

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C. 1985, c. C-44, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
ALL CANADIAN INVESTMENT CORPORATION

NOTICE OF APPLICATION

Name of applicant: The Petitioner

To: Service List

TAKE NOTICE that an application will be made by video conference by the Petitioner at the courthouse at 800 Smithe Street, Vancouver, British Columbia, commencing on October 30, 2020 at 10:00 a.m. for the Orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The Petitioner seeks directions:
 - (a) with respect to a proposed amendment to the Petitioner's Plan of Arrangement, which received preliminary approval by Order made November 18, 2019 and was amended by Order made May 19, 2020 (the "Plan");
 - (b) authorizing the Monitor to enter into a Settlement Agreement with respect to a Notice of Hearing issued by the British Columbia Securities Commission; and
 - (c) such further and other orders as this Honourable Court deems just.

Part 2: FACTUAL BASIS

The Plan

2. On November 10, 2017 Madam Justice Adair made the initial order in these proceedings (the “Initial Order”), granting the Petitioner protection from its creditors pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”).
3. In accordance with an order made September 30, 2020 the stay of proceedings is presently scheduled to expire January 22, 2021.
4. On November 18, 2019 the court made a meeting order setting out the terms and process by which the Petitioner’s Plan would be put to creditors (the “Meeting Order”). By order made May 19, 2020 the Meeting Order was amended, in light of the COVID pandemic, to provide the Monitor with the discretion to determine if the meeting should proceed by way of audio or video conference.

Tab 121: Order made after Application dated November 18, 2019

Tab 148: Order made after Application dated May 19, 2020

5. On November 18, 2019 the Plan received preliminary approval from the court subject to the review and amendment, with the approval of the Monitor, of paragraph 4.4 and 4.5 of the draft Plan of Arrangement attached as Schedule “A” to the Notice of Application dated November 14, 2019.

Tab 109: Notice of Application filed November 14, 2019

Tab 121: Order made after Application dated November 18, 2019

6. Those paragraphs specifically dealt with:
 - (a) the granting of releases, effective as of the Plan Implementation Date (as defined in the Plan) in favour of:
 - (i) the Petitioner and its legal counsel in these proceedings;
 - (ii) the Monitor and its legal counsel in these proceedings; and
 - (iii) any person claimed to be liable derivatively through any and all of the foregoing persons.
 - (b) an injunction, effective as of the Plan Implementation Date, prohibiting the commencement or continuation of legal proceedings and other related enforcement steps, against the Petitioner in connection with any indebtedness, liability or obligation of any kind (including all contingent liabilities), whether

secured or unsecured, at the date of the Initial Order, that would be a claim provable in bankruptcy within the meaning of the BIA.

7. By order made May 19, 2020 paragraphs 4.4 and 4.5 of the Plan were amended to address the issues raised by the court.

Tab 148: Schedule "C" to Order made after Application dated May 19, 2020

8. The Plan, as presently approved, provides for a coordinated wind up and liquidation of the Petitioner's assets so as to realize the greatest possible recovery to stakeholders and the subsequent distribution of those assets in accordance with the following priorities:
 - (a) amounts due and owing under the Administrative Charge;
 - (b) amounts due and owing under the Director's Charge (it is not presently contemplated that any payments will be required);
 - (c) amounts due and owing to Creditors;
 - (d) amounts due and owing under the Representative Council Charge; and
 - (e) distribution of the balance to Preferred Shareholders.
9. Clause 4.2 of the Plan specifically addresses distributions to Creditors and provides:

4.1 Creditor Distributions

The obligations of the Petitioner to the Creditors shall be paid, settled and compromised pursuant to this Plan as follows:

- (a) *the Monitor shall make interim distributions to the Creditors, on a pro rata basis, as and when the Monitor determines, at its sole discretion, there is sufficient Distributable Cash for the purposes of making such distributions;*
- (b) *after making an interim distribution to the Creditors provided herein the Monitor shall file and serve on the Service List a creditors interim distribution certificate including the date and amount of distributions made in accordance with this Section;*
- (c) *the Monitor shall make a final distribution to the Creditors, at such time as the Monitor (at its sole discretion) is of the view that there is sufficient Distributable Cash to fully and completely pay all of the Proven Claims; and*
- (d) *after making the final distributions to the Creditors provided herein the Monitor shall file and serve on the Service List a final creditors interim*

distribution certificate including the date and amount of distributions made in accordance with this Section.

10. A “Proven Claim” is defined in the Plan as being:

1.5.43 “Proven Claim” means the aggregate amount of any and all claims held by a Creditor as determined in accordance with the provisions of the Claims Process Order.

11. Under the terms of the Claims Process Order a “Proven Claim” is defined as being:

(a) the right of any person against the Petitioner in connection with any indebtedness, liability or obligation of any kind (including all contingent liabilities), whether secured or unsecured, as at the date of the Initial Order on November 10, 2017 that would be a claim provable in bankruptcy within the meaning of the BIA (“Claim”); and

(b) which has been allowed by the Monitor, or has been deemed to be allowed by the Monitor, pursuant to the terms of the Claims Process Order.

