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Raffi A. Balmanoukian  
Registrar in Bankruptcy  
Supreme Court of Nova Scotia  
In Bankruptcy and Insolvency  
The Law Courts  
1815 Upper Water Street  
Halifax, NS B3J 1S7

**Re: In the matter of the Notice of Intention to make a proposal of Motryx Inc. pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended**  
**Court No. 45907**  
**Estate No. 51-3134197**



This is the submission of the Applicant, Motryx Inc., which is seeking, *inter alia*, an order for:

- a) abridging notice periods and service requirements pursuant to section 6 of the *Bankruptcy and Insolvency General Rules*;
- b) approving a debtor-in-possession facility term sheet (“**DIP Agreement**”) executed by the Applicant on September 17, 2024, with Aerocom GBMH & Co. (the “**DIP Lender**”) pursuant to which this DIP Lender has agreed to advance to the Applicant a total amount of \$360,000.00;
- c) approving pre-filing payments of the employees of the Applicant and counsel working on securing and maintaining its patents.
- d) granting the following priority charges as against the assets, property, and undertakings of the Applicant (the “**Property**”) which charges shall rank in priority to all other secured interests, trust, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively “**Encumbrances**”) in favour of any person:



- i. an **Administration Charge** against the Property in the amount of \$125,000.00 as security for the payment of the professional fees and disbursements incurred and to be incurred by BDO Canada Limited (the “**Proposal Trustee**”), counsel to the Proposal Trustee and counsel to the Applicant in connection with this proceeding and before and after making this order; and
  - ii. “**DIP Lender Charge**” against the Property as security for the Applicant’s obligations under the DIP Agreement pursuant to s. 50.6 of the *Bankruptcy and Insolvency Act*.
- e) extending the time for the Applicant to file a proposal under the BIA by 45 days, commencing from and including October 27, 2024, up to and including December 11, 2024, pursuant to section 50.4(9) of the BIA; and

**A. Concise Statement of Facts**

Motryx is in the business of delivering quality control and assurance in blood-specimen transport.

Its mission is to empower hospitals, labs and their patients with confidence that blood specimens are transported in a manner that ensures quality diagnostics and accurate testing by monitoring, measuring and reporting on quality indicators related to transport, which are relevant to testing outcomes to help laboratories fulfill requirements.

On September 27, 2024, Motryx filed a Notice of Intention to make a proposal. In support of its application, Motryx has filed the affidavit of President, Niva Sabeshan and the First Report of the Proposal Trustee.

**B. Service, Notice and Abridgement of Time**

The relief sought in this motion is pursuant to the BIA and therefore the *Bankruptcy and Insolvency General Rules* supersede the *Nova Scotia Civil Procedure Rules* in the event of any inconsistency. BIA Rule 3 states:

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

As this is a matter where the BIA does not specify a minimum notice requirement, BIA Rule 6 applies, which states:

6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

In terms of measuring the four days provided for under BIA Rule 6, the period of time is governed by BIA Rule 4, which stipulates clear business days:

If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

In accordance with BIA Rule 6(1), the motion materials will be served electronically by email. No opposition is anticipated. Proof of service by affidavit will be filed in advance of the hearing of the pending motion.

Although Motryx anticipates filing and serving the notice materials within the foregoing timeline, it has included a request for the abridgment of time in case there is any breakdown in service. BIA 6(4) grants the Court authority to amend these time



limits, including to reduce them. Given the nature of the relief sought and the surrounding circumstances, Motryx submits that this is an appropriate circumstance for the Court to abridge the time for the hearing of this matter if such abridgement is required.

**C. Extension of Time to file a proposal**

Pursuant to section 69 of the BIA, a debtor that files an NOI is automatically given the benefit of an initial 30-day stay of proceedings, which may be extended in increments of 45 days on sufficient cause.

The current stay of proceedings is set to expire at the end of the day October 27, 2024, The Company is in a position to deliver a proposal to its creditors. Accordingly, it seeks a 45-day extension of the time to make a viable proposal to its creditors and stakeholders.

The Court has discretion to extend the time for a debtor to file a proposal pursuant to section 50.4(9) of the BIA:

**Extension of time for filing proposal**

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted. 2BIA at s. 50.4(9).

In considering whether to exercise its discretion, the court assesses whether the debtor has discharged its burden of proving on a balance of probabilities that the factors enumerated in s. 50.4(9) of the BIA are objectively satisfied. See, *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131 at para. 19.

As will be further described below, the Company submits that each of the factors of 50.4(9) of the BIA are satisfied.

**(a) The Company has acted in good faith and with due diligence**

In *Re H&H Fisheries Limited*, 2005 NSSC 356, Goodfellow, J., held that the “converse of good faith is bad faith, and bad faith requires a motivation and conduct that is unacceptable.” This is a positive obligation on the part of the Applicant to demonstrate that its conduct in seeking this extension shows that it has acted with good faith and due diligence.

There is no evidence that the Company has acted with bad faith or conducted itself in an unacceptable manner. In contrast, the Company has submitted evidence, including the comments of the Proposal Trustee in the First Report, which confirms that the Company has acted in good faith and with due diligence since the filing of the NOI.

Specifically, the Company has taken the following steps to address its liquidity issues and implement a restructuring that would see its business emerge as a going concern:

- (i) with the assistance of the Proposal Trustee and Company’s legal advisors, began an analysis of its restructuring options for the benefit of the Company’s stakeholders, including its customers, suppliers and employees and is seeking an order for a sale and investment solicitation process;
- (ii) engaged in discussions with its senior secured lender, RBC, to seek consensus in these restructuring proceedings;
- (iii) arranged for and negotiated the DIP Agreement to ensure that the Company has the necessary liquidity to fund the NOI proceeding, continue its ordinary course business operations, and meet its obligations; and continued to operate its Business in the ordinary course.

