Court File No. 31-2253654
Estate File No. 31-2253654

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF FORTE EPS SOLUTIONS INC., A CORPORATION WITH A HEAD OFFICE IN THE TOWN OF MIDLAND IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES OF THE PROPOSAL TRUSTEE

(For a motion returnable June 14, 2017)

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INDEX

TAB 1

2005 BCSC 351
British Columbia Supreme Court

Cantrail Coach Lines Ltd., Re

2005 CarswellBC 581, 2005 BCSC 351, [2005] B.C.W.L.D. 2533,
[2005] B.C.J. No. 552, 10 C.B.R. (5th) 164, 138 A.C.W.S. (3d) 1010

IN THE MATTER OF THE PROPOSAL OF CANTRAIL COACH LINES LTD.

Master Groves

Heard: March 1, 2005
Judgment: March 1, 2005
Docket: Vancouver B050363

Counsel: H. Ferris for Petitioner
R. Finlay for Creditor (Volvo)

Subject: Insolvency

Related Abridgment Classifications
Bankruptcy and insolvency

VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Petitioner company was tour bus operation with 25 years experience — Petitioner suffered serious drop-off in business in recent years — Petitioner missed payment to secured creditor in January 2005 — Petitioner filed notice of intention to make bankruptcy proposal — Petitioner brought application for extension of time in filing proposal — Secured creditor opposed application — Application granted — Extension of time would allow petitioner to make viable proposal — It was disingenuous for secured creditor to oppose proposal even before proposal was made — No evidence existed that extension would substantially prejudice secured creditor — Although circumstances of petitioner clearly prejudiced secured creditor to some degree, minor prejudice did not jeopardize their security.

Table of Authorities

Cases considered by *Master Groves*:

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162, 1993 CarswellOnt 208 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

APPLICATION for extension of time for filing bankruptcy proposal.

Master Groves:

1 This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

2 Cantrail applies to the Court pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* for extension of time for filing a proposal.

3 VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

4 The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

5 Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as September 11th and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.

6 Cantrail was apparently able to meet its obligations up until the 16th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20th of January 2005 and perhaps in response to that, but in any event, on the 1st of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81 creditors of Cantrail who have been notified of this application and only Volvo objects.

7 I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

8 As indicated, Cantrail is applying purport to s. 50.4(9) of the *Bankruptcy and Insolvency Act*. That reads and I will take out some of the language that is not necessary:

> The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned 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.

9 Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

> The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned subsection (8) or any extension thereof granted under subsection (9) if the Court is satisfied that:
>
> (a) the insolvent person has not acted or is not acting in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiry of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

10 The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

11 I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the *Act* and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

12 I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

13 Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

14 If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

15 If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.

16 If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

17 Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buyout of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout — a proposal which if they voted against they would probably be viewed as irrational businesspeople.

18 In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

19 I note the words in the legislation are "a viable proposal". According to the *Concise Oxford Dictionary* viable means feasible. Viable also means practicable from an economic standpoint.

20 I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

21 Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

22 There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The *Act* in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

23 That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3rd of March 2004.

24 It stands to reason from this analysis that the applications of Volvo are dismissed.

Application granted.

End of Document

TAB 2

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency

Related Abridgment Classifications
Bankruptcy and insolvency

XX Miscellaneous

Headnote
Bankruptcy and insolvency --- Miscellaneous

Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — referred to

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

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.

Application granted.

TAB 3

2013 BCSC 1833
British Columbia Supreme Court

Enirgi Group Corp. v. Andover Mining Corp.

2013 CarswellBC 3026, 2013 BCSC 1833, [2013] B.C.W.L.D. 9307, 233 A.C.W.S. (3d) 557, 6 C.B.R. (6th) 32

In the Supreme Court of British Columbia in Bankruptcy and Insolvency

In the Matter of the notice of Intention to Make a Proposal of Andover Mining Corp.

In the Matter of the Application by Enirgi Group Corporation under ss. 50.4(11) and 47.1(1)(b) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-5

Enirgi Group Corporation Creditor and Andover Mining Corp. Insolvent Person

Steeves J.

Heard: September 24, 2013
Judgment: October 4, 2013
Docket: Vancouver B131136

Counsel: D.R. Brown, M. Nied for Creditor
M.R. Davies for Insolvent Person

Subject: Insolvency; Contracts; Corporate and Commercial

Related Abridgment Classifications
Bankruptcy and insolvency

VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Creditor held three promissory notes against debtor — Debtor filed intention to file proposal — Debtor brought application for extension of time for filing proposal for period of 45 days — Creditor brought application for declaration that debtor's attempt to file proposal be immediately terminated, debtor be deemed bankrupt and trustee be appointed — Parties disputed which application should prevail — Application by debtor allowed; application by creditor dismissed with leave to reapply — Debtor had significant assets — It was likely that debtor would be able to present viable proposal — Debtor acted in good faith and with due diligence in attempting to construct proposal — There was no material prejudice to creditor if extension was granted — If debtor presented proposal, creditor would have opportunity to decide its position — Debtor was entitled to have its application considered on merits — If debtor's application was not meritorious it was logical to proceed with creditor's application.

Table of Authorities

Cases considered by *Steeves J.*:

Baldwin Valley Investors Inc., Re (1994), 1994 CarswellOnt 253, 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — considered

Cantrail Coach Lines Ltd., Re (2005), 10 C.B.R. (5th) 164, 2005 BCSC 351, 2005 CarswellBC 581 (B.C. Master) — followed

Com/Mit Hitech Services Inc., Re (1997), 47 C.B.R. (3d) 182, 1997 CarswellOnt 2753 (Ont. Bktcy.) — considered

Convergix Inc., Re (2006), 307 N.B.R. (2d) 259, 795 A.P.R. 259, 24 C.B.R. (5th) 289, 2006 NBQB 288, 2006 CarswellNB 460 (N.B. Q.B.) — considered

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Pt. III — referred to

s. 47.1 [en. 1992, c. 27, s. 16(1)] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by debtor for extension of time for filing proposal; APPLICATION by creditor for declaration that debtor's attempt to file proposal be immediately terminated, debtor be deemed bankrupt and trustee be appointed.