Tab 122: Claims Process Order dated November 18, 2019

12. As a result, the amount which a Creditor is entitled to receive by way of distribution under the Plan is capped at the amount due and owing as at November 10, 2017.

13. On January 28, 2020 the Monitor reported on the claims process conducted in accordance with the terms of the Claims Process Order.

Tab 127: Monitor’s 19th Report to Court dated January 28, 2020

14. On February 18, 2020 the Monitor provided further details on certain claims addressed in the Monitor’s 19th Report.

Tab 13: Report supplemental to the Monitor’s 19th Report to Court dated February 18, 2020

The Proven Claims

15. The Monitor reviewed all of the Proofs of Claim filed in accordance with the Claims Process Order and determined to accept the following Proofs of Claim.

Creditor Name	Amount
Douglas Allan Richardson	154,333.33
James Murray Hancock	1,016,297.09
Clifford Renfrew	77,166.67
Ajit Singh Gill & Simro Gill	154,333.33
Palatee Enterprises Limited (c/o Fred Bell)	154,333.33

Christopher G. Murray	154,333.33
Econ-o-Lith Printing Ltd.	154,333.33
George Bradley Cmolik & Norah Beatrice Wallbank	154,333.33
Harper Grey LLP	4,184.89
Robert William Lockhart	205,777.76
Mervyn & Margaret Olsen	154,333.33
1083163 Alberta Ltd	517,777.72
Joan Margaret Renfrew	77,166.67
Roy Bailey	154,333.33
Wenge Yu	154,333.33
Donald H. Buchanan	154,333.33
Grover, Elliott & Co. Ltd.	1,904.44
Koffman Kalef LLP	476.00
Koffman Kalef LLP	1,036.41
Clark Wilson LLP	14,592.71
ACIC CJ Properties Ltd.	24,000.00
ACIC Financial Development Inc. ("AFDI")	205,000.00
BDO Canada LLP	4,971.50
BDO Canada LLP	30,296.70
ACIC CJ Properties Ltd. (Re: McMillan & Lattin)	<u>72,495.94</u>
	3,796,477.8

16. By order made May 19, 2020, the court:

(a) approved the Monitor's Claims Reports (of January 28, 2020 and February 18, 2020 subject only to the determination of Parkland Funding Limited's ("Parkland") appeal of the Notice of Disallowance; and

(b) confirmed that the Proofs of Claim accepted by the Monitor (outlined above) were "Proven Claims" for the purposes of the Plan and the Meeting Order.

Tab 148

17. Parkland's appeal was dismissed on June 8, 2020.

Tab 152: Reasons for Judgment dated June 8, 202

18. After receiving approval of the amendments to the Plan on May 19, 2020 it was circulated to the service list which includes certain parties approved by the Monitor, and the court, as being "Creditors" for the purposes of the Plan.

19. Certain creditors, representing approximately 40% by value of the total "Proven Claims", have raised concerns regarding the method by which their "Proven Claims" were

calculated and the proposed distribution under the Plan. In particular, those creditors have, through counsel, advised the Petitioner and the Monitor that in circumstances where it appears as though funds will be available for distribution to equity claimants (as defined in the Reasons for Judgment pronounced September 4, 2019), creditors should be entitled to recover interest (in accordance with the specific terms of the material agreements under which the “Proven Claims” arise) up to the date of payment.

20. In those circumstances the Monitor has concerns whether the Plan will be approved in its present form and seeks directions from the court.

Settlement with the BCSC

21. In January 2020 the British Columbia Securities Commission (“BCSC”) issued a Notice of Hearing against the Petitioner and Mr. Bergman, Citation 2020 BCSCCOM 22. A copy of the Notice of Hearing is attached as Appendix B to the Monitor’s 21st Report.

Tab 147

22. In essence, the Notice of Hearing alleges that:

- (a) the Petitioner and Mr. Bergman made misrepresentations and false or misleading statements in Offering Memorandums dated January 21, 2014, February 12, 2015 and June 22, 2015 (the “OM’s”);
- (b) the OM’s were provided to investors and filed with the BCSC; and
- (c) in doing so the Petitioner and Mr. Bergman acted contrary to s. 50(1)(d) and s. 168(1) of the *Securities Act*.

23. The Notice of Hearing is scheduled for a hearing November 12-19, 2020. Mr. Bergman was previously represented by separate counsel and is now acting on his own behalf.

24. Counsel for the Petitioner (on the instructions of the Monitor) initiated discussions regarding a potential resolution of the allegations against the Petitioner (only) given the concerns that the Petitioner’s financial resources could be expended in the proceedings, or if a financial penalty/sanction was imposed, which would be contrary to the interests of stakeholders.

25. On May 19, 2020 the Court authorized the Monitor to enter into settlement discussions, on behalf of the Petitioner, with respect to the Notice of Hearing and directed that in the event that the Monitor was able to negotiate a resolution which it believes is in the best interests of the stakeholders, it should seek approval from the Court

Tab 148

26. Counsel for the Executive Director of the BCSC has advised that it is prepared to enter into a settlement agreement, the specific terms of which are presently being finalized, to

resolve the Petitioner's involvement in the BCSC proceedings. No monetary penalty or sanction is proposed.

