

---

[1] R.S.C. 1985, c. B-3.
[2] Exhibit R-3.
[3] Exhibit R-4.
[4] Exhibits R-5 to R-7.

[9] Faced with cash flow problems, CFG went into default with several of its creditors. The respondents National Bank of Canada, Canada Revenue Agency, Revenu Québec, Commission de la santé et de la sécurité au travail (CSST), Commission de la construction du Québec (CCQ), and GE Canada Equipment Financing G.P. (GE) undertook proceedings, either by serving notice of withdrawal of authorization to collect debts or a writ of seizure on CFG's accounts receivable.

[10] On December 2, 2009, CFG filed a notice of intention under the *BIA*. At the same time, it had the trustee appointed as interim receiver under s. 47.1 *BIA*.

[11] CFG and the trustee asked the Court to make an order so that the fees incurred by the trustee and its legal advisors with regard to the notice of intention along with those incurred by CFG's legal and financial advisors be secured as first charges up to the amount of $100,000.

[12] They also sought authorization for interim financing of $500,000 secured as a first charge over all of CFG's assets, up to the amount of $575,000. In their view, this amount is necessary to enable CFG to present a viable proposal to all of CFG's creditors by mid-January 2010.

[13] Finally, the trustee and CFG asked that the Court officially acknowledge the agreement to stay the collection of accounts receivable made by Jevco and Axa following their notice of withdrawal of authorization to collect debts and under s. 244 *BIA*.

[14] All of CFG's secured creditors agree to the requests made by CFG, the consent of Jevco having been granted following the first day of the hearing and in the wake of certain amendments being made to the motion.

Analysis

Order respecting fees and disbursements of the interim trustee

[15] Section 47.2 (1) *BIA*, which came into force on September 18, 2009, applies to this application:

> If an appointment of an interim receiver is made under section 47 or 47.1, the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper, including an order giving the interim receiver security, ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees or disbursements, but the court shall not make such an order unless it is satisfied that all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court.

[16] This provision expressly contemplates the possibility of giving a priority charge on the debtor's property as long as all secured creditors who could be materially prejudiced as a result of the charge are given the opportunity to be heard.

[17] In this case, all of CFG's secured creditors were served with the motion.[5] They had the opportunity to be heard and consented to the motion.

[18] The evidence heard at the hearing, and particularly the testimony of the trustee José Roberge, along with that of the representative of CFG, Franky Glode, persuade the Court that the steps taken by CFG in accordance with the notice of intention are serious. The appointment of the interim receiver is an important element in achieving the primary objective of CFG – to make a viable proposal to all of its creditors, within a short period, to allow CFG to continue its business operations.

[19] The amount of the requested security is also reasonable. The complexity of the matter, due primarily to the large number of contracts that must be considered by the trustee in his capacity as receiver, will entail a significant amount of work. Many stakeholders are involved in each contract, as either sub-contractors or suppliers.

[20] In addition, these steps must be completed in a short period of time.

[21] The security will thus affect all of the assets of CFG, up to a maximum of $100,000. It covers the fees of the trustee, of its legal advisors, of the legal advisors of CFG, and of any other advisors the trustee may hire from time to time in the performance of its duties.

Interim financing

[22] Section 50.6 *BIA* now permits a debtor who files a notice of intention to ask the court to grant a priority security or charge in favour of a lender:

> 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.

[5] This is evident from the certified statements from the register of movable real rights and the land registers, Exhibits R-18 and R-20; in addition, the trustee attests that there are no secured creditors likely to register a legal hypothec against CFG's immovable property.

[23] In s. 50.6(5) *BIA*, the legislator lists seven open-ended factors for the Court to consider in its analysis of the advisability of granting the interim financing requested:

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

[24] Applying these criteria in the same order, the court finds that:

(a) the trustee and CFG believe they will be in a position to make a proposal to all of the creditors by about January 15, 2010. This short period of time can be explained by the fact that most of CFG's construction contracts must be completed by December 18, 2009. This should enable CFG to establish, with sufficient precision, the assets it will have at its disposal for the purposes of the proposal.

(b) the proceedings under the *BIA* in this case are very recent. The evidence shows that since the filing of the notice of intention, CFG, with the cooperation of the trustee, has adequately managed its business affairs. The company's principal officer has dipped into his own personal resources to assume the debts of CFG. The consent obtained from the secured creditors demonstrates their confidence.

(c) CFG's principal officer enjoys the unanimous support of the company's major creditors.

