ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Estate/Court File No. 31-2481648
Estate/Court File No. 31-2481649

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO

Applicants

FACTUM AND BOOK OF AUTHORITIES OF THE APPLICANTS
(returnable April 29, 2019)

MILLER THOMSON LLP
SCOTIA PLAZA
40 KING STREET WEST, SUITE 5800
P.O. BOX 1011
TORONTO, ON CANADA M5H 3S1

Kyla Mahar LSO#: 44182G
Tel: 416.597.4303 / Fax: 416.595.8695
kmahar@millerthomson.com

Stephanie De Caria LSO#: 68055L
Tel: 416.597.2652 / Fax: 416.595.8695
sdecaria@millerthomson.com

Lawyers for the Applicants

TO: THE SERVICE LIST

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

Estate/Court File No.: 31-2481648
Estate/Court File No.: 31-2481649

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO

Applicants

INDEX

TAB 1

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Estate/Court File No. 31-2481648
Estate/Court File No. 31-2481649

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO

Applicants

FACTUM OF THE APPLICANTS
(returnable April 29, 2019)

TABLE OF CONTENTS

PAGE

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Estate/Court File No. 31-2481648
Estate/Court File No. 31-2481649

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO

Applicants

FACTUM OF THE APPLICANTS
(returnable April 29, 2019)

PART I - INTRODUCTION

1. The Applicants bring this motion seeking an order (the "**Extension Order**"), substantially in the form of the draft order located at tab 3 of the Motion Record, among other thigs, extending the time for each of the Applicants to file a proposal (the "**Proposal Period**") under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "**BIA**") to June 17, 2019.

PART II - THE FACTS

A. Background

2. The Applicants operate a retail business known as the "Green Earth" stores across Ontario ("**Green Earth**"). At the time of commencing these Proposal Proceedings operated 29 retail locations, which are operated by GEEP. GESL purchased and owns the inventory sold in the Green Earth stores (the "**Inventory**"), operates an e-commerce website for online sales of the Inventory and owns real property that houses its warehouse

and distribution centre, which is located at 19-23 Buchanan Court, London, Ontario N5Z 4P9 (the "**Real Property**").

Affidavit of Matthew McBride sworn April 18, 2019 (the "**McBride Affidavit**") at paras. 3-5 and 7.

3. On March 4, 2019, each of the Applicants commenced proposal proceedings (the "**Proposal Proceedings**") under the BIA by each filing a Notice of Intention to File a Proposal ("**NOI**"), which appointed Crowe Soberman Inc. ("**Crowe Soberman**") as Proposal Trustee of each of the Applicants.

McBride Affidavit at para. 11.

4. Prior to commencing these Proposal Proceedings and following consideration of the three proposals, the Applicants, in consultation with Crowe Soberman, elected to retain FAAN Advisors Group Inc. ("**FAAN**") as Chief Restructuring Advisor ("**CRA**") and Shawn Parkin as the Consultant (the "**Consultant**") to assist the Applicants undertake an orderly liquidation of the Applicants' inventory through the conduct of a "going-out-of-business" or similar themed sale (the "**Liquidation Sale**").

McBride Affidavit at paras. 13-14.

B. The Applicants' Activities since the Commencement of the Proposal Proceedings

5. The Applicants have been working diligently with the CRA, Consultant and the Proposal Trustee to preserve and maximize value for their stakeholders.

i. The Administration Order and the Liquidation Process Order

6. On March 7, 2019, Justice Penny granted an Order (the "**Administration Order**"), among other things:

(a) extending the Proposal Period to May 3, 2019;

(b) approving the administrative consolidation of the Applicants' Proposal Proceedings;

(c) approving the engagement of FAAN as CRA;

(d) directing that the CRA be added as a required signing officer on the Applicants' bank accounts for the pendency of the Proposal Proceedings and required to authorize all expenditures of $5,000 or greater;

(e) approving certain court-ordered charges, including the Administration Charge and the D&O Charge (as defined in the Administration Order); and

(f) approving the key employment retention agreement (the "**KERA**"), a copy of which was attached as a confidential appendix to the First Report, and approving the KERA Charge (as defined in the Administration Order).

McBride Affidavit at para. 16.