***Steeves J.*:**

Introduction

1 Enirgi Group Corporation ("Enirgi") holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover Mining Corp. ("Andover"). One of the notes, in the amount of $2.5 million, was due on October 1, 2012 and it has not been paid. In August 2013 Andover filed an intention to file a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). That proposal expires on October 4, 2013.

2 This is a decision about two applications related to those notes.

3 Andover seeks an order pursuant to s. 50.4(9) of the *BIA* for an extension of time for the filing of a proposal for a period of 45 days. According to Andover it has acted, and is acting, in good faith and with due diligence. Further, it would likely be able to make a viable proposal if the extension was granted and no creditor would be materially prejudiced if the extension was granted. Andover also submits that it has significantly more assets than debts and Enirgi has persistently been disruptive of the affairs of Andover as part of a campaign to target the assets of Andover.

4 The second application is by Enirgi pursuant to s. 50.4(11) of the *BIA*. It seeks declarations that Andover's attempt to file a proposal is immediately terminated, a previous stay of proceedings is lifted, Andover is deemed bankrupt and a trustee in bankruptcy is appointed. The primary basis for Enirgi's application is the submission that Andover will not be able to make a proposal before the expiration of the period in question that will be accepted by Enirgi. Enirgi disputes that Andover has significantly more assets than debts. It also submits that it has a veto over any proposal by Andover because it is the largest creditor, it has lost faith in Andover's ability to manage its assets and it is concerned that Andover is restructuring its affairs to dissipate its assets. In the alternative, if there is to be an extension of Andover's proposal, Enirgi submits that a receiver should be appointed pursuant to 47.1 of the *BIA* to ensure transparency and fairness.

5 Each party submits that its application should supersede the application of the other party. There are also disputes between the parties about a number of factual issues set out in affidavit evidence.

Background

6 Andover is an advanced mineral exploration company incorporated under the laws of British Columbia in 2003. Its shares have been listed for trading on the TSX Venture Exchange since 2006. As of September 6, 2013 approximately 12,000,000 shares of Andover were issued and outstanding with more than 398 shareholders. Andover had a market capitalization of about $9 million, as of September 14, 2013; its payroll is $2,441 per month. According to publicly available audited financial statements, as of March 31, 2013, Andover had $42.5 million of assets and $9.1 million of liabilities.

7 Andover has two main assets. It owns 83.5% of Chief Consolidated Mining Company ("Chief") that owns extensive amounts of land and mining equipment in Utah, U.S.A. Andover also owns 100% of the shares of Andover Alaska Inc. ("Alaska"), a company with large land holdings and mineral claims in Alaska, U.S.A. Affidavit evidence from Andover is that it has the prospect of significant and imminent cash flow from more than one project. This is discussed below.

8 Enirgi is a natural resources development company incorporated under the laws of Canada.

9 In 2011 and 2012 Andover issued non-interest bearing, unsecured promissory notes to Sentient Global Resources Fund IV ("Sentient"). The first note was dated September 23, 2011 with a principal of $2.5 million and a maturity date of October 1, 2012. The second note was dated April 30, 2012 with a principal of $2.5 million and a maturity date of May 1, 2014. The third note was dated August 31, 2012, the principal was $1.5 million and the maturity date was September 1, 2014.

10 In September 2012 there were discussions between Andover, Enirgi and Chief in regards to a potential joint venture, with the possibility that Enirgi would take majority ownership of Andover. A memorandum of understanding was executed and Enirgi commenced a process of due diligence. According to Enirgi, the due diligence revealed a complex joint venture agreement between Chief and another company. Ultimately, in March 2013, the parties were not able to agree on terms that were commercially acceptable to Enirgi. On March 27, 2013 Sentient assigned the above three promissory notes to Enirgi including all of the rights and obligations of Sentient under the terms of the notes. These notes are the subject of the current applications. According to Enirgi, it made a reasonable business decision to cease discussions with Enirgi, it became the assignee of the three promissory notes and it then sought repayment of the first promissory note.

11 Andover had not paid the first promissory note at this time, March 2013 (and it had not been paid up to the date of the hearing of these applications). According to Andover, the reason it was not paid on the due date was because there was an expectation that Sentient and then Enirgi would become a partner of Andover in the joint venture (or something more significant) and discussions on this were taking place as late as January 2013. The expectation of all parties, according to Andover, was that any agreement would have included cancellation of the first promissory note. Andover says Enirgi knew this and agreed to it.

12 By letter dated April 5, 2013 Enirgi advised Andover of the assignment of the notes from Sentient to it and that the full amount of the first note (with a maturity date of October 1, 2012) remained outstanding. The letter also expressly put Andover on notice that demand for repayment could occur at any time. According to Andover, Enirgi's demand was made at a meeting in Toronto in May 2013. Andover describes the demand from Enirgi as a "shock" because Andover believed Enirgi acquired the notes from Sentient as part of a process to become a partner with Andover. Because of the short demand period, three days, Andover had no ability to meet the demand. This was the beginning of Enirgi becoming "very aggressive", according to Andover.

13 In a letter dated May 28, 2013 Andover advised Enirgi that it was making its best efforts to secure funding to repay the first promissory note. On May 30, 2013 Enirgi again demanded repayment of the first promissory note. In a letter of that date Enirgi advised Andover that failure to pay would be considered default and the second and third notes would become immediately due and payable. Enirgi takes the position that, by application of the wording of the other two notes, they are now due and owing. As above, the total for all three notes is $6.5 million and the due date for the second

and third notes are May 1, 2014 and September 1, 2014, respectively. Whether Enirgi is correct in its interpretation of the notes and, therefore, all three notes are now due and owing is not an issue to be decided at this time.

14 At the end of May 2013 Andover received $1.7 million as a result of a private placement. Enirgi objects to the fact that Andover did not make prior public disclosure of Enirgi's demand letter prior to closing the private placement. Andover did not use the funds from the private placement to repay the first note. There is a dispute between the parties as to how the $1.7 million was used.