27. The Petitioner and the Monitor are seeking an order authorizing the Monitor to enter into a settlement agreement with respect to proceedings commenced by the BCSC.

Part 3:LEGAL BASIS

28. The Petitioner relies on the terms and provisions of the CCAA, as amended.
29. The Petitioner also relies on Rules 1-3, 4-4, 8-1, 8-5, 22-1 and 22-4 of the *Supreme Court Civil Rules*.
30. Section 45 of the Initial Order provides that the Petitioner may from time to time apply to this Honourable Court for directions in the discharge of its duties under the CCAA.

Tab 4

Interest on the Proven Claims

31. The Plan as presently approved provides for payment to creditors, from the assets of the Petitioner, in an amount determined in accordance with the Claims Process Order. As described above, the calculation of a Proven Claim is determined as at the date of the Initial Order (November 10, 2017).
32. One of the governing principles of insolvency law in Canada is the *pari passu* principle which provides that the assets of an insolvent debtor should be distributed rateably and equally amongst classes of creditors, as found at the date of insolvency.

Attorney General v. Confederation Life Insurance Co., [2001] O.J. No. 2610

33. The ability of insolvency law to treat all creditors fairly and to ensure an orderly distribution of assets where claims arise in different circumstances, and under different terms including the right to recover interest and at varying rates, challenges that approach.
34. For that reason, the common law has developed the "stop interest rule" in an effort to bring fairness to all creditors. In principle, the rule provides that all money realized should be applied equally and rateably in payment of debts as at the date of insolvency.
35. The CCAA is silent with respect to post-filing interest.
36. The "stop interest rule" has been applied consistently through Canada in bankruptcy and winding up legislation including the CCAA.

Nortel Networks Corp. (Re), 2015 ONCA 681

37. Its common application throughout insolvency proceedings is consistent with the view that to the extent possible, insolvency legislation should be integrated and harmonized particularly in light of the increasing use of the BIA as a tool of reorganization and conversely, liquidating plans of arrangement under the CCA.

Century Services Inc. v. Canada (Attorney General) [2010] 3 S.C.R. 379

National Bank of Canada v. Twin Butte Energy Ltd., 2017 ABQB 608

38. However the rule is not absolute. There may be exceptional situations where, at some point in a CCAA proceeding, the common law interest stops rule risks working an unfairness of some sort. For example, a plan of compromise and arrangement can provide for post-filing interest if the parties negotiate for that

Nortel at paragraphs 45 and 48

39. Insolvency legislation recognizes a clear distinction between the interests and entitlements of creditors versus equity claimants. While the BIA is uniform in its application of what is essentially a statutory stop interest rule as between creditors, a clear distinction exists between categories of stakeholders and in particular creditors and equity claimants.

40. The BIA specifically addresses the approach which applies if a surplus is available after payment to creditors and provides:

Interest from date of bankruptcy

143 Where there is a surplus after payment of the claims as provided in sections 136 to 142, it shall be applied in payment of interest from the date of the bankruptcy at the rate of five per cent per annum on all claims proved in the bankruptcy and according to their priority.

Right of bankrupt to surplus

144 The bankrupt, or the legal personal representative or heirs of a deceased bankrupt, is entitled to any surplus remaining after payment in full of the bankrupt's creditors with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings.

41. Here, the court has recognized a distinction between creditors and the preferred shareholders who are equity claimants. It is clear from the Plan that this is a liquidating CCAA and based on present calculations, it appears likely that there will be a surplus available and distributions will be made to equity claimants. To that end, the proceedings are somewhat exceptional as it is extremely unusual for distributions to equity claimants in insolvency proceedings

42. Just this situation was briefly raised by the Ontario Court of Appeal in *Nortel* and left for

another day. The Petitioner submits that the remedial purposes of the insolvency regime favour the consistent treatment of interests throughout insolvency proceedings. Whichever legislative scheme is being utilized the result should be in harmony with the scheme as a whole.

43. To proceed otherwise would encourage forum or legislation shopping in circumstances where the statutory regimes increasingly overlap. To that end, the Petitioner submits that the court should consider applying the following principles:
 - (a) fairness and equality among creditors; and
 - (b) a recognition of the clear distinction between creditor and equity classes.

Settlement of notice of hearing: BCSC

44. The Petitioner submits that a resolution of the Notice of Hearing, by way of a settlement agreement, which does not provide for financial penalties or sanctions is likely in the best interests of stakeholders in that it will:
 - (a) reduce professional fees; and
 - (b) not drain assets recovered for distribution in accordance with the plan of arrangement.

Part 4: MATERIAL TO BE RELIED ON

45. The pleadings and materials filed herein as described above;
46. Monitor's updated report (to be filed); and
47. Such further and other material as counsel may advise and this Honourable Court may allow.

The Applicant estimates that the Application will take 90 minutes.

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application:

- (a) file an application response in Form 33;
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: October 26, 2020

Signature of Jeremy D. West
Counsel for the Petitioner

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts