File No. BK 17-01-04509

THE QUEEN'S BENCH
Winnipeg Centre
IN BANKRUPTCY AND INSOLVENCY

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

AND IN THE MATTER OF THE PROPOSAL OF 5274398 MANITOBA LTD.

MOTION BRIEF OF 5274398 MANITOBA LTD.

(Sale Approval, Vesting and Extension)

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INDEX

PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. Certificate of Filing a Notice of Intention to Make a Proposal, Notice of Intention to Make a Proposal, Consent of Proposal Trustee and List of Creditors, filed August 28, 2017;
2. The Affidavit of Jonathan Doerksen, sworn September 5, 2017 and filed September 5, 2017 (**"Doerksen First Affidavit"**);
3. The Supplemental Affidavit of Jonathan Doerksen sworn September 6, 2017 and filed September 7, 2017;
4. The Confidential Affidavit of Samantha Dunn, sworn September 6, 2017 and filed September 6, 2017;
5. The First Report of the Proposal Trustee, filed September 6, 2017;
6. Order pronounced September 7, 2017, filed September 12, 2017 (**"September 7 Order"**);
7. Second Report of the Proposal Trustee, filed September 15, 2017;
8. Redacted Affidavit of Samantha Dunn, sworn September 6, 2017 and filed September 13, 2017;
9. Third Report of the Proposal Trustee, filed October 11, 2017;
10. Fourth Report of the Proposal Trustee, filed November 14, 2017;
11. Affidavit of Jonathan Doerksen, sworn November 29, 2017, filed December 1, 2017 (**"Doerksen Sale Affidavit"**);
12. Fifth Report of the Proposal Trustee, to be filed (**"Fifth Report"**); and
13. Confidential Report of the Proposal Trustee, to be filed.

PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

Tab

1. Sections 50.4(9), 54(2.1), 60(1.1) 60(1.3), 65.13, 66(1), 67, 69(1), 69.1 and 187 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("**BIA**");

2. Section 7(3) of the *Personal Information Protection and Electronic Documents Act*, (S.C. 2000, ch. 5) ("**PIPEDA**");

3. Sections 36 and 37 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("**CCAA**");

4. *Terrace Bay Pulp Inc.,* Re, 2012 CarswellOnt 9470 (ON SCJ); and

5. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (ON SCJ).

PART III LIST OF POINTS TO BE ARGUED

(a) Overview

1. On August 11, 2017, 5274398 Manitoba Ltd. (**"Cross Country"**) through Lazer Grant Inc. (the **"Proposal Trustee"**), filed with the Official Receiver a Notice of Intention to Make a Proposal (**"NOI"**) under the BIA.

2. The proposal proceedings were commenced to create an environment within which Cross Country could access working capital financing not otherwise available, to pursue an orderly going concern sale process of its plant in Blenheim, Ontario (**"Blenheim Plant"**) to optimize the benefits to stakeholders, with a view to making a viable proposal to creditors and continuing operations from its plant in Morden, Manitoba (**"Morden Plant"**).

3. Throughout the proposal proceedings this Court granted various Orders, including Orders:

   a. Extending the time within which the Proposal Trustee may file a proposal with the Official Receiver;

   b. Approving the engagement of PricewaterhouseCoopers LLP as financial advisor to Cross Country (**"Financial Advisor"**);

   c. Providing for a charge ("**Administration Charge**") as security for the professional fees and disbursements of the Proposal Trustee, counsel to the Proposal Trustee, counsel to Cross Country and the Financial Advisor;

   d. Granting interim, or "debtor-in-possession" working capital financing ("**DIP Loans**") and super priority charges over assets to secure the DIP Loans ("**DIP Lenders' Charge**");

e. Approving the sale process ("**Sale Process**"); and

f. Sealing the Confidential Affidavit of Samantha Dunn.

4. Cross Country has conducted the Court-approved Sale Process (as defined in the September 7 Order) generally in accordance with its terms and with the September 7 Order with the assistance, cooperation and approval of the Proposal Trustee and the Financial Advisor and in consultation with BDC and BMO and the Sale Process has resulted in Cross Country entering into the APA, with the Qualified Offeror (as defined in the Sale Process) recommended by the Financial Advisor and with the approval of the Proposal Trustee.

6. Cross Country now seeks an Order *inter alia*:

a. Approving the sale transaction ("**Transaction**") contemplated by the APA by and between Cross Country, as vendor, and 2598309 Ontario Limited d/b/a Gin-Cor Trailer Holdings ("**Purchaser**"), as purchaser, made as of November 14, 2017;

b. Vesting in the Purchaser Cross Country's right, title and interest in and to the purchased assets described in the APA (the "**Purchased Assets**") as set out in Schedule 2 of the Draft Order, free and clear of any claims and encumbrances, subject to the permitted encumbrances as set out in Schedule 4 of the Draft Order;

c. Authorizing the Proposal Trustee and Cross Country to pay or hold back as follows from the Sale Proceeds in the following priority (capitalized

terms not defined in this Order have the meanings ascribed to them in the Fifth Report):

i. To hold back the CRA Source Deduction Estimated Deemed Trust Claim Amount, and to pay same to CRA promptly upon court approval of a proposal in the within proceedings, and otherwise to distribute same in accordance with the priority of claims in respect of such funds as at immediately prior to the sale, as if the such assets had not been sold and remained in the possession or control of Cross Country immediately prior to the sale;

ii. To pay to the Financial Advisor the Financial Advisor's Claim;

iii. To hold back the Administration Charge (as defined in the September 7 Order), which shall be reduced to $100,000.00 following payment of the Financial Advisor's Claim in subparagraph ii above);

iv. To pay to the DIP Lenders (as defined in the September 7 Order) all amounts owing in accordance with the DIP Term Sheets (as defined in the September 7 Order);

v. To pay to the Municipality of Chatham-Kent the Property Tax Claim in the amount of approximately $125,000.00;

vi. To pay to Cross Country's legal counsel, MLT Aikins LLP, the Sale Closing Fees;

vii. To hold back and then pay the balance of the Sale Proceeds to Business Development Bank of Canada (**"BDC"**) and Bank of Montreal (**"BMO"**) including for the purposes of permanent debt

reduction and operating credit line adjustment, as may be agreed among BDC, BMO and Cross Country, otherwise as may be directed by further Order of this Honourable Court.

d. Discharging the DIP Lenders' Charge as defined and ordered in the September 7 Order; and

e. Extending to 11:59 PM (CST), Friday, January 19, 2018, the time within which Proposal Trustee may file a proposal with the Official Receiver in the matter of the proposal of Cross Country.