(d) the criterion in s. 50.6(5)(*d*) *BIA* does not require that the debtor demonstrate that a viable proposal will be accepted by its creditors. The interim financing must favour the making of such a proposal.

The interim financing requested by CFG should provide sufficient cash flow to allow it to complete its contracts within the next two weeks. The completion of these contracts will facilitate the collection of the related accounts receivable.

The released cash would likely facilitate the making of a more favourable proposal to the creditors. It is true that, as noted by the trustee, the viability of the proposal may require compromises from the creditors.

CFG's principal officer explained that he maintains excellent relationships with most of these creditors. He believes that they may accept such compromises in the interests of continuing to do business with CFG.

Under these circumstances, the court concludes that the proposed loan could favour the making of a viable proposal.

(e) CFG's assets consist primarily of accounts receivable, although the company also owns equipment and a building. The interim financing should make it possible to maximize the value of CFG's core assets.

(f) The priority charge of $575,000 requested by CFG may cause prejudice to its creditors. Nevertheless, it is sometimes necessary, depending on the circumstances, to grant interim financing with a priority charge.

In this case, the court notes that the secured creditors have unanimously consented to the request, and they are the first ones affected by the implementation of the interim financing. The unsecured creditors would be at risk of much greater prejudice in the absence of interim financing. Thus, the anticipated benefits outweigh the potential prejudice associated with the requested interim financing.

(g) The cash flow statement prepared by the trustee confirms the urgent short-term need to grant the requested interim financing.

CFG does not have the cash needed to pay the wages of its employees and for the fuel needed to operate its equipment. The role of the employees is vital just a few days before the start of the holiday period.

> For the week ending December 18, 2009, an operating deficit of almost $200,000 is expected. This deficit must be absorbed, and it could be even larger if the outstanding accounts receivable are not collected.

[25] In short, the court concludes from the analysis of the various factors set out in s. 50.6(5) *BIA* that it is advisable to grant the required interim financing and to grant a priority charge, ranking immediately after the fees of the trustee and its advisors, as provided in this judgment.

FOR THESE REASONS, THE COURT:

[26] **ORDERS** the debtor/petitioner to continue to manage its business and financial affairs so as to ensure its continuity by acting in a commercially reasonable manner.

INTERIM FINANCING

[27] **AUTHORIZES** the debtor/petitioner to sign agreement R-8 and any other subsequent document, if any, as may be required by the interim lender in relation to the interim financing and the terms of the interim financing.

[28] **AUTHORIZES** the debtor/petitioner to borrow, repay and reborrow from the interim lender such amounts from time to time as may be necessary, up to a maximum principal amount of $500,000 outstanding at any time, on the terms and conditions as set forth in the loan agreement, exhibit R-8, as amended during the hearing.

[29] **AUTHORIZES** the debtor/petitioner to execute such credit agreements, security documents and other documents (collectively the “interim financing documents”) as may be required by the interim lender in connection with the interim credit agreement.

[30] **ORDERS** the debtor/petitioner to pay to the interim lender when due all amounts owing (including principal, interest, fees and expenses), under the interim financing documents, all with a view to performing all of its obligations pursuant to the interim financing documents and this order.

[31] **DECLARES** that all of the property of the debtor/petitioner is hereby charged by a hypothec in the amount of $575,000, according to the priority established hereafter, in favour of the interim lender as security, ranking ahead of the securities of all secured creditors for all obligations of the debtor/petitioner to the interim lender with respect to all amounts owing, including principal, interest and the expenses related to the interim financing:

- 1st rank: Interim receiver et al, $100,000
- 2nd rank: Interim loan (DIP), $575,000

Subsequently, the secured or preferred creditors in the order of priority set by statute.

[32] **DECLARES** that all of the property of the debtor/petitioner is hereby charged by a hypothec according to the priority established in the preceding paragraph in favour of the interim receiver, of counsel of the interim receiver, of counsel and financial advisors of the debtor/petitioner, to guarantee payment of their fees and disbursements, up to $100,000.

[33] **DECLARES** that the claims of the interim lender pursuant to the agreement and the interim financing documents shall not be the subject of a transaction and must be treated as a loan not covered by the proposal that the debtor/petitioner will file with all of its creditors following the filing of its notice of intention.

[34] **PROHIBITS** the interim lender from taking any enforcement steps under the agreements and the interim financing documents without providing at least three (3) business days' written notice to that effect to the debtor/petitioner, to the interim receiver, and to creditors whose rights are registered or published in the appropriate registers or having requested a copy of such notice. Upon expiry of such notice period, the interim lender shall be entitled to take any and all steps under the interim financing documents and otherwise permitted at law, the whole in accordance with applicable laws.