**(b) The Company will be likely to make a viable proposal**

The test for whether an insolvent person would likely be able to make a viable proposal if granted an extension is whether the insolvent person might (not certainly will) be able to present a proposal that seems reasonable on its face to a reasonable creditor. See, *Re Convergix Inc.*, 2006 NBQB 288 at para. 40.



In describing the viability test in the context of a first extension, Registrar Balmanoukian stated this test “will not likely be a difficult standard to meet”. See, *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131 at para. 24.

The Company submits that the evidence before the Court satisfies this requirement. In particular, the evidence of the Company is that it will use the extension of the time to make a viable proposal to its creditor and stakeholders.

**(c) No creditor is materially prejudiced**

In considering this factor, courts consider whether there is a significant concern that would be unreasonable for a creditor to accept. In *Re H&H Fisheries Limited*, 2005 NSSC 356, at para. 37.

In considering this factor, Registrar Balmanoukian took judicial notice that “proposals, if performed, generally result in a greater net recovery to creditors overall”. See, *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131 at para. 22.

The Company submits that there is no evidence of any material prejudice to any creditor if the requested extension is granted. Conversely, if the extension is not granted, the Company will be deemed to have made an assignment in bankruptcy and its efforts to successfully restructure its Business will be terminated.

In such circumstances, the Company would lose the majority of its going concern enterprise value to the detriment of its creditors.

Accordingly, the extension of the stay will assist in the likelihood of a greater net recovery to creditors by allowing the Company to continue its Business as a going concern, and avoid a liquidation could be minimal without a going concern operation behind them.

**D. The DIP Agreement Should be Approved**

Section 50.6 of the BIA gives the Court the jurisdiction to approve a DIP financing charge. It 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 the claim of any secured creditor of the debtor.

Section 50.6(5) enumerates a list of factors to guide the court's decision whether to grant the DIP financing and corresponding priority charge:

**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.

Courts have routinely concluded that DIP financing and a corresponding priority charge are appropriate where the evidence demonstrates that a debtor would cease operations if the relief was not granted, the proposal trustee supports the DIP facility, and the DIP lender would not participate without the protection of a security charge.



The Company submits that the DIP Agreement and DIP Lender's Charge are appropriate in this case for the following reasons:

- i. the cash flow projections demonstrate that, without interim financing, the Company will be unable to continue operating as a going concern and cease operations, which will deteriorate the value of the Company's Business and seriously jeopardize the Company's ability to make a proposal;
- ii. advances under the DIP Facility are conditional upon Court approval of the DIP Agreement and the granting of the DIP Lender's Charge;
- iii. the debtor's Business will continue to be managed in the ordinary course with the additional oversight of the Proposal Trustee;
- iv. notice has been provided to all secured creditors and no objection has been raised;
- v. the Proposal Trustee believes the DIP Agreement and DIP Lender's Charge are reasonable and necessary; and

**E. The Administration Charge Should be Granted**

The Company is seeking the Administration Charge, in the amount of \$125,000, to secure the professional fees and disbursements of the Proposal Trustee, along with its counsel, and the Company's counsel.

Section 64.2 of the BIA authorizes this Court to grant a super-priority charge on a debtor's property to secure professional fees:

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

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





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

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

**Priority**

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

Such administration charges are routinely granted in insolvency proceedings where, as here: (a) the debtor has limited means to obtain professional assistance; (b) the involvement of professional advisors is critical to the success of the proceedings under the BIA; and (c) the quantum of the proposed charge is commensurate with the complexity of the debtor's business. See, *Mustang (Re)*, 2015 ONSC 6562 at para. 33.

These charges recognize the value that insolvency professionals bring to such proceedings and allow them to be properly compensated for their efforts. The Company submits that it is appropriate for this Court to grant the Administration Charge given the evidence that, among other things:

(a) the Company requires the assistance of professional advisors to navigate the NOI proceeding;

(b) the beneficiaries of the Administration Charge each have a critical role that is essential to the success of the NOI proceeding;

(c) the roles of the beneficiaries of the Administration Charge are not duplicative;

(d) the quantum of the proposed Administration Charge is reasonable and appropriate in the circumstances;

(e) the Proposal Trustee supports the granting of the Administration Charge; and

(f) RBC and the DIP Lender to not oppose the Administration Charge.

**F. Relief Sought**

Motryx respectfully submits that its application be granted in its entirety.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**BOYNECLARKE LLP**

  
Joshua J. Santimaw

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**SUPREME COURT OF NOVA SCOTIA**  
**IN BANKRUPTCY AND INSOLVENCY**

**Citation:** *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131

**Date:** 20200406

**Docket:** No. 43999

**Registry:** Halifax

**Estate Number:** 51-2624515

**In the Matter of:** The Proposal of Scotian Distribution Services Limited

**Judge:** Raffi A. Balmanoukian, Registrar

**Heard:** March 27, 2020, in Halifax, Nova Scotia (via Teleconference)

**Counsel:** Tim Hill, QC, for the Applicant

**Balmanoukian, Registrar:**

[1] The word “Bankrupt” is derived from the Italian “*banca rotta.*” In times of yore, an insolvent merchant’s place of business would be trashed by irate creditors; the result was a “broken bench.”

[2] In Nova Scotia, the Bench will not break.

[3] During the Great Plague of 1665-6, the Court in London moved from Westminster to Oxford (as did Parliament). But yet, they persisted.

[4] In 2020, we are blessed with far greater modalities of communication and administration. As circumstances direct they are being, and will be brought, to bear in the interests of delivering both justice and access to justice.

[5] As I write, and with a hat tip to Mr. Yeats, mere anarchy is loosed upon the world.

