Court File No. CV-13-10274-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC.

Applicants

FACTUM OF THE APPLICANTS
(Stay Extension Motion, Returnable March 21, 2014)

March 20, 2014

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PART I - INTRODUCTION

1. By this motion, 8440522 Canada Inc., Data & Audio-Visual Enterprises Wireless Inc. ("**Wireless**"), and Data & Audio-Visual Enterprises Holdings Inc. ("**Holdings**") (collectively, the "**Applicants**" or the "**Mobilicity Group**") seek an Order extending the Stay Period, as defined in the Initial Order issued by this Court on September 30, 2013 (the "**Initial Order**") as amended by orders of this Court issued October 24, 2013, December 19, 2013, and February 25, 2014, up to and including April 30, 2014 (the "**Fourth Stay Extension**").

2. The Fourth Stay Extension is needed to provide the Applicants with additional time to:

(a) complete the sale process that was approved by this Court on November 13, 2013 (the "**Sale Process**"); and

(b) finalize the documents necessary to bring a motion to this Court for an Order seeking permission to file a plan of compromise and arrangement (a "**Plan**") in respect of a Successful Bid under the Sale Process and call a meeting of affected creditors to consider and vote on such Plan (the "**Meeting**").[1]

PART II - THE FACTS

A. Background

3. The relevant facts are set out in the Aziz Affidavit, and are summarized below. Capitalized terms used herein and not defined have the meanings ascribed to them in the Aziz Affidavit.

4. On September 30, 2013, the Applicants made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") seeking court protection from their creditors. The application was granted pursuant to the Initial Order of Mr. Justice Newbould. The Initial Order included an initial "**Stay Period**" until October 30, 2013.

5. This Stay Period was extended by successive Orders of this Court—including most recently on February 25, 2014 (the "**Third Stay Extension Order**")—until March 31, 2014.[2]

6. Since the issuance of the Initial Order, the Applicants have focussed on maintaining the stability of their business and advancing the restructuring alternatives available to them, including as a result of the Sale Process.[3]

B. Operations Since the Third Stay Extension Order

7. The Applicants continue to focus their efforts on maintaining the stability of their business. In particular:

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[1] *Affidavit of William E. Aziz*, sworn March 12, 2014 **[Aziz Affidavit]**, Applicant's Motion Record, Tab 2 at para. 6.
[2] Aziz Affidavit, at para. 5.
[3] Aziz Affidavit, at paras. 7 and 14-18.

(a) since the Applicants commenced these CCAA proceedings, they have worked to retain customers and continue to experience a higher than anticipated customer retention rate;

(b) through adjustments in promotional activities, the Applicants have increased customer average revenue per user, which remains higher as compared with pre-filing periods; and

(c) despite a reduction in employee headcount, the Applicants' operating capabilities remain stable.[4]

8. With one recent exception when the Applicant's voice services were temporarily interrupted, the Applicants continue to receive the services they require from all of their major suppliers and ongoing payment arrangements continue uninterrupted.[5]

9. Since the issuance of the Third Stay Extension Order, the Applicants have operated within their cash flow forecast (as last filed with the Court under cover of the Monitor's third report dated February 20, 2013) and honoured their post-filing commitments as they came due.[6]

C. Efforts in Respect of the Sale Process

10. The Applicants have further continued to advance their efforts under the Sale Process, an ongoing competitive process that was approved by this Court on November 13, 2013, pursuant to which the market was canvassed for potential purchasers of the Applicants' shares

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[4] Aziz Affidavit, at paras.8-10 and 13.
[5] Aziz Affidavit, at para. 11.
[6] Aziz Affidavit, at para. 12.

or all or part of their assets.[7] As set out in its Fifth Report, the Monitor is satisfied with the Applicants' due diligence and good faith in this respect.[8]

11. On February 19, 2014, Industry Canada announced the results of the 700 MHz spectrum auction (the "**700 Spectrum Auction**"), the timing of which had impacted the efforts of the Applicants to advance the Sale Process.[9]

12. With the results of the 700 Spectrum Auction now public, the Applicants, their financial advisors Canaccord Genuity and the Monitor are now in a position to complete the Sale Process.[10]

13. The Applicants anticipate bringing a motion to this Court in advance of the expiry of the Fourth Stay Extension for an Order authorizing the Applicants to file a Plan and call a meeting of affected creditors to consider and vote on such Plan (the "**Plan Filing and Creditors' Meeting Order**").