[35] **ORDERS** the debtor/petitioner and/or the interim trustee to provide, in a timely fashion, all the information required by its secured creditors in relation to all of its property and, in general, to its entire business and the administration of its assets.

[36] **ORDERS** the debtor/petitioner to pay, beginning as of the date of this order and ahead of any other disbursement, all wages, social security contributions, social insurance fees, provincial and federal service taxes (QST and GST), and CSST and CCQ contributions required by its current operations.

[37] **DECLARES** that the priorities of the charge of the interim receiver and its counsel and the charge of the interim lender, as between them with respect to any property to which they apply, shall be as follows:

(a) First, the charge of the interim receiver et al, or $100,000

(b) Second, the charge of the interim lender, or $575,000

[38] **AUTHORIZES** the debtor/petitioner or the interim receiver to make a motion to the court for directions regarding the exercise of their respective powers, obligations, and rights concerning the proper execution of the order; this may be done only on notice to the parties that appeared during the hearing concerning this order.

STAY OF PROCEEDINGS

[39] **OFFICIALLY ACKNOWLEDGES** the consent of AXA and Jevco to stay their notice of withdrawal of authorization to collect claims and their notice under s. 244 of the *Bankruptcy and Insolvency Act* following this order.

[40] **ALLOWS** the service of this order outside legal hours and even on a non-juridical day, by bailiff, with no need to show the original, but making the service report on the back of the original, leaving a copy with a reasonable person or, if necessary, leaving a copy under the door, in a mailbox, or affixed to the door or by any other method of service, including by public notice.

[41] **ORDERS** the interim execution of this judgment notwithstanding appeal.

[42] **THE WHOLE** with costs against the estate.

ÉTIENNE PARENT J.S.C.

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Counsel for the interim receiver

Mtre Jean-François Bertrand (box 7)
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Mr. Sylvain Marceau
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Date of hearing: December 7 and 9, 2009

Area of law: Bankruptcy and insolvency

Tab 10

2004 CarswellAlta 1183
Alberta Court of Queen's Bench

Bearcat Explorations Ltd., Re

2004 CarswellAlta 1183, 3 C.B.R. (5th) 167

In the Matter of the Bankruptcy of Bearcat Explorations Ltd.

In the Matter of Bankruptcy of Stampede Oils Inc.

In the Matter of the Proposals of Bearcat Explorations Ltd. and Stampede Oils Ltd.

Romaine J.

Heard: May 27, 2004
Judgment: May 27, 2004
Docket: Calgary BK01-084659, BK01-084660

Counsel: K. Barr for Proposal Trustee
C. Russell for Bearcat Exploration, Stampede Oils
Ms A. Moulton, J. Kruger, D. Vermette for Knox LLC
R. Beeman for Anadarko
T. Czechowskyj for Locke, Stock & Barrel
Ms J. McJannet for Interim Receiver
B. Davison for Trican

Romaine J. **(orally):**

1 Through the efforts of Mr. Czechowskyj, I have received a letter from the office of the Superintendent of Bankruptcy, Ms. Maj, the Division Assistant Superintendent, that advises me that the Senate Committee on Banking Trade and Commerce issued a report in the fall of 2003 recommending that amendments be made to both the *Bankruptcy and Insolvency Act* and the *Company's Creditors Arrangement Act* to specifically provide for DIP financing in corporate reorganizations. However, she also advises that the Superintendent of Bankruptcy wishes to remain neutral on this issue at this time.

2 Further to my refusal last week to allow DIP financing that would rank in priority to Knox LLC, Locke, Stock & Barrel Company Ltd. now applies for an order granting approval for it to advance debtor-in-possession financing of up to $450,000 to Bearcat Exploration Ltd. and Stampede Oils Inc. to be a second charge on the assets of Bearcat and Stampede, ranking after the security of Knox but prior to all other secured and unsecured creditors.

3 This application is supported by the secured creditors other than Knox, and, albeit reluctantly, by the unsecured creditors who were represented at the hearing. It is opposed by Knox and Anadarko, for many of the same reasons they opposed the previous application.

4 The Proposal Trustee supports the application on the basis that, without this funding, the issues between Knox and Bearcat and Stampede will not be resolved through a trial process, and that finality on these issues is important to the creditors generally.