[6] It is not business as usual. Virtually nothing is.

[7] On March 19, 2020, the Supreme Court of Nova Scotia adopted an “essential services” model in response to the Covid-19 pandemic. This has meant that only matters deemed urgent or essential by the presiding jurist will be heard

until further notice; and those, by the method of least direct personal interaction that is consistent with the delivery and administration of justice. This can, in appropriate instances, include written, virtual, electronic, telephone, video, or other modalities, and adaptations of procedures surrounding filing of affidavit and other material.

[8] On March 20, 2020, I issued a memorandum to all Trustees in Nova Scotia reflecting this as it applies to this Court, and underscoring the “urgent or essential” standard. It can be obtained from the Deputy Registrar whose contact coordinates, in turn, are posted on the Court website ([courts.ns.ca](http://courts.ns.ca)).

[9] “Essential” means such matters that must be filed, with or without a scheduled hearing, to preserve the rights of the parties – such as those which face a legislative limitation period. “Urgent” means matters that simply cannot wait, in the opinion of the presiding jurist.

[10] Both the Chief Justice of Nova Scotia, the Honourable Chief Justice Michael J. Wood, and the Chief Justice of the Supreme Court of Nova Scotia, the Honourable Chief Justice Deborah K. Smith, have been clear that this does not mean that Courts, being an essential branch of government and the guardian of the

rule of law, cease to function. It means that they operate during this global emergency – and its local manifestation – on an essential services basis.

[11] Accordingly, scheduled matters are deemed to be adjourned *sine die* unless brought to my attention in accordance with the memorandum noted above and I (or a presiding Justice) deem the standard to be met.

[12] Against that backdrop, evolving in real time, I faced the present application. It is a motion for an extension of time to file a proposal, pursuant to Section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the “BIA”). That section reads:

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted. [emphasis added]

[13] The present motion had been scheduled for March 27, 2020. The applicant’s Notice of Intention had been filed on February 28, 2020, meaning that its expiration, 30 days thereafter, was at the end of March, 2020 (BIA s. 50.4(8)). The

scheduled motion was therefore at the very end of this timeline, and the lack of an extension would result in a deemed assignment in bankruptcy (BIA s. 50.4(8)).

[14] The applicant sought to have the matter heard by teleconference. After a review of the file material, I agreed. The Deputy Registrar, with my gratitude, arranged for recording facilities; this is still an open Court of record. Affected entities are still entitled to notice, and they are still entitled to be heard. As well, our open court principle remains and is at least as important as ever.

[15] To that end, the applicant was directed to provide affected entities, including creditors, with particulars of the conference call, including time and call-in particulars. That was done, and a creditor (who did not object to the application) did indeed avail itself of this facility.

[16] I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

[17] I have granted the order based on the following factors:

[18] First, I am satisfied that the 'urgent or essential' threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be



automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

[19] Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; and that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

[20] The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

[21] It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

[22] No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the extension would be prejudicial, not whether the proposal itself would be.

[23] This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

[24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

[25] I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish,

and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

[26] This Court will, no doubt, face a considerable additional case load as the economic fallout of the current human disaster works its way through what is and remains a robust legal process. An applicant should have every reasonable opportunity to avail itself of a restructuring rather than a bankruptcy, assuming it otherwise meets the requirements of BIA 50.4(9).

### **Conclusion**

[27] The application is granted, and I have issued the order allowing the time to file a proposal to be extended to and including May 11, 2020.

Balmanoukian, R.

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**IN THE SUPREME COURT OF NOVA SCOTIA  
IN BANKRUPTCY AND INSOLVENCY**  
**Citation: *H &H Fisheries Limited, Re*, 2005 NSSC 346**

**Date:** 20051219  
**Docket:** SH B259148  
**Registry:** Halifax

**IN THE MATTER OF:** H & H Fisheries Limited

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**DECISION**

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**Judge:** The Honourable Justice Walter R.E. Goodfellow

**Heard:** December 14, 2005 in Halifax, Nova Scotia

**Counsel:** Victor J. Goldberg and Martha L. Mann for  
H & H Fisheries Limited  
Stephen J. Kingston and Bob Mann, articulated clerk, for  
the Bank of Nova Scotia

**By the Court:**

**BACKGROUND:**

[1] H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

[2] Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

[3] HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS “to finance trade receivables and inventory”. It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including “for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank”. There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

[4] In November 2004 HHFL applied to increase its limit on its operating credit line from \$400,000 to \$1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

[5] In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of \$1,100,000 to January 31, 2005 when the limit was reduced to \$750,000.

[6] In February 2005, HHFL again requested access to the \$1,100,000 credit limit to February 28, 2005 when again it would be reduced to \$750,000 and this

was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of \$200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with \$100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

[7] In June 2005 HHFL advised that as part of its 2005 fiscal year ending June 30, 2005, the company would write off the Emporio account which would give it an operating loss of \$300,000 which would be partially set off by an SR&ED refund of \$200,000, leaving a net loss of \$100,000 for the fiscal year 2005.

[8] In September 2005 BNS received a copy of HHFL's unaudited financial statement for the year ending June 30, 2005 which showed a net loss of \$596,043. This compared with a net loss of \$21,003 for the year ending June 30, 2004.

[9] HHFL had problems with cash flow and operating and contrary to the letter of commitment started to deposit funds to its accounts with CIBC and this was acknowledged by the director of finance of the company in September 2005. There followed innumerable meetings, correspondence between the parties and Mark S. Rosen, a licensed trustee in bankruptcy, who has consented to act as trustee for any proposal in this matter.