15 In a letter dated May 31, 2013 Andover advised Enirgi that it was expecting to receive funds from Chief greater than the amount of the first promissory note. The letter also offered a written undertaking to pay the first promissory note no later than September 3, 2013. On June 3, 2013 Enirgi demanded repayment of the first note, for the third time.

16 Enirgi commenced this action on June 4, 2013 seeking to recover the total amount of the three promissory notes. At the end of July 2013 Andover filed affidavit evidence that it was engaged at the time in negotiations with third parties to raise funding to pay the $2.5 million of the first promissory note. This payment was expected to occur on or before August 22, 2013. On August 8, 2013 the parties agreed to a Consent Order in the following terms:

> . . .
>
> BY CONSENT the Defendant [Andover] is required to pay the Plaintiff [Enirgi] the amount of CAD $2,604,000 on August 22, 2013 and if that amount is not paid by the Defendant to the Plaintiff as of August 22, 2013 this order shall for all purposes be of the same effect as a judgment of This Honourable Court for the payment of CAD $2,604,000 by the Defendant to the Plaintiff;
>
> . . .

17 Andover says it agreed to the Consent Order because it expected to receive the funds to pay the Order. However, Enirgi obstructed the negotiations that were ongoing for the loan. Enirgi says that Andover's actions were misleading. These and other disputes between the parties are discussed below.

18 According to Enirgi, Andover avoided having to meet its obligations pursuant to the first promissory note and the August Consent Order and this resulted in Enirgi losing confidence in Andover. Disclosure of information from the trustee was sought by Enirgi but, according to their submission, only very limited information was provided with regards to Andover's prospects and intentions. For example, Enirgi characterizes a September 6, 2013 letter from Andover as unresponsive and inconsistent with previous statements made by Andover. Enirgi also takes issue with a cash flow statement prepared by the trustee and it is submitted by Enirgi that subsequent requests for disclosure were also not complied with. Enirgi responds, in part, by saying that, as a result of a sophisticated tracking system, Andover has information available to it at a level of detail that is not normally available.

19 As well, on September 4, 2013, Enirgi sent Andover a proof of claim and requested that Andover approve the claim. The claim was for payment of all three promissory notes as well as court order interest with respect to the first promissory note. In a letter dated September 12, 2013 the trustee acknowledged Enirgi's proof of claim but denied that the second and third promissory notes were due and payable. Further, according to the trustee, the proof of claim should be amended accordingly or it would be denied.

20 On August 22, 2013 Andover filed a notice of intention to make a proposal under s. 50.4(1) of the *BIA* and a trustee was appointed. It would have been open to Enirgi to enforce the judgment described in the August 8, 2013 Consent Order the following day, August 23, 2013. The notice listed all of the creditors of Andover and the total is $7,476,961.43. Enirgi is listed as the largest single creditor of Andover with a claim of $6.5 million.

21 During the hearing of these applications on September 24, 2013 counsel for Andover presented an affidavit filed the same day. Attached to the affidavits were two short emails and a letter from the president of Ophir Minerals LLC ("Ophir") in Payson Utah, U.S.A. The letter states:

> The following is a letter stating the intentions of Ophir Minerals LLC and Andover Ventures.. In an attempt to help secure the future of Andover Ventures, Al McKee, CEO of Ophir Minerals LLC, is in the process of securing a three dollar million loan ($3,000,000) privately. This loan will be provided to Gordon Blankstein, Operating Manager for Andover Ventures. This loan will be considered prepayment of royalties due to Andover Ventures through mining operations of Ophir Mineral LLC.; The repayment of the loan will be deducted from the royalties to be paid. The purpose of the loan is to assist in the future financial security between the two companies to ensure future business operations.
>
> [Reproduced as written].

22 Andover relies on this letter as a basis for meeting its obligation to pay the first promissory note in the amount of $2.5 million. Enirgi points to the use of "in the process" in the letter and submits that the letter is of little weight.

23 At the conclusion of argument I was advised by counsel that Andover's proposal expired that day, September 24, 2013. I extended the proposal to October 4, 2013.

Analysis

Review of the evidence

24 There are some significant differences between the parties about the facts in this case. Some of these are portrayed by one party as evidence of bad faith on the part of the other party. These are primarily set out in original and reply affidavits from Gordon Blankstein, the CEO of Andover, and Robert Scargill, the North American Managing Director of Enirgi. There are the usual difficulties preferring one version of events over another on the basis of affidavit evidence. A full trial would be necessary to fully and conclusively decide these issues and this matter was set down for two hours, presumably because of the need to hear at least the application by Andover on the day its proposal expired.

25 It is not in dispute that Enirgi holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover. One of the notes, in the amount of $2.5 million was due on October 1, 2012 and it has not been paid for the reasons discussed below. Enirgi's right to have the other two notes paid out is in dispute since they are due in 2014; that dispute is not part of the subject applications. All three notes are unsecured, non-interest bearing instruments.

26 In April or May 2013 Enirgi demanded payment of the first note ($2.5 million). Enirgi made a second demand in May 2013 and a third in June 2013.

27 In June 2013 Enirgi commenced this action and in August 2013 Andover filed a notice of intention to file a proposal pursuant to s. 50.4(1) of the *BIA*. A trustee was appointed. A Consent Order of this court, dated August 8, 2013, stated that Andover was to pay an amount of $2,604,000 to Enirgi on August 22, 2013.

28 Andover has not paid the $2.5 million due on the first promissory note (or the amount of $2,604,000) for the reasons discussed below.

29 I set out some of the factual differences between the parties as reflected in the affidavit evidence and my conclusions on that evidence as follows:

> (a) Mr. Blankstein, on behalf of Andover, deposes that in May 2013 Enirgi issued an Insider Report advising the public of its demand on the first promissory note. According to Mr. Blankstein there "was no apparent

legal basis to do so" and the directors of Andover "considered this a move to deflate Andover's share value and curtail its ability to raise funds."

In reply Mr. Scargill, with Enirgi, deposes that it "did not issue an insider report or otherwise advise the public that it had made demand on the first note at or about the time it made such demand on May 23, 2013." Further, "the first public announcement of the fact of the demand was made by Andover on June 5, 2013 only after Enirgi had commenced legal proceedings."

