

COURT FILE NUMBER

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

Calgary

APPLICANTS

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9

AND IN THE MATTER OF 1252064 ALBERTA LTD., 1330075 ALBERTA LTD. and HARVEST CAPITAL MANAGEMENT INC.

BENCH BRIEF OF THE APPLICANTS

1252064 ALBERTA LTD., 1330075 ALBERTA LTD. and HARVEST CAPITAL MANAGEMENT INC.

RE: CRITICAL SUPPLIERS

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File No. 284324

I. INTRODUCTION

1 This Bench Brief is tendered on behalf of 1252064 Alberta Ltd., 1330075 Alberta Ltd., and Harvest Capital Management Inc. (collectively the "**Applicants**") in support of an order providing the Applicants with an opportunity to restructure their affairs and develop a plan of arrangement for the benefit of their creditors, including a stay of proceedings, pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**").

2 Generally speaking, the Applicants are in the business of purchasing properties which have the potential for future development and then syndicating those developments to retail investors.

Affidavit of Ronald Aitkens, sworn June 4, 2012, at para. 4.

3 The Applicants hold an interest in a number of different investments and properties. However, the Applicants' investments are illiquid and as such the Applicants are insolvent.

Affidavit of Ronald Aitkens, sworn June 4, 2012, at paras. 5-12.

4 The Applicants require that certain goods and services be provided in order to continue operating. These goods and services include the provision garbage collection, utilities, and property management. The Applicants do not have sufficient cash flow to provide for such goods and services. Accordingly, it is anticipated that DIP financing will be required, and that until such DIP financing is in place, a critical suppliers' charge will be necessary.

Affidavit of Ronald Aitkens, sworn June 4, 2012, at paras. 20-24 and Exhibit "V" and "W".

II. ISSUE

5 Does the Court have the authority to order that suppliers continue to provide goods and services for the purposes of allowing a CCAA applicant to continue operations during a CCAA stay of proceedings?

III. LAW AND ARGUMENT

6 The overall purpose of the CCAA is to temporarily allow a debtor corporation to avoid bankruptcy (and liquidation), to continue operating, and to find a business strategy enabling it to meet the demands of its creditors.

Janis Sara, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Canada Limited, 2007) at pp. 5, 9 [Tab 1]

***Blue Range Resource Corp., Re*, 2000 ABCA 239 (per Fruman J.A.), at para. 6 [Tab 2]**

Canwest Global Communications Corp., Re, (2009) 59 C.B.R. (5th) 72 (ONSCJ per Pepall J.), at para. 41 [Tab 3]

- 7 In furtherance of the goal of allowing a CCAA applicant to continue operating, at least in the short term, the recent amendments to the CCAA gives the Court jurisdiction to make an order declaring a person to be a "critical supplier" to the applicant. A critical supplier may be ordered to continue the supply of goods and service during a CCAA stay of proceedings in exchange for a critical suppliers' charge:

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

Companies' Creditors Arrangement Act, RSC 1985, c C-36, s. 11.4.

- 8 Section 11.4 was proclaimed into force as of September 18, 2009. It has received to date limited judicial consideration.

L.W. Houlden, G.B. Morawetz, Janis Sara, *Bankruptcy and Insolvency Law of Canada*, 4th ed., looseleaf, (Toronto: Thomson Reuters, 2009) at N§102 [Tab 4].

- 9 Industry Canada explains the designation of critical suppliers pursuant to section 11.4 as striking a balance between the conflicting interests of suppliers generally, who are motivated to limit their own exposure, and CCAA applicants, who are motivated to restructure:

Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

Industry Canada, "Clause by Clause Briefing Book of An Act to Establish the Wage Earner Protection Program Act [...]" (6 September 2011) [Tab 5].

- 10 The Court has the power to compel an "unwilling supplier" to continue to supply goods and services where that supplier is "critical to the company's continued operation" or where an interruption in supply "could have an immediate material adverse impact on the [company's] business, operations and cash flow".

***Canwest Global Communications Corp., Re.*, (2009) 59 C.B.R. (5th) 72 (ONSCJ per Pepall J.), at para. 42 [Tab 3].**

***Priszm Income Fund, Re.*, 2011 ONSC 2061 (per Morawetz J.), at para. 34 [Tab 6].**

- 11 In return for continuing to provide services, critical suppliers may either secure immediate payment from the CCAA applicant, or secure a priority charge over other secured creditors.

***Canwest Global Communications Corp., Re.*, (2009) 59 C.B.R. (5th) 72 (ONSCJ per Pepall J.), at para. 42-43 [Tab 3].**

- 12 In the case where a critical supplier is not paid immediately out of the CCAA applicant's operating revenues, the Court may direct that the critical supplier continue to provide goods or services to the applicant on "credit". The credit is secured by the critical suppliers' charge.

Order, filed February 7, 2012, *Catalyst Paper Corporation, Re.*, (BCSC, Vancouver Registry, No. S120712) unreported decision [Tab 7].

- 13 The Court has the ability to rank a critical suppliers' charge behind an administration charge.

***Priszm Income Fund, Re.*, 2011 ONSC 2061 (per Morawetz J.), at para. 35 [Tab 6].**

- 14 Examples of critical suppliers include "utility service providers", "suppliers of waste disposal services", and "providers of appliance repair and information technology services".

***Priszm Income Fund, Re.*, 2011 ONSC 2061 (per Morawetz J.), at para. 32 [Tab 6].**