## **LEGISLATION:**

**Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2.**

**ss. 50.4(9):**

### **Extension of Time for Filing Proposal**

In order to obtain an extension, the debtor must establish the following three items

(a) that it is acting in good faith and with due diligence;

(b) that it would likely be able to make a viable proposal if an extension were granted; and

(c) that no creditor would be materially prejudiced.

s. 54(2.2)(3):

**Related creditor** - A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

62(1.2)(2):

**On whom approval binding** - A proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) All unsecured claims, and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal.

but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto. (S.C. 1992, c. 27, s. 26).

## **Interpretation Act, R.C.C. 1985, c. I-21**

### Law Always Speaking

#### *Law always speaking*

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

### Enactments Remedial

#### *Enactments deemed remedial*



12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

**APPLICATION:**

[10] HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005.

Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14<sup>th</sup> I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

**ONUS:**

[11] The court, as directed by s. 50.4(9) above, must be 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.

[12] The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

[13] This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites

of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

**[14] Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?**

[15] There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protect its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

[16] Does a breach of contract automatically constitute bad faith? The answer is, “not necessarily”, but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating funds and at one point a signed invoice or record which was somewhat misleading with respect to the possibility of some relatively minor accounts having been directed to the CIBC in error.

[17] The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to one's family or a pay-down on a mortgage or judgment on one's home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of “survival”. Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best

interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than as I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

[18] It is argued by HHFL that only its conduct since the filing of the Notice of intention November 3, 2005 should be considered and with respect, I am inclined to disagree. The manner in which a party conducts itself in the past, particularly the immediate past, is often an indicator of likely conduct in the immediate future. In addition, what you have here is a breach of the contract/commitment letter which occurred before November 3, 2005 and continued and overlapped the date of the filing of the Notice of intention.

[19] The court does have the opinion of a respected trustee whose sworn testimony by affidavit has not been challenged and Mark S. Rosen, LLB, FCIRP, has been involved for some time and very active in endeavouring to come to grips with the challenge and has met with and communicated with officials of BNS, BDC and many of the unsecured creditors. After reciting in detail the extent of such activity he deposes in paragraph 14 of his affidavit of December 1, 2005 as follows:

14. I have been working with and receiving information from Messrs. Hartlen and Limpert as well as Harley Hiltz, the director of marketing and production for the Company, who at all times have been fully co-operative. From my experience and dealings with the Company, I believe that the Company has acted and is acting in good faith and with due diligence in working towards formulating a viable proposal. I believe that the Company would likely be able to make a viable proposal if the extension is granted.

My finding on this prerequisite is that by a relatively small margin HHFL has satisfied the court on a balance of probabilities that it has been and is likely to act in good faith. In reaching this conclusion I have not taken into account the

representation made in oral argument that Mr. Hartlen has probably advanced \$90,000 to \$95,000 to HHFL recently because I do not recall seeing anything in the evidence, particularly documentation confirming this infusion and therefore I am unable to give it any weight.

[20] The second wing of subparagraph (a) is in relation to due diligence and while the company has not acted in quite the timely manner it ought to have acted its deficiency in this regard is not severe and the cumulative evidence before me including the summary contained in Mr. Rosen's affidavit of December 1, 2005 and the volume of response which has been made to the BNS's requests and entitlement for documentation, combined with the efforts being made by the trustee in bankruptcy, Mark S. Rosen, to address a resolution constitutes satisfaction on a balance of probabilities of due diligence to this date.

**[21] Would HHFL likely to be able to make a viable proposal if the extension being applied for were granted?**

[22] "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (*Re Baldwin Valley Investors Inc.*, [1994] 23 C.B.R. (3<sup>rd</sup>) 219). Again, the court must be satisfied on a balance of probabilities that HHFL **would likely**. This at the very least 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.

[23] Lack of detail and assurance of this kind was considered in *St. Isidore Meats Inc. v. Paquette Fine Foods Inc.* [1997] O.J. No. 1863. In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):

"...[T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future."

[24] The BNS points to a number of specifics of what it considers a lack of effort that should result in a finding that there is little likelihood of HHFL making a viable proposal. BNS notes the fact that it has stated clearly that it no longer has any interest of being involved in the affairs of HHFL which will necessitate, in all

probability, an alternate financial institution and to date no inquiries have been made by HHFL or the Trustee of any financial institution. The absence of this step will take on weight depending upon the totality of the circumstances that exist at the time of the Notice of intention and that have developed since the Notice of intention was filed.

[25] There has been a considerable degree of activity before and since the Notice of intention was filed November 3, 2005. It seems in the total evidence available to the court through the affidavits filed that it is a reasonable inference to draw that it is highly unlikely that any financial institution would show any interest in filling the shoes of BNS until a determination is made with respect to this application for an extension of time to January 30, 2006. Since the Notice of intention has been filed the evidence is that HHFL has made a profit for November 2005 greater than that was anticipated. It had been anticipated that the profit would have been \$7,000 and it appears to be approximately \$19,600. There is an indication that the company is operating a new business model as a processing facility and there is evidence of the projected sales. In addition, there is evidence of a company, Pesca Pronta, having entered into a contract which by now would have had two substantial deliveries of lobster and in response to my inquiry during argument it appears that the first delivery has been paid for. HHFL advances the affidavit of Francesco Amoruso of Rome, Italy as to a possible solution and substitution by financial injection from that company, however, at this stage all that affidavit establishes is that an effort is being made by HHFL to address their situation. It further confirms that this is a busy, crucial period for HHFL but it does not at this point provide any comfort to be BNS or the court as to being a probable element of a viable proposal.

[26] Paragraph 5 of Francesco Amoruso's affidavit merely states:

I have had discussions with Mr. Hartlen with respect to a potential share investment in H & H by Pesca Pronta in the approximate amount of \$400,000.00 Cdn. I am very interested in pursuing the investment opportunity but will require 30 days to discuss the situation with my brothers/partners. I am hopeful that the transaction can be finalized. In the meantime, my company will continue to deal with H & H.

[27] To this point the court has not been advised nor has BNS of any further developments, inquiries or progress with respect to Amoruso's affidavit which can only be classified as a statement of interest.

[28] HHFL has made a concerted effort to secure government financing by way of a grant. The company has spent \$6,000 for the services of a consultant in the preparation of its grant application and on December 9, 2005 a science officer who is performing the due diligence for the grant indicated her satisfaction with the scientific basis of the claim and that she would be making a positive recommendation. The only weight that can be given at this stage to the grant application is that it is another example of the efforts being made by HHFL and its proposed trustee but until the grant reaches the stage of being a balance sheet item it can be given no further weight.

[29] BNS raises an objection to a determination that HHFL can satisfy the requirement pointing out that BNS and BDC as one class of secured creditor represent a substantial majority position of the secured claims. R. Hartlen Investments Inc. is bound by s. 54.2.2(3) as noted above.

[30] BNS takes the position that it has a clear veto over any proposal that may be advanced and that it will not be supporting any proposal to secured creditors that might be filed by HHFL.

[31] In *Re Cumberland Trading Inc.*, [1994] O.J. No. 132, wherein Farley J. stated at para. 4:

Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed \$750,000. On that basis, Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly, Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under BIA regime, one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-a-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality of a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

[32] In that case Farley, J. held that Skyview's position was satisfactory proof that the company would not likely be able to make a proposal that would be accepted by the creditors. In that case Skyview had 95% in value of Cumberland's admitted secured creditors and here the math appears to give BNS a virtual veto.

HHFL counters that when you look at the funds in the company's bank accounts at the end of November 2005 of approximately \$170,000 that such reduces the debt outstanding of BNS and again reiterates that BNS has since the Notice of intention being filed received approximately \$90,000 U.S. on its account. BNS is correct in that the mere presence of money in a debtor's bank account does not reduce indebtedness unless it is applied to the indebtedness. Since the notice of intention was filed HHFL has paid the required interest to BNS for November 2005. In this case, it is clear from the evidence before me and particularly the affidavit of the Trustee that there is a recognition of the proposal providing either alternate financing, such as speculated in Mr. Amoruso's affidavit or approaching alternate financial institutions. It would seem reasonable to assume that the proposal that will be advanced if it has a means of essentially paying out by substitution injection of capital of BNS indebtedness then the proposal presumably would be acceptable. It is inconceivable that if the BNS indebtedness were satisfied that BNS should retain the right to apply a guillotine effect to the extreme prejudice of itself and all other interested parties including the probable closure of the plant. The second largest secured creditor is the Business Development Corporation and they are in agreement to the granting of an extension to HHFL.

[33] In these circumstances, again by the a fairly narrow margin, I conclude that HHFL has met this prerequisite on a balance of probabilities. In doing so, I am not overlooking the considerable debt of HHFL that, while the projections for the next couple of months are favourable, clearly, the proposal will require addressing BNS.

[34] The third step is: **Will any creditor be materially prejudiced if the extension being applied for were granted?** As noted, there has been some improvement in the position of BNS since the Notice of intention was filed in that it has received approximately \$95,000 U.S. which the Bank's solicitor points out came direct to it and not through any exercise of direction by HHFL. BNS has also received the November 2005 interest. In this case there are only two significant unrelated secured creditors, BNS and BDC. BDC consents to the extension of time but I am mindful of the fact that its security is a first charge over the fixed assets which are by themselves not likely to significantly decrease in value but on the other hand would probably have some measure of increased value by virtue of an operating going concern and also there is an indication of additional land being acquired from government by HHFL. I do agree with BNS that additional land, even if the obtaining of it is imminent, does not by itself provide any comfort to the

Bank which has as its security a first charge on trade receivables and inventory. What does come through from the totality of the evidence is that this is a busy and likely profitable time for the industry and Mr. Rosen, in his affidavit, deposes at paragraphs 11 and 12:

11. I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
12. In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

[35] I struggle with what constitutes material prejudice and there is some guidance in *Re Cumberland Trading Inc.* above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one- ie., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *quo* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. ...

[36] In the case before the court, the accounts receivables as of November 31, 2005 amounted to \$956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.



[37] This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

### **CONDITIONS:**

[38] During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

**J.**



**Convergix, Re 2006 NBQB 288**

**IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK**

**IN BANKRUPTCY AND INSOLVENCY**

**JUDICIAL DISTRICT OF SAINT JOHN**

**Court Numbers: 12381, 12382, 12383, 12384 and 12385**

**Estate Numbers: 51-879293, 879309, 879319, 879326 and 879332**

**IN THE MATTER of the Proposals of Convergix,  
Inc., Cynaptec Information Systems Inc.,  
InteliSys Acquisition Inc., InteliSys (NS) Co.,  
InteliSys Aviation Systems Inc.**

**BEFORE: Justice Peter S. Glennie**

**HEARING HELD: Saint John**

**DATE OF HEARING: July 27, 2006**

**DATE OF DECISION: August 1, 2006**

**COUNSEL:**

**R. Gary Faloon, Q.C., on behalf of the Applicants**

## **DECISION**

### **GLENNIE, J. (Orally)**

[1] The issue to be determined on this application is whether related insolvent corporations are permitted to file a joint proposal pursuant to the *Bankruptcy and Insolvency Act*. For the reasons that follow, I conclude that such corporations are permitted to do so.

### **OVERVIEW**

[2] The Applicants, Convergix, Inc., Cynaptec Information Systems Inc., IntelliSys Acquisition Inc., IntelliSys (NS) Co., and IntelliSys Aviation Systems Inc. (the "Insolvent Corporations") are each wholly owned subsidiaries of IntelliSys Aviation Systems of America Inc. ("IYSA").