5 The first issue, which I did not decide at the time of the last application, is whether DIP financing is available or appropriate under proposal proceedings pursuant to the *Bankruptcy and Insolvency Act*, or whether it should only be available pursuant to the *Companies' Creditors Arrangement Act*. Counsel have been unable to refer a case to me where DIP financing was considered

by a court overseeing a bankruptcy proposal process, other than *AgriBio Tech Canada Inc.*, which I have previously indicated is not helpful due to its unusual facts.

6 The courts have found authority for the use of DIP financing in CCAA scenarios both under the legislation and through the exercise of their inherent jurisdiction. The brevity of the CCAA and its remedial nature has allowed the courts to be creative in ensuring the objects of the legislation are met.

7 In contrast, the BIA proposal provisions are specific and detailed. They are designed to provide a quick and inexpensive process for an insolvent debtor to resolve issues with its unsecured creditors and emerge from the proposal process. However, there is nothing in these provisions that precludes the concept of super-priority financing, nor would DIP financing be in conflict with the proposal provisions under the BIA.

8 Inherent jurisdiction is a "residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, in particular, to ensure the observance of the due process of law ... to do justice between the parties and to secure a fair trial between them.": in *Royal Oak Mines Inc., Re* (14 March 1999) Ontario Court File No. 98-CL-3278 (O.S.C.J.) (Com. List) [1999 CarswellOnt 988 (Ont. Gen. Div. [Commercial List])], Farley J. at paragraph 22, citing Halsbury, Volume 37, 4th edition, at paragraph 14. Because it is an extraordinary power, it should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), at 480.

9 I am satisfied that I have the authority through the exercise of inherent jurisdiction to order DIP financing in an appropriate case involving a proposal under the BIA, although such cases may be rare. This is an extraordinary case.

10 As in the previous application, the most important factor to consider is whether the benefit of the financing clearly outweighs the prejudice to the creditors whose security is being subordinated to financing: *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]). Given that the proposed financing would no longer have priority over the secured interests of Knox, the balance of equities now rests with granting the order rather than refusing it.

11 The issues before the court relating to Knox's claim are serious issues. In order to ensure that they are determined by a fair trial so that justice will be done between the parties and the interests of all creditors determined in accordance with due process, the application for DIP financing in its present form should be granted.

12 I appreciate that Knox may be prejudiced in its capacity as an unsecured creditor and that it may be a substantial unsecured creditor after the trial has finished. It shares that potential prejudice, however, with the other unsecured creditors, and not as in the previous application, unequally given its status in the litigation.

13 I also take note of the timing of this application and the lack of disclosure given to unsecured creditors prior to their vote on the proposal. That is an issue for another day. So is whether or not the proposal is doomed to failure as that depends, to a great extent, on the outcome of the proceedings before me between Knox and Bearcat and Stampede.

14 I have considered Knox's submission that the funding is only sufficient to take Bearcat and Stampede through the litigation process. While DIP financing orders are normally only made where there is a reasonable prospect of successful restructuring, this is only one of the factors that can be taken into account by a court. In making this decision, I have noted the amount of financing applied for relative to the large amounts owed to creditors. Without this funding, there appears to be a substantial risk that the issues between Knox and the insolvent companies will not be determined. Therefore the benefit of such financing, in this unusual case, outweighs the potential prejudice to creditors.

15 I direct that the funds be administered through the Interim Receiver who may apply for direction and may enter into the appropriate protocol with the Proposal Trustee to ensure that duplication of effort is avoided. The funds are only to be used for the purpose of funding the litigation as set out in Exhibits 3 and 4 of the examination for discovery of Mr. Locke, to allow Bearcat and Stampede to continue in business during the proposal process and for the preservation of their assets for the benefit of creditors. They are not to be used to repay existing indebtedness to Mr. Locke or any other third party, either principle or interest. The order is to include a two day comeback provision for creditors who did not receive notice of this application.

16 Is there anything else that needs to be discussed with respect to the terms of the order? Mr. Kruger?

MR. KRUGER: My Lady, I think you captured it by giving leave to the Interim Receiver to come back to you because I would think things, such as whether the amount should — the full amount should immediately be paid or not, factor into things. One wouldn't want to have a situation where we get to trial next week, things don't go well for Bearcat and Stampede, and suddenly we have 50 of the $450,000 on the table and the rest not. But I should leave that for Mr. Mann who unfortunately can't be here today either.

THE COURT: Right

MR. KRUGER: Ms. McJannet is in his place. But I think you've captured in the order that matter. Of course what remains is the question of costs of the first application of Locke, Stock & Barrel which we would submit they lost. We won and we should have those costs.

THE COURT: Right, and perhaps Mr. Czechowskyj would have something to say with respect to costs of this application so ...