The result is that I am asked to prefer one person's affidavit evidence over another: either Enirgi issued an insider's report with the information of its demand, as deposed by Mr. Blankstein, or it did not, as deposed to by Mr. Scargill. However, since there is no evidence of an insider report with the statement in question I am unable to agree with Andover that such a report exists.

(b) There were negotiations between Andover and Enirgi (and Chief) in October 2012 about a potential joint venture. A memorandum of understanding was signed but, following due diligence by Enirgi, there was no agreement on the joint venture.

According to Mr. Blankstein the prospect of these negotiations being successful (as well as previous negotiations to a similar end with Sentient) was the main reason that the first note was not paid. It was anticipated, by Andover at least, that any joint venture agreement would include purchase of stock in Andover and cancellation of the first note. There were "verbal assurances" from Sentient and Enirgi that there was no intention to make demand on the note and it was intended to convert the note as part of a venture agreement. Further, according to Andover, the demand on the first note was the beginning of a very aggressive campaign by Enirgi to ultimately get access to the assets of Andover, assets which were and are worth significantly more than the first note or all three notes.

In his affidavit evidence Mr. Scargill agrees that there were negotiations as described by Mr. Blankstein. However, they ended when he (Mr. Scargill) asked Mr. Blankstein to consider all or majority ownership by Enirgi in Andover. This was the "only possible involvement" by Enirgi in Andover, according to Mr. Scargill. He asked Mr. Blankstein to consider "what sort of transaction" that he and Andover might be interested in "but no transaction was ever proposed by Mr. Blankstein outside of a sale by him and his family of their equity ownership stake." Since there was "no realistic likelihood" of a transaction, Enirgi decided to cease its efforts and turn its attention on being repaid for the first note.

It is clear that negotiations between Andover and Enirgi did not work out. It is also clear that Andover was surprised that the three promissory notes were assigned from Sentient to Enirgi. The evidence does not suggest that either party was more responsible than the other for the lack of an agreement (assuming there is some legal significance to that issue).

Mr. Scargill does not deny or mention the point raised by Mr. Blankstein that Enirgi agreed not to demand payment of the first note. Therefore, I conclude that there was at least acquiescence between the parties at the time of their negotiations that cancellation of the first promissory note would be part of any agreement. This conclusion also explains why payment on a note worth $2.5 million and due in October 2012 was not demanded by Sentient and then Enirgi until after the negotiations failed.

In any event, the negotiations did fail and any commitment not to demand payment on the note ended. There is no evidence of any collateral agreement that amended the terms of payment and, therefore, the terms of the notes applied. That was obviously a shock to Andover's cash flow but it was permitted under the terms of the note, including the short period to make payment.

(c) As above, I am not determining the issue of whether the second and third promissory notes are now due and payable because the first note was not paid.

A related matter is that Enirgi says that one of the deficiencies by Andover in disclosure of information relates to the Proof of Claim sent by Enirgi to Andover in September 2013. It required the trustee of Andover to confirm that the second and third notes were due and payable. The trustee declined to do so as long as the proof of claim included all three notes.

Since the issue of whether the second and third notes are now due is very much in dispute, I can find nothing objectionable in the trustee's response.

(d) In May 2013 Andover obtained about $1.7 million from a private placement. According Mr. Scargill, none of this money was used to pay the first promissory note. Instead, it was used to repay a shareholder loan and to settle a wrongful dismissal lawsuit. Enirgi is concerned that all of the money from the private placement has been used for purposes other than payment of the first note.

Mr. Blankstein agrees that Andover received $1.7 million from a private placement. However, he deposes that Mr. Scargill "neglects to include" all of the facts although Mr. Scargill "knew all about" the placement "from its inception" and Enirgi "was invited to participate in it." Specifically, Mr. Scargill was "fully aware" of the payment of the shareholder loan (in the amount of $375,000). He was told about it at the time and he "never indicated any objection" to it then. Further, the funds from the placement were committed in April 2012 to "pay certain items" and for the operating expenses of Andover "for the next several months, well before the sudden demand for repayment by Energi [sic] on May 23, 2013." Despite knowing that Andover was to receive the money from the private placement at the time of its demand, Enirgi raised no complaints or allegations until Mr. Scargill's affidavit, filed September 17, 2013.

Mr. Blankstein also deposes that the former employee involved in the lawsuit was an employee of Chief and it made the settlement. The settlement was for $275,000 but it is to be paid in instalments and only $50,000 has thus far been paid. Chief is responsible for paying the balance.

Overall there was a private placement of about $1.7 million dollars that was received by Andover before its proposal was filed. It was used to pay for a shareholder loan and for operating expenses and some of these at least were committed to as early as April 2012. Further, the wrongful dismissal payment was a matter involving Chief, rather than Andover, and only $50,000 has been paid by Chief. I conclude that Mr. Scargill did not have all of the pertinent information before him when he gave his affidavit evidence.

(e) According to the affidavit of Mr. Scargill, Andover's agreement to the August 2013 Consent Order:

> ... was calculated to encourage Enirgi to consent to the Judgment and mislead Enirgi into believing that Andover would be in a position to pay the Judgment as required and that available funds would not be used in the interim, for the Preferential Payments [the private placement, discussed above] or other improper purposes.

On the other hand, Mr. Blankstein deposes that Andover agreed to the Consent Order because it thought at the time that it was to receive $3 million as a result of mortgaging assets of its Utah operations, through Chief. However, the mortgage did not complete. Efforts to obtain an unsecured loan were then unsuccessful. Mr. Blankstein has also deposed that in the summer of 2013, counsel for Enirgi contacted counsel for Andover, "[d]espite there being no apparent legal basis for doing so", and "insisted that Chief entering into a mortgage transaction would violate the agreements between Energi [sic] and Andover and was prohibited." This left Mr. Blankstein "scrambling to raise an unsecured loan in a very short time frame."

In argument, Enirgi described Mr. Blankstein's evidence on this issue as misleading. The basis of this is that the correspondence between counsel was without prejudice, it occurred on or about June 21, 2013 and, therefore,

"the suggestion that Andover only learned after August 8, 2013 [the date of the Consent Order] that Enirgi refused to consent is clearly misleading."