D. The Stay Extension is Appropriate and Necessary

14. The Applicants require the additional time the Fourth Stay Extension would provide to conclude the Sale Process and finalize the documents necessary to seek the Plan Filing and Creditors' Meeting Order.[11]

15. The Updated Cash Flow Statement prepared by the Applicants and reviewed by the Monitor in conjunction with this motion shows that the Applicants expect to have sufficient

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[7] Aziz Affdavit, at paras. 14-15.
[8] Fifth Report of the Monitor, dated March 18, 2014, at para. 12.
[9] Aziz Affidavit, at para. 18.
[10] Aziz Affidavit at para. 19.
[11] Aziz Affidavit, at para. 21.

resources during the proposed Fourth Stay Extension period to meet their post-filing obligations during that same period.[12]

16. The Monitor, the Ad Hoc Committee of Noteholders, the DIP Lenders, the Bridge Lenders and QCP CW S.A.R.L. all support the Fourth Stay Extension.[13]

PART III - ISSUES AND THE LAW

17. The Applicants submit that the proposed Fourth Stay Extension is appropriate in the circumstances.

18. Subsection 11.02(2) of CCAA authorizes a court, other than on an initial application, to make an order staying all proceedings in respect of a debtor company for any period of time necessary.[14]

19. As has been previously applied by Justice Brown in granting a stay extension order to allow a debtor to continue to advance a sale process, the statutory test to obtain such an order is as follows:

(a) the applicant must satisfy the court that circumstances exist that make the order appropriate; and

(b) the applicant must satisfy the court that it has acted, and is acting, in good faith and with due diligence.[15]

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[12] Aziz Affidavit, at para. 23.
[13] Aziz Affidavit, at para. 26.
[14] CCAA, s. 11.02(2).
[15] CCAA, s. 11.02(3); *Futura Loyalty Group Inc. (Re)*, [2012] O.J. No. 5362 at para. 2 (Ont SCJ), Book of Authorities of the Applicant [**BOA**], Tab 1.

20. In *Century Services Inc. v. Canada (Attorney General)*,[16] the Supreme Court of Canada held that the question of whether circumstances make a stay extension order appropriate should be considered in light of the policy objectives underlying the CCAA:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs [...].[17]

21. The CCAA is a statute designed to "facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy".[18] To that end, Justice Farley in *Lehndorff General Partner Ltd (Re)* observed as follows:

> Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.[19]

22. The Fourth Stay Extension is necessary to give the Applicants time to conclude the Sale Process, and finalize the documents necessary to seek the Plan Filing and Creditors' Meeting Order.[20] In the circumstances, and in light of the objectives of the CCAA, granting the Fourth Stay Extension is appropriate.

23. In *Canwest Global Communications Corp. (Re)*,[21] Justice Pepall noted four factors in deciding to extend a stay of proceedings: (a) forecasts indicated that the debtors had sufficient cashflow resources to operate through the requested extended stay period; (b) the monitor

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[16] 2010 SCC 60 [***Century Services***], BOA, Tab 2.
[17] *Century Services*, *supra* at para. 70.
[18] *Lehndorff General Partner Ltd. (Re)*, [1993] 9 B.L.R. (2d) 275 at para. 5 (Ont. Ct. J. (Gen. Div.)) [***Lehndorff***], BOA, Tab 3.
[19] *Lehndorff, supra* at para. 6.
[20] Aziz Affidavit at para. 26.
[21] [2009] O.J. No. 4788 (Ont. S.C.J.) [***Canwest***], BOA, Tab 4.

supported the stay extension; (c) there was a lack of opposition to the motion; and (d) the debtors had acted and were continuing to act in good faith and with due diligence.[22]

24. The Updated Cash Flow Statement submitted in conjunction with this motion indicates that the Applicants have sufficient cash resources to continue operations through the requested extended Stay Period.[23]

25. The Monitor, the Ad Hoc Committee of Noteholders, the DIP Lenders, the Bridge Lenders and QCP CW S.A.R.L. all support the Fourth Stay Extension.[24] The Applicants are unaware of any opposition to the Fourth Stay Extension.

26. Since the issuance of the Third Stay Extension Order, the Applicants have continued to work in good faith and with due diligence in the pursuit of their restructuring activities, including in the pursuit of a value-maximizing transactions for the business of the Applicants that would benefit the Applicants' stakeholders.[25]

27. For these reasons, it is respectfully submitted that the Stay Period should be extended to April 30, 2014.

PART IV - ORDER REQUESTED

28. For the reasons set out above, the Applicants request an Order substantially in the form of the draft Order attached at Tab 3 of the Applicants' Motion Record.

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[22] *Canwest, supra* at para. 43.
[23] Aziz Affidavit, at para. 22.
[24] Aziz Affidavit, at para. 26.
[25] Aziz Affidavit, at para. 25.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of March, 2014.

Norton Rose Fulbright Canada LLP

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Lawyers for the Applicants
Data & Audio-Visual Enterprises Wireless Inc.,
Data Audio-Visual Enterprises Holdings Inc. and
8440522 Canada Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1 *Futura Loyalty Group Inc. (Re)*, [2012] O.J. No. 5362 (Ont SCJ).

2 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.

3 *Lehndorff General Partner Ltd. (Re)*, [1993] 9 B.L.R. (2d) 275 (Ont. Ct. J. (Gen. Div.)).

4 *Canwest Global Communications Corp. (Re),* [2009] O.J. No. 4788 (Ont. S.C.J.).

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.**

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

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Proceeding commenced at Toronto

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