(b) *Sale Approval and Vesting Order*

7. Cross Country seeks an Order approving the sale of the Purchased Assets on a going-concern basis. With respect to any sale of assets in the context of a proposal proceeding and outside the ordinary course of business, Court approval pursuant to section 65.13 of the BIA must be obtained. Section 65.13 provides,

Restriction on disposition of assets
65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

…

Notice to secured creditors
(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered
(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(*a*) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(*b)* whether the trustee approved the process leading to the proposed sale or disposition;

(*c*) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(*d*) the extent to which the creditors were consulted;

(*e*) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(*f*) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

…

Assets may be disposed of free and clear
(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction - employers
(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

[Tab 1]

7. Similar to section 65.13 of the BIA, section 36 of the CCAA also requires that debtors, subject to that Act, obtain Court approval of any sale of assets outside the ordinary course of business. Section 36 of the CCAA provides:

Restriction on disposition of business assets
36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder

approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

…

Factors to be considered
(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

…

Assets may be disposed of free and clear
(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers
(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

[Tab 3]

8. In considering whether to grant an order approving the sale of assets under section 36 the CCAA, Justice Morawetz of the Ontario Superior Court in *Terrace Bay Pulp Inc.*, Re, 2012 CarswellOnt 9470 ("**Terrace**") found that the list of

factors enumerated in section 36(3) largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) ("**Soundair**"). Soundair summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

(a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

[Tab 4, para 44]

9. The Court in Terrace considered the Soundair factors and in the context of whether to grant an order approving the sale the Court considered the following:

a. With respect to whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, the Court considered:

   i. The bids available for acceptance as at the date of acceptance;

   ii. The marketing program, including the number of parties expressing interest and the number of parties bidding;

   iii. That the offer was accepted after negotiation and consultation with the first secured lender;

   iv. That the Monitor concluded that the offer was the superior offer and provided the best opportunity to position the business as a viable going concern operation for the long term; and

v. That the price was not so unreasonably low so as to warrant the Court to enter the Sales Process by considering the bids.

(*at para*. 45 to 55)

b. With respect to considering the interests of all parties, the Court considered whether the Monitor considered the interests of all parties, including the first secured lender, the Township and the employees.

(*at para*. 56 & 57)

c. With respect to the efficacy and integrity of the process by which the offers were obtained, the Court considered whether the process was properly conducted and therefore should not be interfered with.

(*at para*. 58 to 61)

d. Lastly, with respect to whether there has been unfairness in the working out of the process, the Court considered the fact that there were no allegations that the Monitor had proceeded in bad faith.

(*at para*. 62 to 66)

[Tab 4]

10. In the present case, Cross Country submits that it has complied with section 65.13 of the BIA and is therefore entitled to an order approval the sale and vesting the assets in the Purchaser for the following reasons:

a. Notice has been given to the secured creditors who are likely to be affected by the proposed sale.

b. The process surrounding the sale was reasonable in the circumstances.

   i. It was conducted in accordance with the Court-approved Sale Process.

   ii. The Purchaser's offer provides for:

      1. the likely continued employment of approximately 76 employees; and

      2. the assumption of certain equipment leases. (*Doerksen Sale Affidavit, para. 9(d); Fifth Report*)

c. The Proposal Trustee approved the Sales Process *(First Report, para 11(g); Fifth Report)*.

d. The Proposal Trustee recommends the Transaction, is of the opinion that the Transaction is more beneficial than to creditors than a sale or disposition under bankruptcy and has filed a report with this Court to that effect. *(Fifth Report)*

e. The bid was accepted (subject to Court approval) after appropriate consultation with BMO and BDC. *(Doerksen Sale Affidavit, para 9(e))*

f. The purchase price is reasonable and fair having regard to the market value of the assets. *(Doerksen Sale Affidavit, para 9(c); Doerksen First Affidavit, Exh. 5 & 6)*

g. It is intended that the proceeds of the sale be distributed to the priority and secured creditors.

h. Provision has been made for the payment of the Charge referred to above and for the required payments under section 60(1.3). *(Doerksen Sale Affidavit, para 9(d))*

11. Accordingly, Cross Country submits that an order approving the Transaction is appropriate.

(c) Distributions

12. The Order sought by Cross Country contemplates certain hold backs and distributions. Such distributions are in accordance with the priorities accorded including under the September 7 Order (paragraph 11) and the BIA (section 60).

(d) Extension of Time in Which to File a Proposal

13. Section 50.4(9) of the BIA provides,

> 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.

[Tab 1]

14. The Ontario Superior Court of Justice has examined the test to be applied to extend the time limit in which to file a proposal in the context of a NOI. In *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (ON SCJ) the main asset of the applicant was a gold and platinum project in Brazil (the **"Project"**). The Project was nearly complete, but in order to preserve the applicant's interest in the Project additional funds were required which could not be raised in the ordinary course. The applicant needed time to assess whether a sale of the assets in the context of a proposal process was more beneficial to creditors than a bankruptcy. The applicant therefore sought an order authorizing the following:

(a) DIP loan and super priority charge over assets to secure the DIP loan;

(b) an administration charge;

(c) a directors' and officers' Charge;

(d) a sale and investor solicitation process (the **"SISP"**);

(e) approval of the engagement of a financial advisor; and

(f) an extension of the stay.