From this I take it that Enirgi did contact Chief to say any mortgage by Chief would violate agreements between Andover and Enirgi. This took place before the date of the Consent Order. On its face it supports the contention by Andover that Enirgi has obstructed its efforts to obtain funding although there is no evidence or argument before me to decide whether Enirgi was correct in taking the view it did with Chief.

(f) Enirgi asserts, through Mr. Scargill, that Andover is attempting to restructure its assets and this is evidenced from its "continued failure to engage Enirgi" by refusing to provide information regarding its plans or opportunities, despite Enirgi's repeated requests for information. Mr. Blankstein replies by deposing that Andover is not attempting to restructure; [i]t is simply attempting to gain some time and distance so as to be able to pay Enirgi."

All that can be said on this point is that there is no evidence that Andover is restructuring its assets. Mr. Scargill is concerned that is happening or it is going to happen but the evidence here does not support that conclusion.

(g) In argument Enirgi submits that Andover has been "unresponsive" to requests for information about the proposal process being followed by Andover. For example, Mr. Scargill deposes that Andover, in correspondence in August 2013, did not adequately address the concerns of Enirgi. Similarly, according to Enirgi, Andover has provided a deficient cash flow statement and has generally provided inadequate information. Enirgi also submits that Andover has given only "vague assertions" and inconsistent information about its assets and its potential plans.

For its part, Mr. Scargill deposes that Andover asked Enirgi by letter of September 6, 2013 (through counsel) to present "whatever proposal or suggestion" Enirgi might have and Andover would be "more than happy to consider same." No reply was received.

Mr. Blankstein also deposes that Andover provided information to Enirgi about all of Chief's information, files and data with the agreement by Enirgi that it would be returned. It was not returned. In reply Mr. Scargill deposes that "by oversight" the information was not returned and it was returned on or about September 18, 2013.

The evidence is that both parties have been tactical in their requests for information and their responses to those requests. There has been some unresponsiveness and some vagueness as the parties have positioned themselves for their competing applications. I can find no legal or other issue that is relevant to those applications.

(h) In its 2013 financial statements Andover stated that it had filed a notice "to seek creditor protection" and it was done "to ensure the fair and equitable settlement of the Company's liabilities in light of the legal challenges launched" by Enirgi. According to Enirgi the reference to "legal challenges" is incorrect and this statement by Andover demonstrates that the notice of proposal was a "purely defensive" act on the part of Andover.

I take it as beyond dispute that Andover has been operating in a defensive manner since the demand on the first note was made in May 2013. Further, I accept that its notice of intention to file a proposal is also defensive. As for what are "legal challenges" that is a phrase that is capable of many meanings.

(i) Andover alleges that Enirgi has obstructed its efforts to obtain financing to pay the first promissory note of $2.5 million. Mr. Blankstein deposes that, to this end, Enirgi has done the following (in part, this is a summary of some of the above issues): made an abrupt demand for payment (after it and Sentient had given verbal assurances that there would be no demand); made demands on the second and third promissory notes that are payable in 2014; interfered in attempts by Andover to enter into a joint venture with Ophir without any legal basis to do so; and disrupted a mortgage transaction between Andover and Chief in the summer of 2013.

Mr. Scargill, in reply, deposes that neither he nor anyone ("after due inquiry") has been in contact with Ophir.

The allegation by Andover about Ophir is a vague one and I accept Mr. Scargill's evidence on it. I have discussed the issues of Enirgi's abrupt demand on the first promissory note and the allegation that Enirgi disrupted a mortgage arrangement between Andover and Chief above. Enirgi interprets the language of the three promissory notes to mean that all are due on default of the first one. That is a legal issue that is not before me.

(j) Enirgi attempts to minimize the assets of Andover and maximize its debts. There may well be more detailed evidence that supports a different valuation of the assets than presented by Andover. However, on the evidence in this application, I accept that Andover is cash poor and asset rich.

30 Despite vigorous argument to the contrary by both parties I am unable to find bad faith on the part of either party. There is the apparent communication by Enirgi to Chief about a possible mortgage arrangement for Andover which reflects the aggressive approach that Enirgi has taken to Andover. That represents the aggressiveness of Enirgi rather than any bad faith.

31 Clearly there has been a falling out between the parties and it is also clear that Andover is vulnerable because of its lack of cash and Enirgi is being aggressive in seeking repayment of, at least, the first note.

The applications

32 Andover now seeks an extension of its proposal pursuant to s. 50.4(9) of the *BIA* and Enirgi seeks termination of Andover's proposal pursuant to s. 50.4(11) of the *BIA*.

33 I set out the two provisions of the *BIA* at issue as follows;

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.

...

Court may terminate period for making proposal

50.4(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

34 Each party says that its application should prevail over the other's application. I will review the case law presented by the parties on this issue as well as some interpretive issues under s. 50.4(9) and s. 50.4(11).

The approaches in Cumberland and in Baldwin

35 In a decision relied on by Enirgi, Mr. Justice Farley of the Ontario Court of Justice denied the appeal of a registrar's decision that had dismissed an application for an extension of time by debtors under s. 50.4(9): *Baldwin Valley Investors Inc., Re*, [1994] O.J. No. 271 (Ont. Gen. Div. [Commercial List])). The court noted that the test under 50.4(9)(b) was whether the debtors "would likely be able to make a viable proposal if the extension being applied for was granted." "Likely" did not mean a certainty and, using the Oxford Dictionary, it was defined as "such as might well happen, or turn out to be the thing specified, probable ... to be reasonably expected." Applied to the facts, the conclusion was that it was not likely the debtors would be able to make such a proposal since they had only submitted a cash flow statement. At para. 4, Mr. Justice Farley concluded "I do not see the conjecture of the debtor companies' rough submission as being 'likely'". Further, the court noted at para. 6 that the debtors did not even attempt to meet the condition of material prejudice under s. 50.4(9)(c) and the debtor was changing inventory into cash.