MR. CZECHOWSKYJ: Right, I think — My Lady, obviously I'd be submitting that we be entitled to costs of this application since they balance each other out and both parties are entitled to one set of costs which should be the same, I would submit.

THE COURT: Okay. Mr. Kruger?

MR. KRUGER: The difference, I would submit, is that this is DIP funding. The company comes to the Court, essentially it's the insolvent's, asking for the indulgence. We oppose on reasonable basis. This is — this is new territory in law and certainly there's no basis for a cost order against us. But where they came with their first application, lost that, where Locke, Stock & Barrel came from the outside we should have those costs with respect.

THE COURT: Mr. Kruger, I appreciate those differences but I am going to direct that each party bear their own costs of both applications. Ms. McJannet, I know you are here for Mr. Mann. It is my direction that the Interim Receiver can come back and ask for direction, is that enough for you today or ...

MS. MCJANNET: I think that that's enough for us today and subject to what Mr. Kruger has said and things —

THE COURT: Right.

MS. MCJANNET: — like that I think that that suffices.

THE COURT: Okay.

MR. KRUGER: The one thing which we should probably deal with in that matter, My Lady, but which I want to give notice is obviously we want payment out of that amount of the $25,000 —

THE COURT: Yes.

MR. KRUGER: — owed to us.

THE COURT: Yes, and I did not mean to exclude that. That is included in Exhibits 3 or Exhibit 4, I believe.

MR. KRUGER: Yes.

THE COURT: And it is not excluded from what I have indicated —

MR. KRUGER: Thank you —

THE COURT: — would be proper. Mr. Czechowskyj, anything?

MR. CZECHOWSKYJ: I don't think so, My Lady. I've got a draft order prepared that I'll circulate to my friends and I'm sure we can work out the terms.

THE COURT: Okay. Why do we not leave that and I will give you an opportunity to look at the order and if there is any issue arising from that then I am available.

MR. CZECHOWSKYJ: Yeah, are you around for the rest of this week, My Lady, or ...

THE COURT: Yes.

MR. CZECHOWSKYJ: Okay.

THE COURT: Well, just not much.

MR. KRUGER: And —

MR. CZECHOWSKYJ: No, but fair enough. We'll get this done this afternoon then is what I'd anticipate.

THE COURT: Right. Okay.

MR. KRUGER: My Lady, what we have before the Court as well is a motion for the stay to be lifted so that we can commence receivership —

THE COURT: Right.

MR. KRUGER: — proceedings and maybe that is something which we should just adjourn to the trial and —

THE COURT: Right.

MR. KRUGER: — come at the end of trial depending upon what you may find.

THE COURT: Okay.

MR. KRUGER: I may or I may not go forward with that application.

THE COURT: Okay. Mr. Czechowskyj?

MR. CZECHOWSKYJ: Fair enough, My Lady. I was just going to comment on that that I also have instruction to bring a cross-motion to have our own Receiver appointed. So just so that everybody's on notice that if we get to that stage that's also supported by Coastline and by Topham.

THE COURT: Okay. So —

MR. CZECHOWSKYJ: But we'll let that —

THE COURT: — I will —

MR. CZECHOWSKYJ: — leave that for another day.

THE COURT: — adjourn your application. Perhaps I should just say sine die, Mr. Kruger, on —

MR. KRUGER: Yes, that's good.

THE COURT: — the basis that —

MR. KRUGER: That's good, My Lady.

THE COURT: — we will deal with that after the trial.

MR. KRUGER: This matter is not going to get less complex, My Lady.

THE COURT: No. Unfortunately. So we are going to continue then the — is it the third week in — I am sorry.

MR. KRUGER: The (INDISCERNIBLE), My Lady.

THE COURT: The third week? We are ready to continue?

THE COURT CLERK: Yeah. See you in June.

THE COURT: If not before. Thank you.

MR. CZECHOWSKYJ: Thank you, My Lady.

THE COURT CLERK: Order in Court.

17 JUDGMENT CONCLUDED

Application allowed.

Tab 11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *League Assets Corp. (Re),*
2013 BCSC 2043

Date: 20131108
Docket: S137743
Registry: Vancouver

In The Matter of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, As Amended

And

In The Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57, As Amended

And

In The Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, As Amended

And

In The Matter of A Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A"

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	D.E. Gruber T.M. Tomchak R. Morse T.C. Louman-Gardiner
Counsel for PricewaterhouseCoopers Inc. as Monitor:	J.R. Sandrelli T.R.M. Jeffries
Counsel for Quest Mortgage Corp., Quest Capital Management Corp.	C.D. Brousson
Counsel for BCMP Mortgage Investment Corporation and Interior Savings Credit Union	K.E. Siddall

Counsel for TCC Mortgage Holdings Inc. FCC Mortgage Associates Inc.; Citizens Bank of Canada; First Calgary Financial Credit Union Limited, Firm Capital Mortgage Fund Inc.	Geoffrey Thompson R.B. Dawkins
Counsel for Canadian Western Bank	A. Frydenlund
Counsel for Romspen Investment Corporation	S.H. Stephens
Counsel for Business Development Bank of Canada	D.B. Hyndman
Counsel for Timbercreek Mortgage Investment Corporation	William C. Kaplan, Q.C. H. Sevenoaks
Counsel for Ad Hoc Committee of Convertible Promissory Noteholders of League Opportunity Fund Ltd.	W.E.J. Skelly
Counsel for Export Development Canada, Bank of Montreal and Churchill Real Estate Inc.	H. Ferris
Counsel for Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (Proposed DIP Lenders)	G.J. Gehlen
Counsel for Maxium Financial Services	P.J. Reardon
Counsel for Roynat Inc.	D.K. Fitzpatrick
Counsel for Proposed Representative Counsel for Investors	J. Grieve
Place and Date Of Hearing:	Vancouver, B.C. October 25, 2013
Place and Date of Judgment:	Vancouver, B.C. November 8, 2013

professionals should not be required to simply rely on a court ordered charge to protect their outstanding fees. The Administration Charge in any event would not have been sufficient to cover the amounts expected to be incurred to the date of the comeback hearing.

[39] Further, if they wish, the stakeholders will have the opportunity to review all professional fees at the end of this matter. In particular, paragraph 34 of the Initial Order provides that the Monitor and its legal counsel will pass their accounts before this court. Paragraphs 6 and 7 of the Initial Order provide for the payment of *reasonable* fees and disbursements to the League Group's counsel.

[40] Without the proposed DIP funding, the League Group readily admits that it will be unable to continue. The Monitor states:

> … If the financing is not approved, the current liquidity situation is such that League will not be able to fund payroll on Friday, October 25th, which will require an immediate cessation of operations and the accompanying liquidation of its assets in a forced and distressed manner.

[41] I am satisfied that the DIP financing sought on this application is urgently needed in order to fund operations within these proceedings until the comeback hearing. Accordingly, I agree that such funding will enhance the prospects of an arrangement by the League Group to its creditors.

(e) The nature and value of the League Group's property

[42] As I have stated numerous times, many of the secured creditors oppose the continuation of this proceeding and wish to take steps to realize on their security.

[43] Most of the assets owned by the League Group are complex real estate holdings including income producing properties and development properties, some of which are not yet completed.

[44] The Monitor points out what might be said to be fairly obvious; namely, that such a realization scenario is not in the interests of the creditors, including even these secured creditors, or the numerous other stakeholders in these proceedings:

> A forced and distressed liquidation is clearly not in the interests of the creditors or Investors, nor is it in the interests of many of the mortgage lenders who do not enjoy first mortgage security and whose security is spread across multiple properties and assets. Such lenders will then be compelled to deal with complicated scenarios where their recovery on one property will determine the extent to which they must rely on another property for the recovery of their loans. If a liquidation of League's assets is to occur, it is imperative that such a liquidation should occur on an orderly and controlled basis.

[45] In addition, as pointed out by counsel for the League Group, the nature of the assets is such that even if the secured creditors were to take steps to realize on their security, they would inevitably be incurring some of the same types of expenses, including professional fees, as are currently being proposed to be paid in accordance with the cash flow forecast: *Pacific Shores Resort & Spa Ltd.* at para. 49(f).

(f) Whether any creditor would be materially prejudiced as a result of the DIP Lender's Charge

[46] The issue of material prejudice to the secured creditors was largely focused on the evidence as to the value of the secured assets and the "implied equity" which was calculated based on certain mortgage amounts stated to be outstanding.

[47] Again, I do not intend to focus on each individual secured creditor. Many of the secured creditors take issue with what has been described as the appraised value of the various projects over which they hold security and also with what is calculated to be the mortgage debt outstanding on those projects.

[48] The League Group and the Monitor do not dispute that this calculation of $210.9 million of "implied equity" is not a certain calculation. In particular, the Monitor emphasizes that it has only, to this time, performed a "high level review" of the calculation of equity in the various projects. The Monitor notes:

a) Marketable Securities: those amounts are based on recent trading prices of units in the Partners REIT, which are publicly traded;

asset are to be allocated as follows: firstly, to unencumbered or not fully encumbered assets and secondly, to assets generally based on a *pro rata* allocation based on the actual value of an asset.