[Tab 5]

15. The matter came before Justice Wilton-Siegel of the Ontario Superior Court of Justice. In reviewing the facts of the case and section 50.4(9) of the BIA, Justice Wilton-Siegel found that an extension was appropriate based on the following findings of the Court:

a. The applicant was acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP;

b. The applicant required additional time to determine whether it could make a viable proposal to stakeholders and an extension of the stay would increase the likelihood of a feasible sale transaction or a proposal;

c. There was no material prejudice likely to result to creditors from the extension of the stay itself;

d. The applicant's cash flows indicated that it would be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP loan; and

e. The proposal trustee supported the requested relief.

16. Cross Country submits that an extension is similarly appropriate in the current circumstances for the following reasons:

a. Cross Country is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders.

b. There is no material prejudice likely to result to creditors from the extension of the stay itself.

c. The updated cash flow projections (the **"Projections"**) prepared by Cross Country with the assistance of the Proposal Trustee and attached to the Fifth Report indicate that it will be able to meet its financial obligations, during the extended stay period.

d. The Proposal Trustee supports the requested relief for extension.

17. Accordingly, based on the foregoing, Cross Country submits that the stay ought to be extended as requested.

December 1, 2017

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Bankruptcy and Insolvency Act
R.S.C., 1985, c. B-3

Extension of time for filing proposal

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may 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.

--

Certain Crown claims

54 (2.1) For greater certainty, subsection 224(1.2) of the Income Tax Act shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of Her Majesty in right of Canada or a province for amounts that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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Certain Crown claims

60 (1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the

collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Proposals by employers

60 (1.3) No proposal in respect of an employer shall be approved by the court unless

a) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive under paragraph 136(1)(d) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the bankrupt's business during the same period; and

the court is satisfied that the employer can and will make the payments as required under paragraph (a).

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Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement

for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

65.13 (2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

65.13 (3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

65.13 (4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

65.13 (5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

65.13 (6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

65.13 (7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of

the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

65.13 (8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

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Act to apply

66 (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

Assignments

66 (1.1) For the purposes of subsection (1), in deciding whether to make an order under subsection 84.1(1), the court is to consider, in addition to the factors referred to in subsection 84.1(3), whether the trustee approved the proposed assignment.

Final statement of receipts and disbursements

66 (1.2) For the purposes of subsection (1), the trustee is to prepare the final statement of receipts and disbursements referred to in section 151 without delay after

(a) the debtor files or is deemed to have filed an assignment;

(b) the trustee informs the creditors and the official receiver of a default made in the performance of any provision in a proposal; or

(c) the trustee gives the certificate referred to in section 65.3 in respect of the proposal.

Examination by official receiver

66 (1.3) For the purposes of subsection (1), the examination under oath by the official receiver under subsection 161(1) is to be held — on the attendance of the person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) — before the proposal is approved by the court or the person becomes bankrupt.

Division to be applied conjointly with other Acts

66 (1.4) The provisions of this Division may be applied together with the provisions of an Act of Parliament, or of the legislature of a province, that authorizes or provides for the sanction of compromises or arrangements between a corporation and its shareholders or any class of its shareholders.

Effect of Companies' Creditors Arrangement Act

66 (2) Notwithstanding the Companies' Creditors Arrangement Act,

(a) proceedings commenced under that Act shall not be dealt with or continued under this Act; and

(b) proceedings shall not be commenced under Part III of this Act in respect of a company if a compromise or arrangement has been proposed in respect of the company under the Companies' Creditors Arrangement Act and the compromise or arrangement has not been agreed to by the creditors or sanctioned by the court under that Act.

Definitions

66.11 In this Division,

administrator means

(a) a trustee, or

(b) a person appointed or designated by the Superintendent to administer consumer proposals; (administrateur)

consumer debtor means an individual who is bankrupt or insolvent and whose aggregate debts, excluding any debts secured by the individual's principal residence, are not more than $250,000 or any other prescribed amount; (débiteur consommateur)

consumer proposal means a proposal made under this Division. (proposition de consommateur)

Consumer proposal

66.12 (1) A consumer proposal may be made by a consumer debtor, subject to subsections (2) and 66.32(1).

Dealing with certain consumer proposals together

66 (1.1) Two or more consumer proposals may, in such circumstances as are specified in directives of the Superintendent, be dealt with as one consumer proposal where they could reasonably be dealt with together because of the financial relationship of the consumer debtors involved.

Restriction

66 (2) A consumer debtor who has filed a notice of intention or a proposal under Division I may not make a consumer proposal until the trustee appointed in respect of the notice of intention or proposal under Division I has been discharged.

To whom consumer proposal is made

66 (3) A consumer proposal shall be made to the creditors generally.

Creditors' response

66 (4) Any creditor may respond to a consumer proposal by filing with the administrator a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or

(b) sections 124 to 134, in the case of secured creditors.

Term of consumer proposal

66 (5) A consumer proposal must provide that its performance is to be completed within five years.

Priority of claims, fees

66 (6) A consumer proposal must provide

(a) for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the consumer debtor;

(b) for the payment of all prescribed fees and expenses

(i) of the administrator on and incidental to proceedings arising out of the consumer proposal, and

(ii) of any person in respect of counselling provided pursuant to paragraph 66.13(2)(b); and

(c) for the manner of distributing dividends

Commencement of proceedings

66.13 (1) A consumer debtor who wishes to make a consumer proposal shall commence proceedings by

(a) obtaining the assistance of an administrator in preparing the consumer proposal; and

(b) providing the administrator with the prescribed information on the consumer debtor's current financial situation.