36 The court also noted that the registrar (who made the decision being appealed) focused on the fact that the creditor had lost all confidence in the debtor. The creditor held a substantial part of the creditor's debt. Mr. Justice Farley pointed out, at para. 3, that that was not the test under s. 50.4(9)(b):

> This becomes clear when one examines s. 50.4(11)(b) and (c); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(b) and 11(b)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(c) but with no corresponding clause in s. 50.4(9)).

37 Enirgi relies on this statement for its submission that its application for termination under s. 50.4(11) should prevail over the application of Andover under 50.4(9).

38 However, that statement was made as a comment on the previous registrar's reliance on the fact that the creditor (who held significant security) would not vote for any proposal. Mr. Justice Farley in *Baldwin* pointed out that was not the test under 50.4(9). He reasoned that this was clear because Parliament had distinguished between a situation of a viable proposal under s. 50.4(9)(b) and s. 50.4(11)(b) from a situation where it is likely that the creditors will not vote for a proposal no matter how viable, under s. 50.4(11)(c). In s. 50.4(9) there was no clause corresponding to 50.4(11)(c). The result is that this part of *Baldwin* does not support Enirgi's submission that an application under s. 50.4(11) supersedes one under s. 50.4(9).

39 The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under 50.4(11), unlike the subject case. At para. 8, the court did contrast the provisions by saying that, if the debtor had been successful in its application to extend, it would have been a "Pyrrhic victory" because the creditor bank would have been able "to come right back in a motion based on s. 50.4(11)(c)."

40 This is broad language but I acknowledge that it is capable of meaning that 50.4(11) is to supersede s. 50.4(9). However, such an interpretation would seem to be inconsistent with the other reference in *Baldwin* that the two provisions apply to different situations (discussed above). I also note that *Baldwin* only decided the merits of the s. 50.4(9) application, there was no application under s. 50.4(11) and there was no decision in favour of the creditor on the basis of that provision. The above statement was, therefore, *obiter*.

41 Another decision relied on by Enirgi is *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List])) where a creditor sought to terminate a debtor's proposal after the notice of intention was filed. There does not appear to have been an application by the debtor to extend the proposal under s. 50.4(9), only an application under s. 50.4(11). Mr. Justice Farley found there was no indication what the proposal of the debtor was to be; "... there was not even a germ of a plan revealed" only a "bald assertion" and "[t]his is akin to trying to box with a ghost" (paragraph 8). The application for termination under s. 50.4(11) was allowed.

42 The court noted, at para. 5, that the *BIA* was "debtor friendly legislation" because it provided for the possibility of reorganization by a debtor but it (and the *Companies Creditors Arrangement Act*, R.S.C. 1985 c. C-36) "do not allow debtors absolute immunity and impunity from their creditors". Concern was expressed about debtors too frequently waiting until the last moment, or beyond the last moment, before thinking about reorganization. The automatic stay available to a debtor by filing a notice of intention to file a proposal was noted. However:

> ... [the] *BIA* does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case [the creditor] is utilizing s. 50.4(11) to do so.

43 Enirgi relies on this statement in its submission that its termination application should proceed over the extension application of Andover. This is broad language but I acknowledge Enirgi's submission that this statement provides support for its position that s. 50.4(11) permits it to "cut short" a stay or extension under s. 50.4(9).

44 The court also described s. 50.4(11)(c) as permitting termination of a proposal if the debtor cannot make one before the expiration of the "period in question, that will be accepted by the creditors ..." Mr. Justice Farley concluded that s. 50.4(11) deals specifically with the situation "where there has been no proposal tabled." It provides that there is "no absolute requirement" that the creditors have to wait to see what the proposal is "before they can indicate they will vote it down" (paragraph 9). Enirgi relies on this statement.

45 In my view, this statement goes no further than saying what is self-evident: under s. 50.4(11)(c) any proposal must be accepted by the creditors. However, as explained in *Baldwin*, that is not a requirement under s. 50.4(9). *Cumberland Trading Inc.* also says that the making of the proposal may be still to come but a creditor can exercise its rights under s. 50.4(11)(c). I do not agree with Enirgi that this statement in *Cumberland Trading Inc.* supports its submission.

46 From the above I conclude that there is some support for the submission of Enirgi that I should consider (and allow) its application under s. 50.4(11) over that of Andover under s. 50.4(9). There is the *obiter* in *Baldwin* that a successful application under s. 50.4(9) would be a Pyrrhic victory because a creditor could come right back with an application under s. 50.4(11). And there is the statement in *Cumberland Trading Inc.* that an application under s. 50.4(11) can cut short an application under s. 50.4(9).

The approach in Cantrail

47 A quite different view is set out in a more recent British Columbia case, *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351 (B.C. Master) [*Cantrail*] a decision relied on by Andover. Master Groves, as he then was, was presented with a submission by the creditor in that case that it intended to vote against any proposal from the debtor because it had lost faith in the debtor. The creditor was one of 91 creditors and its share of the total debt was not explained. This is essentially the position of Enirgi.

48 In response to the creditor's submission that it could vote under s. 50.4(11) against any proposal of the debtor under s. 50.4(9) the court said:

> 14. If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type [sic] of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.
>
> 15. If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.
>
> 16. If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

49 Since there was no evidence of bad faith on the part of the debtor in *Cantrail* and no determination of what the actual proposal would be, Master Groves allowed the application under s. 50.4(9) to extend the proposal and dismissed the application of the creditor under s. 50.4(11) to terminate the proposal (paragraphs 15-17). This is the result sought by Andover but opposed by Enirgi.

50 Master Groves also adopted the view at para. 11 of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.)) that the intent of the *BIA* is that s. 50.4(9) and s. 50.4(11) should be judged on a rehabilitation basis rather than on a liquidation basis. And, in *Cantrail*, at para. 4, the court concluded that an objective standard must be applied to determine what a reasonable person or creditor would do, as was done in *Baldwin*.

51 Enirgi distinguishes *Cantrail* on two grounds. First, it is submitted that at para. 9 *Cantrail* contains the inaccurate statement that "s. 50.4(11) is the mirror of 50.4(9)". As well, there was no discussion of *Cumberland* in *Cantrail*.