[3] For all intents and purposes, the Insolvent Corporations have operated as one entity since 2001. The Insolvent Corporations have one "directing mind" and have the same directors. The Insolvent Corporations maintain one bank account.

[4] The Insolvent Corporations are considered related companies under the provisions of the *Income Tax Act (Canada)*.

[5] Payments to all creditors of the Insolvent Corporations, including some of the major creditors such as Atlantic Canada Opportunities Agency have all been made by one of the Insolvent Corporations, namely, IntelliSys Aviation Systems Inc. ("IntelliSys"), even though loan agreements may have been made with other of the Insolvent Corporations. Similarly, all employees of all the Insolvent Corporations are paid by IntelliSys.

## **Filing of Notice of Intention to make a Proposal**

[6] The Insolvent Corporations attempted to file a joint Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") on June 27<sup>th</sup>, 2006 in the Office of the Superintendent of Bankruptcy ("OSB"). By letter dated June 28<sup>th</sup>, 2006 the OSB advised that it would not accept the filing of this joint Proposal.

[7] On June 29<sup>th</sup>, 2006 each of the Applicants filed in the OSB a Notice of Intention to Make a Proposal. The Insolvent Corporations have each filed in the OSB a Projected Monthly Cash-Flow Summary and Trustee's Report on Cash-Flow Statement.

## **Extension Pursuant to Subsection 50.4(9) of the BIA**

[8] IYSA is required to file quarterly reports with the U.S. Securities and Exchange Commission in Washington, D.C. It is a publicly traded security, over-the-counter, on the NASDAQ. The Applicants say the implications on IYSA created by the financial situation of the Insolvent Corporations must be considered. The Applicants assert that the initial 30 day period of protection under the BIA is not sufficient time for all of the implications on IYSA to be determined and dealt with.

[9] The Applicants say that their insolvency was caused by the unexpected loss of their major client which represented in excess of 25% of their combined revenue. They say that time is needed to assess the market and determine if this revenue can be replaced and over what period of time.

[10] The Insolvent Corporations and Grant Thornton Limited have completed a business plan. It has been presented to investors and/or lenders. The Insolvent Corporations will need more time than the initial period of protection of 30 days under the BIA to have these lenders and investors consider the business plan and make lending and/or investment decisions.

[11] Counsel for the Applicants advise the Court that the OSB does not object to joint proposals being filed by related corporations but requires a Court Order to do so.

[12] The Insolvent Corporations host systems for several Canadian airlines. They provide all aspects of reservation management including booking through call centers and web sites as well as providing the capability to check in and board passengers. The total reservation booking volume is about 1300 reservations per day which results in a revenue stream of \$520,000 per day. The applicants say the loss of revenue for even one day would be catastrophic. They assert that serious damage would be caused to the various client airlines. The Applicants also say it would take at least 30 days to bring another reservation system online.

### **ANALYSIS**

[13] There are no reported decisions dealing with the issue of whether a Division I proposal can be made under the BIA on a joint basis by related corporations. There are two decisions, one dealing with partners [*Howe Re*, [2004] O.J. No. 4257, 49 C.B.R. (4th) 104, 2004 CarswellOnt 1253] and the other dealing with individuals [*Nitsopoulos Re*, [2001] O.J. No. 2181, 25 C.B.R. (4th) 305, 2001 CarswellOnt 1994].

[14] Section 2 of the BIA provides that 'persons' includes corporations.

[15] When interpreting the breadth of the BIA section dealing with proposals, I am mindful of the following comments from ***Bankruptcy and Insolvency Law of Canada*** by Hon. L.W. Houlden and Hon. G. B. Morawetz, Third Edition Revised, (2006, Release 6, pages 1-6 and 1-6.1):

The *Act* should not be interpreted in an overly narrow, legalistic manner: *A. Marquette & Fils Inc. v. Mercure*, [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, 10 N.R. 239; *Re Olympia and York Developments Ltd.* (1997), 143 D.L.R. (4th) 536, 45 C.B.R. (3d) 85, 1997 CarswellOnt 657 (Ont. Gen. Div.); *Sun Life Assurance Co. of Canada v. Revenue Canada (Taxation)*, 45 C.B.R. (3d) 1, 47 Alta L.R. (3d) 296, 1997 CarswellAlta 254, [1997] 5 W.W.R. 159, 144 D.L.R. (4th) 653 (C.A.); *Re County Trucking Ltd.* (1999), 10 C.B.R. (4th) 124, 1999 CarswellNS 231 (N.S.S.C.). It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided: *Re Handelman* (1997), 48 C.B.R. (3d) 29, 1997 CarswellOnt 2891 (Ont. Gen. Div.).

The *Act* puts day-to-day administration into the hands of business people - - trustees in bankruptcy and inspectors. It is intended that the administration should be practical not legalistic, and the *Act* should be interpreted to give effect to this intent: *Re Russell* (1999), 177 D.L.R. (4th) 396, 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.).

[16] In *Howe, supra*, the debtors brought a motion for an order directing the OSB to accept for filing a joint Division I proposal, together with a joint statement of affairs, joint assessment certificate and joint cash flow statement.

[17] The OSB accepted that the filing of a joint Division I proposal by the debtors was appropriate as the debts were substantially the same and because the joint filing was in the best interests of the debtors and their creditors. However, the OSB attended at the motion to make submissions regarding its policy in relation to the filing of joint Division I proposals. The policy stipulated

that the OSB would refuse the filing of a proposal that did not on its face meet the eligibility criteria set out in the BIA. The policy further provided that the OSB would refuse the filing of a joint Division I proposal where the trustee or the debtors failed to obtain a Court Order authorizing the filing.