Duties of administrator

66.13 (2) An administrator who agrees to assist a consumer debtor shall

(a) investigate, or cause to be investigated, the consumer debtor's property and financial affairs so as to be able to assess with reasonable accuracy the consumer debtor's financial situation and the cause of his insolvency;

(b) provide, or provide for, counselling in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b);

(c) prepare a consumer proposal in the prescribed form; and

(d) subject to subsection (3), file with the official receiver a copy of the consumer proposal, signed by the consumer debtor, and the prescribed statement of affairs.

Where consumer proposal not to be filed

66.13 (3) The administrator shall not file a consumer proposal under paragraph (2)(d) if he has reason to believe that

(a) the debtor is not eligible to make a consumer proposal; or

(b) there has been non-compliance with anything required by this section or section 66.12.

Where consumer proposal wrongly filed

66.13 (4) Where the administrator determines, after filing a consumer proposal under paragraph (2)(d), that it should not have been filed because the debtor was not eligible to make a consumer proposal, the administrator shall forthwith so inform the creditors and the official receiver, but the consumer proposal is not invalid by reason only that the debtor was not eligible to make the consumer proposal.

Duties of administrator

64.14 The administrator shall, within ten days after filing a consumer proposal with the official receiver,

(a) prepare and file with the official receiver a report in the prescribed form setting out

(i) the results of the investigation made under paragraph 66.13(2)(a),

(ii) the administrator's opinion as to whether the consumer proposal is reasonable and fair to the consumer debtor and the creditors, and whether the consumer debtor will be able to perform it, and

(iii) [Repealed, 2005, c. 47, s. 49]

(iv) a list of the creditors whose claims exceed two hundred and fifty dollars; and

(b) send to every known creditor, in the prescribed form and manner,

(i) a copy of the consumer proposal and a copy of the statement of affairs referred to in paragraph 66.13(2)(d),

(ii) a copy of the report referred to in paragraph (a),

(iii) a form of proof of claim as prescribed, and

(iv) a statement explaining that a meeting of creditors will be called only if required under section 66.15 and that a review of the consumer proposal by a court will be made only if it is requested in accordance with subsection 66.22(1).

Meeting of creditors

66.15 (1) The official receiver may, at any time within the forty-five day period following the filing of the consumer proposal, direct the administrator to call a meeting of creditors.

Idem

66.15 (2) The administrator shall call a meeting of creditors

(a) forthwith after being so directed by the official receiver under subsection (1), or

(b) at the expiration of the forty-five day period following the filing of the consumer proposal, if at that time creditors having in the aggregate at least twenty-five per cent in value of the proven claims have so requested,

and any meeting of creditors must be held within twenty-one days after being called.

Notice to be sent to creditors

66.15 (3) The administrator shall, at least ten days before a meeting called pursuant to this section, send to the consumer debtor, every known creditor and the official receiver, in the prescribed form and manner, a notice setting out

(a) the time and place of the meeting;

(b) a form of proxy as prescribed; and

(c) such other information and documentation as is prescribed.

Chair of meeting

66.16 (1) The official receiver, or the nominee thereof, shall be the chair of a meeting called pursuant to section 66.15 and subsection 66.37(1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

Adjournment of meeting for further investigation and examination

66.16 (2) Where the creditors by ordinary resolution at the meeting so require, the meeting shall be adjourned to such time and place as may be fixed by the chair

(a) to enable a further appraisal and investigation of the affairs and property of the consumer debtor to be made; or

(b) for the examination under oath of the consumer debtor or of such other person as may be believed to have knowledge of the affairs or property of the consumer debtor, and the testimony of the consumer debtor or such other person, if transcribed, shall be placed before the adjourned

meeting or may be read in court on the application, if any, for the approval of the consumer proposal.

Creditor may indicate assent or dissent

66.17 (1) Any creditor who has proved a claim may indicate assent to or dissent from the consumer proposal in the prescribed manner to the administrator at or prior to a meeting of creditors, or prior to the expiration of the forty-five day period following the filing of the consumer proposal.

Effect of assent or dissent

66.17 (2) Unless it is rescinded, any assent or dissent received by the administrator at or before a meeting of creditors has effect as if the creditor had been present and had voted at the meeting.

Where consumer proposal deemed accepted

66.18 (1) Where, at the expiration of the forty-five day period following the filing of the consumer proposal, no obligation has arisen under subsection 66.15(2) to call a meeting of creditors, the consumer proposal is deemed to be accepted by the creditors.

Idem

66.18 (2) Where there is no quorum at a meeting of creditors, the consumer proposal shall be deemed to be accepted by the creditors.

Voting on consumer proposal

66.19 (1) At a meeting of creditors, the creditors may by ordinary resolution, voting all as one class, accept or refuse the consumer proposal as filed or as altered at the meeting or any adjournment thereof, subject to the rights of secured creditors.

Related creditor

66.19 (2) A creditor who is related to the consumer debtor may vote against but not for the acceptance of the consumer proposal.

Voting by administrator

66.19 (3) The administrator, as a creditor, may not vote on the consumer proposal.

Creditors may provide for supervision of consumer debtor's affairs

66.2 The creditors, with the consent of the consumer debtor, may include such provisions or terms in the consumer proposal with respect to the supervision of the affairs of the consumer debtor as they may deem advisable.

Appointment of inspectors

66.21 The creditors may appoint up to three inspectors of the estate of the consumer debtor, who shall have the powers of an inspector under this Act, subject to any extension or restriction of those powers by the terms of the consumer proposal.

Application to court

66.22 (1) Where a consumer proposal is accepted or deemed accepted by the creditors, the administrator shall, if requested by the official receiver or any other interested party within fifteen days after the day of acceptance or deemed acceptance, forthwith apply to the court to have the consumer proposal reviewed.

Where consumer proposal deemed approved by court

66.22 (2) Where, at the expiration of the fifteenth day after the day of acceptance or deemed acceptance of the consumer proposal by the creditors, no obligation has arisen under subsection (1) to apply to the court, the consumer proposal is deemed to be approved by the court.

Procedure for application to court

66.23 Where the administrator applies to the court pursuant to subsection 66.22(1), the administrator shall

(a) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the consumer debtor, to every creditor who has proved a claim and to the official receiver;

(b) forward a copy of the report referred to in paragraph (c) to the official receiver at least ten days before the date of the hearing; and

(c) at least two days before the date of the hearing, file with the court a report in the prescribed form on the consumer proposal and the conduct of the consumer debtor.

Court to hear report of administrator, etc.

66.24 (1) The court shall, before approving the consumer proposal, hear the report mentioned in paragraph 66.23(c) and, in addition, shall hear the official receiver, the administrator, the consumer debtor, any opposing, objecting or dissenting creditor or other interested party, and such further evidence as the court may require.

Refusal to approve the consumer proposal

66.24 (2) Where the court is of the opinion that the terms of the consumer proposal are not reasonable or are not fair to the consumer debtor and the creditors, the court shall refuse to approve the consumer proposal, and the court may refuse to approve the consumer proposal whenever it is established that the consumer debtor

(a) has committed any one of the offences mentioned in sections 198 to 200; or

(b) was not eligible to make a consumer proposal when the consumer proposal was filed with the official receiver.

Proposal must comply with Act

66.24 (3) The court shall refuse to approve a consumer proposal if it does not comply with subsections 66.12(5) and (6).

Power of court

66.24 (4) Subject to subsections (1) to (3), the court may either approve or refuse to approve the consumer proposal.

Withdrawal of consumer proposal

66.25 A consumer debtor may withdraw a consumer proposal

(a) at any time before its deemed approval by the court by virtue of subsection 66.22(2), where no court review is requested; or

(b) where a court review is requested, at any time before its actual approval or refusal by the court pursuant to section 66.24.

Where periodic payments not provided for

66.251 Where a proposal is approved or deemed approved by the court and the terms of the proposal do not provide for the distribution of available moneys at least once every three months, the administrator shall forthwith, upon ascertaining any change in the consumer debtor's circumstances that leads the administrator to conclude, after consultation with the debtor where practicable, that such change could jeopardize the consumer debtor's ability to meet the terms of the proposal, in writing, notify the official receiver and every known creditor of the change.

Payments to administrator

66.26 (1) All moneys payable under the consumer proposal shall be paid to the administrator and, after payment of all fees and expenses mentioned in paragraph 66.12(6)(b), the administrator shall distribute available moneys to the creditors in accordance with the terms of the consumer proposal.

Deposit of moneys

66.26 (2) In such circumstances as are specified in directives of the Superintendent and with the approval of the Superintendent, the administrator may deposit all moneys relating to the administration of consumer proposals in a single trust account.

Section 147 applies

66.26 (3) Section 147 applies, with such modifications as the circumstances require, to all distributions made to the creditors by the administrator pursuant to subsection (1).

Notifications

66.27 The administrator shall, within five days after

(a) the refusal of a consumer proposal by the creditors,

(b) the refusal of a consumer proposal by the court, and

(c) the withdrawal of a consumer proposal by the consumer debtor,

so notify in the prescribed form and manner the consumer debtor, every known creditor and the official receiver.

Time for determining claims

66.28 (1) The time with respect to which the claims of creditors shall be determined is the time of the filing of the consumer proposal.

On whom approval binding

66.28 (2) Subject to subsection (2.1), a consumer proposal accepted, or deemed accepted, by the creditors and approved, or deemed approved, by the court is binding on creditors in respect of

(a) all unsecured claims; and

(b) secured claims for which proofs of claim have been filed in the manner provided for in sections 124 to 134.

When consumer debtor is released from debt

66.28 (2.1) A consumer proposal accepted, or deemed accepted, by the creditors and approved, or deemed approved, by the court does not release the consumer debtor from any particular debt or liability referred to in subsection 178(1) unless the consumer proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the consumer proposal.

Certain persons not released

66.28 (3) The acceptance of a consumer proposal by a creditor does not release any person who would not be released under this Act by the discharge of the consumer debtor.

Administrator may issue certificate

66.29 (1) If a consumer proposal is approved or deemed approved by the court, the administrator may, if the administrator believes on reasonable grounds that the debtor owns land or other valuable property, issue a certificate in respect of the proposal, and may cause the certificate to be filed in any place where a certificate of judgment, writ of seizure and sale or other like document may be filed or where a legal hypothec of judgment creditors may be registered.

Effect of filing certificate

66.29 (2) A certificate filed under subsection (1) operates as a certificate of judgment, writ of execution or legal hypothec of judgment creditors until the proposal is fully performed.

Annulment of consumer proposal

66.3 (1) Where default is made in the performance of any provision in a consumer proposal, or where it appears to the court

(a) that the debtor was not eligible to make a consumer proposal when the consumer proposal was filed,

(b) that the consumer proposal cannot continue without injustice or undue delay, or

(c) that the approval of the court was obtained by fraud,

the court may, on application, with such notice as the court may direct to the consumer debtor and, if applicable, to the administrator and to the creditors, annul the consumer proposal.

Validity of things done

66.3 (2) An order made under subsection (1) shall be made without prejudice to the validity of any sale, disposition of property or payment duly made, or anything duly done under or in pursuance of the consumer proposal, and notwithstanding the annulment of the consumer proposal, a guarantee given pursuant to the consumer proposal remains in full force and effect in accordance with its terms.

Annulment for offence

66.3 (3) A consumer proposal, although accepted or approved, may be annulled by order of the court at the request of the administrator or of any creditor whenever the consumer debtor is afterwards convicted of any offence under this Act.

Notification of annulment

66.3 (4) Where an order annulling the consumer proposal of a consumer debtor who is not a bankrupt has been made pursuant to this section, the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.

Annulment effect

66.3 (5) Where a consumer proposal made by a bankrupt is annulled,

(a) the consumer debtor is deemed on the annulment to have made an assignment and the order annulling the proposal shall so state;

(b) the trustee who is the administrator of the proposal shall, within five days after the order is made, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another trustee in lieu of that trustee; and

(c) the trustee shall forthwith file a report thereof in the prescribed form with the official receiver, who shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 49.

Deemed annulment — default of payment

66.31 (1) Unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, a consumer proposal is deemed to be annulled on

(a) in the case when payments under the consumer proposal are to be made monthly or more frequently, the day on which the consumer debtor is in default for an amount that is equal to or more than the amount of three payments; or

(b) in the case when payments under the consumer proposal are to be made less frequently than monthly, the day that is three months after the day on which the consumer debtor is in default in respect of any payment.

Deemed annulment — amendment withdrawn or refused

66.31 (2) If an amendment to a consumer proposal filed before the deemed annulment of the consumer proposal under subsection (1) is withdrawn or refused by the creditors or the court, the consumer proposal is deemed to be annulled at the time that the amendment is withdrawn or refused.

Duties of administrator in relation to deemed annulment

66.31 (3) Without delay after a consumer proposal is deemed to be annulled, the administrator shall

(a) file with the official receiver a report in the prescribed form in relation to the deemed annulment; and

(b) send a notice to the creditors informing them of the deemed annulment.

Effects of deemed annulment — consumer proposal made by a bankrupt

66.31 (4) If a consumer proposal made by a bankrupt is deemed to be annulled,

(a) the consumer debtor is deemed to have made an assignment on the day on which the consumer proposal is deemed to be annulled;

(b) the trustee who is the administrator of the consumer proposal shall, within five days after the day on which the consumer proposal is deemed to be annulled, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, despite section 14, affirm the appointment of the trustee or appoint another trustee in lieu of that trustee; and

(c) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed annulment and the official receiver shall, without delay, issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49.

Validity of things done before deemed annulment

66.31 (5) A deemed annulment of a consumer proposal does not prejudice the validity of any sale or disposition of property or payment duly made, or anything duly done under or in pursuance of the consumer proposal and, despite the deemed annulment, a guarantee given under the consumer proposal remains in full force and effect in accordance with its terms.

Notice of possibility of consumer proposal being automatically revived

66.31 (6) In the case of a deemed annulment of a consumer proposal made by a person other than a bankrupt, if the administrator considers it appropriate to do so in the circumstances, he or she may, with notice to the official receiver, send to the creditors — within 30 days, or any other number of days that is prescribed, after the day on which the consumer proposal was deemed to be annulled — a notice in the prescribed form informing them that the consumer proposal will be automatically revived 60 days, or any other number of days that is prescribed, after the day on which it was deemed to be annulled unless one of them files with the administrator, in the prescribed manner, a notice of objection to the revival.

Automatic revival

66.31 (7) If the notice is sent by the administrator and no notice of objection is filed during the period referred to in subsection (6), the consumer proposal is automatically revived on the expiry of that period.

Notice if no automatic revival

66.31 (8) If a notice of objection is filed during the period referred to in subsection (6), the administrator is to send, without delay, to the official receiver and to each creditor a notice in the prescribed form informing them that the consumer proposal is not going to be automatically revived on the expiry of that period.

Administrator may apply to court to revive consumer proposal

66.31 (9) The administrator may at any time apply to the court, with notice to the official receiver and the creditors, for an order reviving any consumer proposal of a consumer debtor who is not a bankrupt that was deemed to be annulled, and the court, if it considers it appropriate to do so in the circumstances, may make an order reviving the consumer proposal, on any terms that the court considers appropriate.

Duty of administrator if consumer proposal is revived

66.31 (10) Without delay after a consumer proposal is revived, the administrator shall

(a) file with the official receiver a report in the prescribed form in relation to the revival; and

(b) send a notice to the creditors informing them of the revival.

Validity of things done before revival

66.31 (11) The revival of a consumer proposal does not prejudice the validity of anything duly done — between the day on which the consumer proposal is deemed to be annulled and the day on which it is revived — by a creditor in the exercise of any rights revived by subsection 66.32(2).

Effects of annulment

66.32 (1) Unless the court otherwise orders, where a consumer proposal is annulled or deemed annulled, the consumer debtor

(a) may not make another consumer proposal, and

(b) is not entitled to any relief provided by sections 69 to 69.2

until all claims for which proofs of claim were filed and accepted are either paid in full or are extinguished by the operation of subsection 178(2).

Idem

66.32 (2) Where a consumer proposal is annulled or deemed annulled, the rights of the creditors are revived for the amount of their claims less any dividends received.

66.33 [Repealed, 2005, c. 47, s. 54]

Certain rights limited

66.34 (1) If a consumer proposal has been filed in respect of a consumer debtor, no person may terminate or amend any agreement, including a security agreement, with the consumer debtor, or claim an accelerated payment, or the forfeiture of the term, under any agreement, including a security agreement, with the consumer debtor, by reason only that

(a) the consumer debtor is insolvent, or

(b) a consumer proposal has been filed in respect of the consumer debtor

until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled.

Idem

66.34 (2) Where the agreement referred to in subsection (1) is a lease, subsection (1) shall be read as including the following paragraph:

"(c) the consumer debtor has not paid rent in respect of a period preceding the filing of the consumer proposal."

Idem

66.34 (3) Where a consumer proposal has been filed in respect of a consumer debtor, no public utility may discontinue service to that consumer debtor by reason only that

(a) the consumer debtor is insolvent,

(b) a consumer proposal has been filed in respect of the consumer debtor, or

(c) the consumer debtor has not paid for services rendered, or material provided, before the filing of the consumer proposal

until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled.

Certain acts not prevented

66.34 (4) Nothing in subsections (1) to (3) shall be construed

(a) as prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the filing of the consumer proposal; or

(b) as requiring the further advance of money or credit.

Provisions of section override agreement

66.34 (5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

Powers of court

66.34 (6) The court may, on application by a party to an agreement or by a public utility, declare that this section does not apply, or applies only to the extent declared by the court, where the applicant satisfies the court that the operation of this section would likely cause it significant financial hardship.

Eligible financial contracts

66.34 (7) Subsection (1) does not apply in respect of an eligible financial contract.

Permitted actions

66.34 (8) Despite section 69.2, the following actions are permitted in respect of an eligible financial contract that is entered into before the filing of a consumer proposal and is terminated on or after that filing, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the consumer debtor and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Net termination values

66.34 (9) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the consumer debtor to another party to the eligible financial contract, that other party is deemed, for the purposes of subsection 69.2(1), to be a creditor of the consumer debtor with a claim provable in bankruptcy in respect of those net termination values.

Previous Version

Assignment of wages

66.35 (1) An assignment of existing or future wages made by a consumer debtor before the filing of a consumer proposal is of no effect in respect of wages earned after the filing of the consumer proposal.

Assignment of debts at request of administrator

66.35 (2) In order to ensure compliance with the terms of a consumer proposal, the administrator may, at any time after the consumer proposal is filed, require of, and take from, the consumer debtor an assignment of any amount payable to the consumer debtor, including wages, that may become payable in the future, but no such assignment can, unless the consumer debtor agrees, be for an amount greater than is due and payable pursuant to the terms of the consumer proposal.

Third parties protected

66.35 (3) An assignment made pursuant to subsection (2) is of no effect against a person owing the amount payable until a notice of the assignment is served on that person.

When section ceases to apply

66.35 (4) This section ceases to apply where the consumer proposal is refused by the creditors or by the court, or is withdrawn, annulled or deemed annulled.

No dismissal, etc., of employee

66.36 No employer shall dismiss, suspend, lay off or otherwise discipline a consumer debtor on the sole ground that a consumer proposal has been filed in respect of that consumer debtor.

Amendment to consumer proposal

66.37 If an administrator files an amendment to a consumer proposal before the withdrawal, refusal, approval or deemed approval by the court of the consumer proposal, or after the approval or deemed approval by the court of the consumer proposal and before it has been fully performed or annulled or deemed annulled, the provisions of this Division apply to the consumer proposal

and the amended consumer proposal, with any modifications that the circumstances require, and, for that purpose, the definition consumer debtor in section 66.11 is to be read as follows:

consumer debtor means an individual who is insolvent;

Certificate if consumer proposal performed

66.38 (1) If a consumer proposal is fully performed, the administrator shall issue a certificate to that effect, in the prescribed form, to the consumer debtor and to the official receiver.

Effect if counselling refused

66.38 (2) Subsection (1) does not apply in respect of a consumer debtor who has refused or neglected to receive counselling provided under paragraph 66.13(2)(b).

Administrator's accounts, discharge

66.39 The form and content of the administrator's accounts, the procedure for the preparation and taxation of those accounts and the procedure for the discharge of the administrator shall be as prescribed.

Act to apply

66.4 (1) All the provisions of this Act, except Division I of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to consumer proposals.

Where consumer debtor is bankrupt

66.4 (2) Where a consumer proposal is made by a consumer debtor who is a bankrupt,

(a) the consumer proposal must be approved by the inspectors, if any, before any further action is taken thereon;

(b) the consumer debtor must have obtained the assistance of a trustee who shall act as administrator of the proposal in the preparation and execution thereof;

(c) the time with respect to which the claims of creditors shall be determined is the time at which the consumer debtor became bankrupt; and

(d) the approval or deemed approval by the court of the consumer proposal operates to annul the bankruptcy and to revest in the consumer debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the consumer debtor, unless the terms of the consumer proposal otherwise provide.

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Property of bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the Income Tax Act, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any

refund owing to the bankrupt under the Income Tax Act in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the Family Orders and Agreements Enforcement Assistance Act, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Deemed trusts

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Exceptions

67 (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or

(b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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Stay of proceedings — Division I proposals

69.1 (1) Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or;

(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;

(c) Her Majesty in right of Canada may not exercise Her rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, until

(i) the trustee has been discharged,

(ii) six months have elapsed following court approval of the proposal, or

(iii)the insolvent person becomes bankrupt; and

(d) Her Majesty in right of a province may not exercise Her rights under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection,

in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation, until

(iii) the trustee has been discharged,

(iv) six months have elapsed following court approval of the proposal, or

(v) the insolvent person becomes bankrupt.

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Seal of court

187 (1) Every court shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of the court in all legal proceedings.

Court not subject to be restrained

187 (2) The courts are not subject to be restrained in the execution of their powers under this Act by the order of any other court.

Power of judge in chambers

187 (3) Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.

Periodical sittings

187 (4) Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

Court may review, etc.

187 (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Enforcement of orders

187 (6) Every order of a court may be enforced as if it were a judgment of the court.

Transfer of proceedings to another division

187 (7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

Trial of issue, etc.

187 (8) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

Formal defect not to invalidate proceedings

187 (9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Proceedings taken in wrong court

187 (10) Nothing in this section invalidates any proceedings by reason of their having been commenced, taken or carried on in the wrong court, but the court may at any time transfer the proceedings to the proper court.

Court may extend time

187 (11) Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

Court may dispense with certain requirements respecting notices

187 (12) Where in the opinion of the court the cost of preparing statements, lists of creditors or other material required by this Act to be sent with notices to creditors, or the cost of sending the material or notices, is unjustified in the circumstances, the court may give leave to omit the material or any part thereof or to send the material or notices in such manner as the court may direct.