52 I accept that, while there are a number of similarities between the two sections, there is one significant difference: under s. 50.4(11)(c) a creditor has a veto over any proposal. S. 50.4(9) does not contain such a veto and it is not a mirror to the extent of being exactly the same as s. 50.4(11). In my view this comment on a very small part of *Cantrail* does not affect the broader meaning of that judgement. And it is true that *Cumberland* was not discussed in *Cantrail* although the submission of the creditor in *Cantrail*, as recorded in the oral judgement, is in language very similar to that used in *Cumberland*.

53 Another decision relied on by Andover as being similar to *Cantrail* is *Plancher Heritage Ltée / Heritage Flooring Ltd., Re*, [2004] N.B.J. No. 286 (N.B. Q.B.) where a debtor filed an application under s. 50.4(9) for an extension and the creditor filed an application for termination under s. 50.4(11). The court allowed the application for an extension. The *Cumberland* and *Baldwin* decisions were noted but in *Plancher Heritage Ltée / Heritage Flooring Ltd.* the evidence was that the creditor would be paid out and, in any event, the creditor was not in a position to veto any proposal. *Cantrail* was also followed in *Entegrity Wind Systems Inc., Re*, 2009 PESC 25 (P.E.I. S.C.) although the facts in *Entegrity Wind Systems Inc.* did not include an application by the creditor under s. 50.4(11). The objective standard discussed in *Cantrail* was also adopted in *Convergix Inc., Re*, 2006 NBQB 288 (N.B. Q.B.).

Cumberland or Cantrail?

54 The result of the above is that there are different approaches to situations where there are competing applications under sections 50.4(9) and 50.4(11).

55 The comments from *Cumberland* discussed above suggest that an application by a creditor under s. 50.4(11) can "cut short" an application under 50.4(9) and there is no absolute requirement that a creditor has to wait to see a proposal before voting it down. And in *Baldwin* there is a comment, in *obiter*, that any successful application under s. 50.4(9) would be a Pyrrhic victory because the creditor could "come right back" with an application under s. 50.4(11).

56 On the other hand, in *Cantrail* the court decided that there should be an extension for a viable proposal, not yet formulated, under s. 50.4(9) even though the creditor has lost faith in the debtor and has said it will vote against any proposal.

57 As a matter of interpretation of the *BIA* I consider that s. 50.4(9) and 50.4(11) set out distinct rights and obligations. In the first case a debtor is entitled to an extension of time to make a proposal; in the second case a creditor can apply for the termination of the time for making a proposal. As I understand the submission of Enirgi the fact that it is the primary creditor (by some considerable margin), that it has lost confidence in Andover and that it will not accept any proposal from Andover supports consideration of its application for termination under s. 50.4(11).

58 The problem with this submission is that it does not reflect the factors under 50.4(9) for granting an extension of time for a proposal. A creditor under this provision does not have the rights that Enirgi seeks over the debts of Andover. Those rights are in s. 50.4(11)(c) but that is a different inquiry. Indeed, one effect of the submission of Enirgi is to conflate s. 50.4(9) and s. 50.4(11). I recognize the comments from *Cumberland* and *Baldwin* that may support a contrary view. However, recognition must be given to the differences between the provisions in dispute and that contrary view does not do so. In my view the analysis and conclusions in *Cantrail* is to be preferred.

59 I add that there are some situations where an application for an extension is overtaken by an application for termination. In *Cumberland* there was not even a germ of a proposal from the debtor for the analysis under s. 50.4(9). In that circumstance the court then proceeded to the other application before it from the creditor under s. 50.4(11).

60 Other cases relied on by Enirgi are of a similar kind. In *Baldwin* the proposal was conjecture and rough (and the debtor had not even considered the issue of any material prejudice to the creditor from the proposal). Similarly, in *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863 (Ont. Bktcy.)) and *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Alta. Q.B.) the courts proceeded to a determination of the s. 50.4(11) application after finding there was no viable proposal. In *Triangle Drugs Inc., Re*, [1993] O.J. No. 40 (Ont. Bktcy.)) the creditors had a veto and they had actually seen the proposal. The court imported principles from the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, concluded that it was fruitless to proceed with a plan that is doomed to failure and allowed the creditor's application under s. 50.4(11). In *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.)) there was no good faith or due diligence on the part of the debtor and the court proceeded to consider and allow the creditor's application under s. 50.4(11).

61 In my view, these cases represent recognition of the procedural and business realities of the various situations rather than a legal conclusion that an application for termination will supersede an application for an extension.

62 It follows that I find that Andover is entitled to have its application under 50.4(9) considered on its merits. If it is not meritorious then it is logical and consistent with the authorities to proceed with the application by Enirgi under 50.4(11).

The application by Andover under s. 50.4(9)

63 With regards to the merits of Andover's application under s. 50.4(9) all of the following issues must be decided in its favour. Has it acted in good faith and with due diligence? Is it likely it would be able to make a viable proposal if an extension is granted? And, if an extension is granted, would a creditor be materially prejudiced?

64 With regards to good faith and due diligence *N.T.W.* says that it is the conduct of Andover following the notice of intention in August 2013, rather than its conduct before then, that is to be considered. I have found above that the evidence does not support a finding of bad faith against either party.

65 With regards to due diligence, since August 2013 Andover has obtained the September 24, 2013 letter from Ophir that says the latter "is in the process" of finalizing a loan of $3,000,000 to Andover. This is not a firm commitment of funds and nor does it need to be under s. 50.4(9); it does reflect some diligence on Andover's part. Mr. Blankstein also deposes that he has been having discussions with another party but he cannot reveal the name of that party because he is concerned that Enirgi will obstruct those discussions, as they did with Chief in June 2013. This latter information is not particularly helpful. Nonetheless I conclude that Andover has acted with sufficient due diligence.

66 Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not be a certainty and "likely" means "such as might well happen."(*Baldwin*, paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

67 I turn to a review of the assets of Andover in order to consider whether they provide some support for the viability of any proposal from Andover. The evidence for this review is from the affidavit of Mr. Blankstein.