[18] Registrar Sproat rejected the OSB's position as expressed in the policy. He held that the OSB had no authority to reject the filing of a proposal, subject to the proposal meeting the requirements of section 50(2) of the BIA, namely the lodging of documents.

[19] The Registrar reviewed case law dealing with the permissibility of joint Division I proposals under the BIA. He found that, while not explicitly authorized, the provisions of the BIA could reasonably be interpreted as permitting a trustee to file with the official receiver a joint Division I proposal. In this regard he quoted from his comments in ***Re Shireen Catharine Bennett***, Court File No. 31-207072T, where he stated:

It seems to me that the decision of Farley J. in *Re Nitsopoulos* (2001) 25 C.B.R. (4th) 305 (Ont. S.C.) is clear on the issue that the BIA does not prohibit the filing of a joint proposal and. . .does not formally approve/permit a joint proposal to be filed. In my view, it would be consistent with the purpose of the BIA and most efficient and economical to extend the decision in *Re Nitsopoulos* and hold that joint proposals may be filed. . .I am not persuaded that a formal court order is required to permit a joint proposal to be filed. It seems to me that potential abuses can be avoided in the fashion outlined at paragraph 9 of *re Nitsopoulos* i.e. on an application for court approval. . .and determination of abuse (if any) can be dealt with on that application.

Thus to summarize, no order is necessary for a joint Division I proposal to be filed. In the event that the Trustee has difficulty in the said filing the matter may be restored to my list and the OSB shall attend on the date agreed upon.



[20] In the result, the Registrar ordered the OSB to accept for filing the joint proposal. The Court further held that a joint Division I proposal is permitted under the BIA and that the OSB must accept the filing of the joint proposal even in the absence of a Court Order authorizing such filing.

[21] In *Nitsopoulos, supra*, a creditor of each of Mr. and Mrs. Notsopoulos brought a motion for an order that a proposal could not be filed on a joint basis.

[22] The joint proposal lumped all unsecured creditors of the Nitsopouloses into one class, whether such creditors were creditors of the husband, the wife, or both. Justice Farley identified the issue as whether the BIA allowed a joint Division I proposal to be made.

[23] He focused on an important distinction between a Division II consumer proposal and a Division I proposal. A Division I proposal must be approved by the Court to be effective. In contrast, a Division II proposal need not be specifically approved by the Court unless the Official Receiver or any other interested party applies within fifteen days of creditor acceptance to have the proposal reviewed. Justice Farley stated that the role of the Superintendent in Bankruptcy, on a directive basis, is not necessary given that there will automatically be a review by the Court to determine whether the terms and conditions of the proposal are fair and reasonable and generally beneficial to the creditors. He concluded that this review would encompass a consideration equivalent to section 66.12(1.1) of the BIA such that it would be able to determine if a joint proposal should be permitted.

[24] Justice Farley concluded that the BIA should not be construed so as to prohibit the filing of a joint Division I proposal.

[25] In my opinion the filing of a joint proposal is permitted under the BIA and with respect to this case, the filing of a joint proposal by the related corporations is permitted. The BIA should not be construed so as to prohibit the filing of a joint proposal. As well, I am not persuaded that a formal court order is required to permit a joint proposal to be filed.

[26] In this particular case, the affidavit evidence reveals various facts which support the view that a joint filing is in the best interest of the Insolvent Corporations and their creditors.

[27] I am satisfied that the Insolvent Corporations have essentially operated as a single entity since 2001. Payments to all creditors have been made by IntelliSys, even though the loan agreements may have been made with other of the insolvent corporations. Inter-corporate accounting for the Insolvent Corporations may not reflect these payments or transactions.

[28] In reaching the conclusion that a joint filing is in order in this case, I have taken the following factors into consideration:

- (a) The cost of reviewing and vetting all inter-corporate transactions of the Insolvent Corporations in order to prepare separate proposals would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.
- (b) The cost of reviewing and vetting all arms-length creditors' claims to determine which Insolvent Corporation they are actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.
- (c) The cost of reviewing and determining ownership and title to the assets of the Insolvent Corporations would be unduly expensive

and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

[29] In addition, certain of the Insolvent Corporations have only related party debt. Pursuant to section 54(3) of the BIA, a related creditor can vote against a proposal, but not in favor of the proposal. As a result, IntelliSys (NS) Co. and IntelliSys Acquisition Inc. cannot obtain the required votes for the approval of an individual proposal without a court order.

[30] In my opinion, these considerations are consistent only with a finding that a joint proposal is the most efficient, beneficial and appropriate approach in this case.

[31] In view of the reasoning in *Howe* and *Nitsopoulos*, the interrelatedness of the Insolvent Corporations, the court review inherent in any Division I proposal, and the lack of any prejudice to the creditors of the Insolvent Corporations, I conclude that the Insolvent Corporations ought to be permitted to file a joint proposal.

[32] In *Re Pateman* [1991] M.J. No. 221 (Q.B.), Justice Oliphant commented, "I have some serious reservations as to whether a joint proposal can be made save and except in the case of partners, but since I need not determine that issue, I leave it for another day."

[33] In my opinion, the companies in this case are in effect corporate partners because they are so interrelated. They have the same bank account, the same controlling mind and the same location of their offices.

[34] I am of the view that the filing of a joint proposal by related corporations is permitted under the BIA, and that on the facts of this case, an Order should issue authorizing such a filing. Such an Order is consistent with the principles underlying the interpretation of the BIA, and is in the best interests of all stakeholders of the Insolvent Corporations.

### **Extension of Time for Filing a Proposal**

[35] The Applicants also seek an order pursuant to Section 50.4(9) of the BIA that the time for filing a Proposal be extended by 45 days to September 10<sup>th</sup>, 2006.