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Personal Information Protection and Electronic Documents Act

S.C. 2000, c. 5

Disclosure without knowledge or consent

7 (3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(a) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organization;

(b) for the purpose of collecting a debt owed by the individual to the organization;

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law,

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province, or

(iv) the disclosure is requested for the purpose of communicating with the next of kin or authorized representative of an injured, ill or deceased individual;

(c.2) made to the government institution mentioned in section 7 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act as required by that section;

(d) made on the initiative of the organization to a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

(d.1) made to another organization and is reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation;

(d.2) made to another organization and is reasonable for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud;

(d.3) made on the initiative of the organization to a government institution, a part of a government institution or the individual's next of kin or authorized representative and

(i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,

(ii) the disclosure is made solely for purposes related to preventing or investigating the abuse, and

(iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse;

(d.4) necessary to identify the individual who is injured, ill or deceased, made to a government institution, a part of a government institution or the individual's next of kin or authorized representative and, if the individual is alive, the organization informs that individual in writing without delay of the disclosure;

(e) made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the

disclosure;

(e.1) of information that is contained in a witness statement and the disclosure is necessary to assess, process or settle an insurance claim;

(e.2) of information that was produced by the individual in the course of their employment, business or profession and the disclosure is consistent with the purposes for which the information was produced;

(f) for statistical, or scholarly study or research, purposes that cannot be achieved without disclosing the information, it is impracticable to obtain consent and the organization informs the Commissioner of the disclosure before the information is disclosed;

(g) made to an institution whose functions include the conservation of records of historic or archival importance, and the disclosure is made for the purpose of such conservation;

(h) made after the earlier of

(i) one hundred years after the record containing the information was created, and

(ii) twenty years after the death of the individual whom the information is about;

(h.1) of information that is publicly available and is specified by the regulations; or

(h.2) [Repealed, 2015, c. 32, s. 6]

(i) required by law.

Companies' Creditors Arrangement Act
RSC 1985, c. C-36

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

36 (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

36 (3) In deciding whether to grant the authorization, the court is to consider, among other things

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

36 (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

36 (5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

36 (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Application of sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

36.1 (1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

36.1 (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

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Deemed trusts

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Exceptions

37 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed

to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or

(b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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CITATION: Terrace Bay Pulp Inc. (Re), 2012 ONSC 4247
COURT FILE NO.: CV-12-9566-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC., Applicant**

BEFORE: **MORAWETZ J.**

COUNSEL: **Pamela Huff, Marc Flynn and Kristina Desimini, for the Applicant, Terrace Bay Pulp Inc.**

Alec Zimmerman and James Szumski, for Birchwood Trading, Inc.

M. Starnino, for the United Steelworkers

Alan Merksey, for Tangshan Sanyu Group Xingda Chemical Fiberco Limited

Alex Ilchenko, for Ernst & Young Inc, Monitor

Jacqueline L. Wall, for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines

Janice Quigg, for Skyway Canada Ltd.

Fred Myers, for the Township of Terrace Bay

Peter Forestell, Q.C., for Aditya Birla Group and AV Terrace Bay Inc.

HEARD: **JULY 16, 2012**

ENDORSED: **JULY 19, 2012**

REASONS: **JULY 27, 2012**

ENDORSEMENT

[1] Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

[2] The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

[3] Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

[4] Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

[5] Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

[6] On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

[7] With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

[8] The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

[9] Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

[10] The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

[11] Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

[12] Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

[13] Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

(a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;

(b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;

(c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;

(d) employment of approximately 75 additional employees, plus the existing management of the mill;

(e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

[14] Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991) 7 C.B.R. (3d) 1 (C.A.) has not been met.

[15] Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

[16] For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

FACTS

[17] The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monitor.

[18] On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

[19] The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

[20] The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

[21] The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

[22] After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

[23] Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

[24] Four parties expressed an interest in Terrace Bay after the Bid Deadline.

[25] The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

[26] The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan, as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

[27] It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

[28] As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

[29] The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

[30] In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

(a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;

(b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;

(c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;

(d) the Sales Process Terms provide no bid protections for the potential Purchaser;

(e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;

(f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;

(g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;

(h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

[31] As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

[32] The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

[33] The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

[34] The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

[35] The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

[36] The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

[37] In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

[38] The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

[39] The Monitor also provided in the Supplemental Report an update with respect to the position of the Purchaser.

[40] The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

[41] The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

[42] The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

LAW AND ANALYSIS

[43] Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[44] I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank of Canada v.*

Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

> (a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[45] In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

> When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:
>
> > Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
> >
> > If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[46] In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan

appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

[47] The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number of parties expressed interest and a number of parties did put forth binding offers.

[48] Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

[49] I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

[50] It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

[51] Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 30. What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> 31. If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

[52] In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

[53] It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

[54] I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

[55] I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act improvidently.

[56] The second point in the *Soundair* analysis is to consider the interests of all parties.

[57] On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

[58] The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

[59] I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

> It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them.

[60] At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trustco*, at p. 109:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

[61] In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

[62] The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

[63] There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

[64] I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

[65] In all respects, I am satisfied that there has been no unfairness in the working out of the process.

[66] In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

[67] In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

[68] I have concluded that the Approval and Vesting Order should be granted.

[69] I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

[70] The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

[71] The authorities cited, *Lama v. Coltsman* (1978) 20 O.R. (2d) 98 (CO.CT.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp.*, (2005) O.J. No. 4832 (S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

[72] For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to

issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

[73] The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

DISPOSITION

[74] In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

MORAWETZ J.

Date: July 27, 2012

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

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, As Amended

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

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

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

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

H. Chaiton, for the Proposal Trustee

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

HEARD: January 16, 2014

ENDORSEMENT

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

Background

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

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

DIP Loan and DIP Charge

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

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

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

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

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

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

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

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

Administration Charge

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

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

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

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

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

Directors' and Officers' Charge

[16] Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

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

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

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

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

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

The SISP

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

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

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

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

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

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

Engagement Letter with the Financial Advisor

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

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

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

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

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

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

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

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

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

Extension of the Stay

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

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

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

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

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

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

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

Wilton-Siegel J.

Released: February 7, 2014