[55] I agree that this allocation provision should alleviate many of the secured creditors concerns as to how the DIP Lender's Charge may be borne. It remains to be seen, of course, whether any allocation issues will in fact arise as that will be dependent on the success of the restructuring.

(g) The Monitor's report

[56] The Monitor's first report to the court is dated October 23, 2013. The Monitor supports the proposed DIP financing and the granting of a DIP Lender's Charge, having reviewed the financial terms of the DIP Lenders and being satisfied that those are reasonable terms and the best available in the marketplace.

[57] The Monitor is also satisfied that the restriction of the DIP Lender's Charge to $1.6 million will allow for the minimum cash requirements for the League Group to meet its operating and restructuring obligations until the time of the comeback hearing.

[58] Finally, the Monitor has expressed the view that it supports both the DIP Lender's Charge and the Representative Counsel Charge referred to below to a total of $1.85 million notwithstanding that those charges would prime the existing secured creditors, other than the Enforcing Mortgagees. The Monitor states that it is sensitive to concerns being raised by the mortgage lenders as a result of the priming but that it supports the priming on the basis that there appears to be equity in the properties such that it is unlikely the mortgage lenders will ultimately be impacted by these priority charges.

[59] As the Monitor notes, it is usual in these types of cases that a DIP Lender will advance monies into those proceedings only where the loans are supported by a court ordered priority charge over existing charge holders. All of the parties who submitted offers to the League Group to provide DIP financing required such a

priority charge. In *Timminco Ltd. (Re)*, 2012 ONSC 948, aff'd 2012 ONCA 552, Mr. Justice Morawetz stated:

> [49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders …

[60] The same considerations discussed in *Timminco Ltd.* are at play here. It is unreasonable to expect that any DIP lender would advance the required DIP financing, save and except with a charge having priority over existing creditors. As stated by the League Group and as confirmed by the Monitor, this DIP financing is necessary and urgently required to continue the operations of the League Group for a very short period of time until the comeback hearing. Failure to obtain that financing will result in a liquidation scenario - one which, given the different stakeholder groups and the complexity of the assets, will no doubt result in a multiplicity of realization proceedings at great cost. In that liquidation scenario, there will likely be prejudice to those who are said, at this time, to be the stakeholders who have significant equity in the assets.

[61] It is a fundamental objective of the *CCAA* to avoid such an outcome if at all possible.

[62] In conclusion, the DIP financing is urgently required by the League Group and is necessary to fund the operations for a very short period of time to the comeback hearing. The order approving the DIP facility is granted. However, in my view, there is no need to approve any DIP facility beyond the $1.6 million financing needed to the time of the comeback hearing. The League Group is at liberty to bring a further application in respect of any further DIP financing.

Tab 12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775

Date: 20111107
Docket: S117098
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	D.K. Fitzpatrick
Appearing on behalf of the Monitor:	S. Dvorak
Counsel for Fisgard Capital Corporation:	A.A. Frydenlund S. Stephens
Counsel for Unsecured Loan Holders:	D. Toigo
Counsel for Water's Edge Rental Pool Creditors:	K.S. Campbell
Counsel for bcIMC Construction Fund Corp.:	C.D. Brousson
Place and Date of Hearing:	Vancouver, B.C. November 2 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. November 7, 2011

in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] ... I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner.

[42] Further, bcIMC's insistence that it will not cooperate in terms of a refinancing simply does not make sense in light of what has already occurred in relation to bcIMC's debt and the positions and actions they have taken in relation to their debt. Firstly, they have already made the "with prejudice" offer to accept an amount under their first mortgage position only, which would give rise to a loss of approximately $20 million. Secondly, they have investigated the potential sale of their debt, which gave rise to an offer of $20 million.

[43] Both of these circumstances indicate to me that they are open to negotiations with the petitioners and that those negotiations may possibly result in a refinance of their debt that would allow the Group to go forward on some restructured basis.

[44] bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc. (Re)* (2000), 283 A.R. 146 (Q.B.) at para. 25, this is some evidence that bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 12, 244 A.R. 93, where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

[45] The petitioners seek DIP financing in the amount of $600,000, which is just shy of the $620,000 which the cash flow indicates will be required to see them through to December 11.