[36] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: *Re Doaktown Lumber Ltd.* (1996), 39 C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

[37] An extension may be granted if the Insolvent Corporations satisfy the Court that they meet the following criteria on a balance of probabilities:

- (a) The Insolvent Corporations have acted, and are acting, in good faith and with due diligence;
- (b) The Insolvent Corporations would likely be able to make a viable proposal if the extension is granted; and,
- (c) No creditor of the Insolvent Corporations would be materially prejudiced if the extension is granted.

[38] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See **Re Cantrail Coach Lines Ltd.** (2005), 10 C.B.R. (5<sup>th</sup>) 164.

[39] I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

- (a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;
- (b) The Insolvent Corporations have completed a business plan;
- (c) The Insolvent Corporations are diligently working on the Restructuring;
- (d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and
- (e) Representatives of the Insolvent Corporations have met with outside investors.

[40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In **Re Baldwin Valley Investors Inc.** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well

happen" and "probable" "to be reasonably expected". See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4<sup>th</sup>) 114 (N.S.S.C.).

[41] The Affidavit evidence in this case demonstrates that the Insolvent Corporations would likely be able to make a viable proposal as there appears to be a core business to form the base of a business enterprise; management is key to the ongoing viability of the business and management appears committed to such ongoing viability; and debts owing to secured creditors can likely be serviced by a restructured entity.

[42] I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.

[43] Accordingly, I conclude that each of the requirements of section 50.4(9) of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

**CONCLUSION AND DISPOSITION**

[44] In the result, an Order will issue that the Insolvent Corporations may file a joint proposal pursuant to the provisions of the BIA, and that, pursuant to Section 50.4(9) of the BIA, the time for filing a Proposal is extended by 45 days to September 10<sup>th</sup>, 2006.

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**Peter S. Glennie**  
**A Judge of the Court of Queen's Bench**  
**of New Brunswick**

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**CITATION:** Mustang GP Ltd. (Re), 2015 ONSC 6562  
**COURT FILE NOS.:** 35-2041153, 35-2041155, 35-2041157  
**DATE:** 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

**RE:** IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED  
PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

**BEFORE:** Justice H. A. Rady

**COUNSEL:** Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited  
Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

**HEARD:** October 19, 2015

### **ENDORSEMENT**

#### **Introduction**

[1] This matter came before me as a time sensitive motion for the following relief:

- (a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

- (b) administratively consolidating the debtors' proposal proceeding;
- (c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;
- (d) granting a charge in an amount not to exceed \$150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;
- (e) granting a charge in an amount not to exceed \$2,000,000 in favour of the debtors' directors and officers;
- (f) approving the process described herein for the sale and marketing of the debtors' business and assets;
- (g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and
- (h) granting the debtors an extension of time to make a proposal to their creditors.

### **Preliminary Matter**

[2] As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as

the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

- [3] Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

### **Background**

- [4] The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.
- [5] On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.
- [6] The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.
- [7] Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

- [8] In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.
- [9] The plant employs twelve part and full time employees.
- [10] The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant “launch challenges” due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.
- [11] Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying \$1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and “caused a substantial drain on the debtors’ working capital resources”.
- [12] The debtors’ working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately \$4.8 million.

- [13] In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to \$11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.
- [14] On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. – 2478223 Ontario Limited – purchased and took an assignment of FCC’s debt and security at a substantial discount.
- [15] Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors’ business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.
- [16] On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors’ assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary’s sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the

debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

[17] On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

[18] In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

- i. the sale process will be commenced immediately following the date of the order approving it;
- ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;
- iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;

- iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;
- v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;
- vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;
- vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;
- viii. the closing of the sale transaction will take place within one business day from the sale approval date;
- ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

[19] StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

A partial credit bid for a purchase price equal to: (i) \$250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

[20] The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

[21] StormFisher Environmental Ltd. has offered to make a DIP loan of up to \$1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

[22] The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

[23] Searches of the *PPSA* registry disclosed the following registrations:



(a) Harvest Ontario Partners:

- (i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;
- (ii) BMO in respect of accounts.

(b) Harvest Power Mustang Generation Ltd.

- (i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;
- (ii) BMO in respect of accounts; and
- (iii) Roynat Inc. in respect of certain equipment.

[24] There are two registrations on title to 1087 Green Valley Road. The first is for \$11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for \$239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

## Analysis

### a) the administrative consolidation

[25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion

materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

**b) the DIP agreement and charge**

- [26] S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

**50.6(1) *Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

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

- [27] S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

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

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

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

[28] This case bears some similarity to *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

[29] The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminished.

[30] In *Re Comstock Canada Ltd.*, 2013 ONSC 4756 (S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 as follows:

[I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

...the purpose of the CCAA... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

...

Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".

[Emphasis in original]

[31] I recognize that in the *Comstock* decision, the court was dealing with a CCAA proceeding. However, the comments quoted above seem quite apposite to this case. After all, the CCAA is an analogous restructuring statute to the proposal provisions of the BIA.

**c) administration charge**

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

**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.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

**d) the D & O charge**

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

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

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

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

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

[35] I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

**e) the sale process and the stalking horse agreement of purchaser sale**

[36] The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

[37] In *Re Brainhunter* (2009), 62 C.B.R. (5<sup>th</sup>) 41, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the “Nortel Criteria”) the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

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

14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors’ assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[38] It occurs to me that the Nortel Criteria are of assistance in circumstances such as this – namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

[39] In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies* 2012 ONSC 175 (S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

[40] I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

**f) Extension of time to file a proposal**

[41] It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is



necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

[42] For these reasons, the relief sought is granted.

*Justice H.A. Rady*  
Justice H.A. Rady

**Date:** October 28, 2015