68 Alaska (wholly owned by Andover) is expecting, as a result of preliminary discussions, a N143101 Resource Calculation for a property to show approximately 1,200,000,000 pounds of copper with a gross value of about $3,600,000,000. An immediate net value of $60,000,000 and $120,000,000 is estimated, depending on the world price of copper. The State of Alaska is confident enough in the property that it has financed a road to it. In a separate property, Alaska has an estimated mineralization of 4,000,000 tons of 4.5% copper and Andover has spent approximately $10,000,000 in developing this project. Alaska is solvent and up to date in its financial obligations.

69 With respect to Chief (83% owned by Andover), it is also solvent and generally up to date on its obligations. Andover purchased 65% of the shares of Chief in 2008 for $8,700,000 with an environmental claim against it in the amount of $60,000,000. That claim has been negotiated down to a smaller number and the current amount due is $450,000, with half due in November 2013 and the other half due in November 2014. This has increased the value of Chief significantly, according to Andover.

70 Financial statements in March 2013 showed Chief had $33,000,000 in equity, based on land and equipment (not mineral deposits). It owns more than 16,000 acres of land in Utah and leases an additional 2,000 acres. Plant and equipment have been independently appraised at $19,200,000. Andover estimates a cash flow in the next year of $7,000,000 to $11,000,000 to Chief.

71 Andover and Chief are also presently involved in a joint venture with Ophir regarding deposits of silica, limestone and aggregate on property owned by Chief. Production will commence in November 2013 and sold to customers of Ophir. Ophir is spending $3,000,000 on exploration and development and production equipment has been ordered. Andover expects to receive from these two mines and a third (a joint venture with Rio Tinto) $7,200,000 to $10,900,000 in annual production net revenues commencing at the end of 2014.

72 Chief has another property called Burgin Complex. At one time Enirgi was apparently interested in this specific property. A Technical Report, dated December 2, 2011, shows an expected cash flow of $483,000,000 in today's metal prices.

73 By way of a summary, publicly available financial statements in March 2013 report that Andover had $42.5 million in assets and $9.1 of liabilities.

74 Enirgi generally minimizes the asset value of Andover but it does not dispute the specific numbers above. In my view these are impressive numbers and they reflect a strong asset base for Andover. I accept that they do not demonstrate the cash at hand to pay the first promissory note and at this time Andover remains asset rich and cash poor. But it is not "trying to box with a ghost" (as in *Cumberland*) to conclude that the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a $3,000,000 cash loan from Ophir and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen.

75 Enirgi points out that it holds the largest portion of unsecured debt of Andover (more than 80%) and it submits that this gives them a veto over any proposal. That may take place but thus far there is no proposal and Enirgi will have to make a business decision about its response in the event one is presented. Again, as an issue under s. 50.4(9), a proposal does not have to be acceptable to Enirgi. As well, I also note comments from the Court of Appeal, in the context of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, that questioned the legal basis of a creditor forestalling an application for a stay and whether the court's jurisdiction could be "neutralized" in that way: *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) at para. 26, cited in *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]), at paras. 40-41.

76 The third requirement under s. 50.4(9) is that no creditor should be materially prejudiced if an extension is granted. As emphasized in *Cantrail* at para. 21 the test is not prejudice but material prejudice. It is also an objective test: *Cumberland* at para. 11. In the subject case there is no evidence that the security in the first promissory note would be less if an extension was granted. Enirgi asserts that Andover is restructuring its assets but there is no evidence of that and, in the event it occurs, remedies are available on short notice. Unlike in *Cumberland*, the debtor here is not converting inventory into cash. It is true that the note (or notes) is non-interest bearing but Enirgi knew that when it became an assignee in March 2013 and the note had not been unpaid since October 2012. I conclude that there is some prejudice to Enirgi but not material prejudice.

77 Finally, I note in *Cantrail* and *N.T.W.* that the objective of the *BIA* is rehabilitation rather than liquidation. Andover has a nominal payroll but liquidation of Andover and its assets would obviously affect a number of other companies and be a complicated and protracted affair. It may come to that but on the basis of the evidence available at this time I conclude that an extension of Andover's proposal should be granted.

78 Since Andover has met the requirements of s. 50.4(9) I find that its application under that provision must be allowed. It should be given the opportunity to make a proposal and an extension of time of 45 days is granted to do so.

Summary and conclusion

79 In cases such as this where there are competing applications under s. 50.4(9) and s. 50.4(11) the debtor is entitled to present a proposal under the former provision if it is likely a viable proposal can be presented and the other requirements of s. 50.4(9) are met. In that event the debtor should have the opportunity to present a proposal. A creditor has the ability under s. 50.4(11) to decide whether a proposal is acceptable but does not have that right under s. 50.4(9).

80 In this case Andover has significant assets and it is likely that it will be able to present a viable proposal. As well, there is no evidence of the part of Andover of bad faith, it has acted generally in good faith, it has acted with due diligence in attempting to construct a proposal and there is no material prejudice to Enirgi if an extension is granted. In the event that Andover presents a proposal Enirgi will have then have the opportunity to decide what its position will be on it. This will be a business decision rather than a matter under s. 50.4(11).

81 The application by Andover under s. 50.4(9) is allowed. It is entitled to an Order extending the time for filing a proposal under Part III of the *BIA* for a period of 45 days to give it an opportunity to present a proposal.

82 The application of Enirgi under s. 50.4(11) is dismissed with leave to reapply.

83 I considered the alternate application of Enirgi to appoint a receiver under section 47.1 of the *BIA*. I note that there is a trustee appointed as part of the notice of intention. He apparently disagreed with Enirgi about what should be in a proof of claim document but for defensible reasons. There is otherwise no evidence that something more than a trustee is warranted at this time.

84 I remain seized of this matter and any subsequent applications related to the insolvency of Andover. I am available on short notice if there is a need to move expeditiously. Costs will be in the cause.

Application by debtor allowed; application by creditor dismissed with leave to reapply.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF FORTE EPS SOLUTIONS INC., A CORPORATION WITH A HEAD OFFICE IN THE TOWN OF MIDLAND IN THE PROVINCE OF ONTARIO

Court File No. 31-2253654
Estate File No. 31-2253654

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

Proceeding commenced at **TORONTO**

BOOK OF AUTHORITIES OF THE PROPOSAL TRUSTEE (RETURNABLE JUNE 14, 2017)

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