[46] The petitioners have in hand a term sheet from Fisgard which allows for funding to a maximum of $2.5 million. If the DIP financing is ordered, the parties are generally agreed that it will be restructured so as to separate the funding to Parkside Resort and Pacific Shores Resort given the different debt structures on those properties. There would also have to be some general funding for head office expenses.

[47] There also appears to be the possibility that PSOE and the Club will recommence paying the amounts that would normally have been billed to them by the petitioners but for the prepayments that were made in anticipation of services continuing. If so, that will provide an additional $323,000 by December 11.

[48] The granting of DIP financing is to be considered in accordance with s. 11.2 of the *CCAA*, which are relatively new provisions that came into force in September 2009:

> Interim Financing
>
> **11.2** (1) On application by a debtor company 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 company'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 company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> Priority – secured creditors
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> Priority – other orders
>
> (3) 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
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (*a*) the period during which the company is expected to be subject to proceedings under this Act;

> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[49] I will address each of the factors listed in s. 11.2(4):

a) at this time the petitioners are seeking to continue the stay for a further five weeks until December 11, 2011, which is not an inordinate amount of time given the ambitious task ahead of them. Nevertheless, in my view it is essential that they be given this breathing room to explore restructuring options. The parties and the Monitor can assess their progress by that time to determine whether a continuation from that time forward is appropriate.

b) regarding management, as I have stated above, in my view the current management of the business is acting in good faith and with due diligence. They appear to be in the best position to potentially come to a solution given their expertise and the complexities involved. They have taken immediate steps to address cash flow difficulties in terms of the operational costs. I would also add that no party has submitted that the present management team be replaced by, for example, a Chief Restructuring Officer or that the Monitor should be granted further powers to address any deficiencies in that respect.

c) it goes without saying that bcIMC does not support current management. However, a substantial number of other stakeholders do support the management team, including BCC, who has a significant financial stake in the matter given its second mortgage on Parkside Resort. Fisgard does

not support management either. However, I am of the view that this position should be discounted substantially given that it is fully secured on Pacific Shores Resort.

d) the DIP financing is necessary in the circumstances to allow the Group's operations to continue. Without it, this proceeding cannot go forward. In that respect, it will enhance the prospects of a viable compromise or arrangement.

e) I have already discussed the nature and value of the Group's assets. Allowing the Group to continue can only serve to maintain the existing goodwill in the Group's business. It is well acknowledged that a receivership would have disastrous consequences in relation to the ability to market the units.

f) material prejudice is the most substantial argument of bcIMC and Fisgard in opposition to the DIP financing. I accept that the imposition of the charge may prejudice them in the event that the assets are not sufficient to pay their first mortgages, although that seems more unlikely in respect of Fisgard. Nevertheless, the materiality of the charge is questionable, particularly since the secured lenders have expressed an intention to continue the operations of Pacific Shores and Parkside Resorts respectively – which would in turn result in any receiver obtaining priority borrowings and which would erode the security in the same manner as DIP financing. The DIP financing will allow operations to continue, which will maintain the goodwill and enhance values in the meantime. In these circumstances, I am satisfied that the benefits of DIP financing outweigh any potential prejudice to the secured creditors, particularly bcIMC: see *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. at para. 28.

I would note that material prejudice to secured creditors is only one factor and is to be considered in equal measure with the others listed in

Tab 13

CITATION: Colossus Minerals Inc. (Re), 2014 ONSC 514
COURT FILE NO.: CV-14-10401-00CL
DATE: 20140207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: S. Brotman and D. Chochla, for the Applicant Colossus Minerals Inc.

L. Rogers and A. Shalviri, for the DIP Agent, Sandstorm Gold Inc.

H. Chaiton, for the Proposal Trustee

S. Zweig, for the Ad Hoc Group of Noteholders and Certain Lenders

HEARD: January 16, 2014

ENDORSEMENT

[1] The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

[2] The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has

no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

[3] The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

[4] First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

[5] Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

[6] Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

[7] Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

[8] Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

[9] Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

[10] For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

[11] Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

[12] Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

[13] First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

[14] Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

[15] Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

[16] Colossus seeks approval of an indemnity and 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 Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

[17] The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

[18] First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

[19] Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

[20] Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

[21] Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

[22] The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

[23] First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

[24] Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

[25] Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

[26] Lastly, the Proposal Trustee supports the proposed SISP.

[27] Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

[28] The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

[29] Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[30] Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

[31] For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

[32] Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

[33] As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

[34] In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

[35] Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

[36] Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

[37] The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

[38] The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

[39] First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

[40] Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

[41] Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

[42] Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

[43] Lastly, the Proposal Trustee supports the requested relief.

Wilton-Siegel J.

Released: February 7, 2014

Tab 14

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010