7. In addition, on March 7, 2019, Justice Penny granted an Order (the "**Liquidation Process Order**"), among other things:

(a) approving the consulting agreement between the Applicants and the Consultant dated February 25, 2019 (the "**Consulting Agreement**");

(b) approving the Sale Guidelines attached as Schedule "A" to the Liquidation Process Order for the conduct of the Liquidation Sale;

(c) authorizing the Applicants, with the assistance of the CRA and the Consultant, to conduct the Liquidations Sales at the retail locations in accordance with the Liquidation Process Order and the Sale Guidelines; and

(d) authorizing that, until June 30, 2019 or such earlier date as a lease is disclaimed in accordance with the BIA or such later date as may be agreed to by the Consultant, the

Applicants and the applicable landlord, the Consultant shall have access to the Closing Stores in accordance with the applicable leases and the Sale Guidelines on the basis that the Consultant is assisting the Applicants and the Applicants have granted the right of access to the applicable Closing Store to the Consultant.

McBride Affidavit at para. 17.

ii. Status of the Liquidation Sales

8. The Liquidation Sales commenced on March 9, 2019 and are ongoing at all 29 stores. The Liquidation Sales have been progressing well to date and gross recoveries have exceeded projections. In particular, retail sales for the five week period ending April 12, 2019 were approximately $3.7 million as compared to the projection for the same period of $2.5 million.

McBride Affidavit at paras. 18 and 21.

9. Since the commencement of the Proposal Proceedings, the Applicants have issued 27 notices of lease disclaimers.

Second Report of the Proposal Trustee dated April 24, 2019 (the "**Second Report**") at para. 14.

10. The Applicants have staggered issuance of the lease disclaimers and therefore the timing of the store closures. The first three lease disclaimers become effective as of April 29, 2019.

McBride Affidavit at para. 25.

11. It is currently anticipated that the Applicants will issue the remaining notices of lease disclaimer in the next two weeks, which would result in the Applicants concluding the Liquidation Sales in or around the end of May, 2019.

McBride Affidavit at para. 28.

iii. Employee Terminations

12. As at the date of the commencement of the Proposal Proceedings, GEEP employed approximately 202 individuals across its retail store locations, 179 on a part-time basis and GESL employed 13 full-time head office and warehouse employees. All employees are non-unionized.

McBride Affidavit at para. 29.

13. In accordance with the requirements of the *Employment Standards Act, 2000*, on March 28, 2019, the Applicants filed a Notice of Termination of Employment (the "**Notice of Termination**") with the Ministry of Labour notifying the Ministry that it was terminating more than 50 employees in the same four-week period. The Notice of Termination was posted at each of the 29 retail locations and the head office/warehouse distribution centre.

McBride Affidavit at para. 30.

14. In addition, individual letters of termination were provided to the employees of GEEP and GESL. Since providing the original letters of termination, the Applicants have issued revised letters of termination to certain employees where the Applicants will be closing the store where those employees are employed prior to the date in the original letter of termination.

McBride Affidavit at para. 31.

15. To date, approximately 35 employees have resigned or been terminated by either GEEP or GESL. All employees whose employment has ended have been paid or will be paid their wages and accrued vacation pay to the date of termination.

McBride Affidavit at para. 32.

iv. Real Property Marketing Process

16. GESL entered into a Listing Agreement with CBRE Limited, as Brokerage (collectively, the "**Listing Agreement**") to market and sell the Real Property at a listing price of $6,500,000. There has been interest in the Real Property, however, to date no offers or letters of intent have been received in respect of the Real Property.

McBride Affidavit at para. 32.

C. Stay Extension

17. The Proposal Period was extended pursuant to the Administration Order to May 3, 2019. The Applicants are now seeking a 45-day extension of the Proposal Period, which will extend the Proposal Period to June 17, 2019.

McBride Affidavit at paras. 44-45.

18. A 45-day extension of the Proposal Period provides the Applicants the time needed to complete the Liquidation Sales and consider next steps in these Proposal Proceedings having the benefit of the results from the completed Liquidation Sales. It will also allow the Applicants time to continue marketing the Real Property, seek buyers for remaining equipment and fixtures at the head office/distribution centre and allow for final payroll to be paid including most KERA and store level stay bonus amounts to employees.

McBride Affidavit at para. 50.

19. The cash flow projections prepared by the Applicants with the assistance of the CRA and the Proposal Trustee and appended to the Second Report indicate that the Applicants will have sufficient liquidity to fund both operating costs and the costs of these Proposal Proceedings during the requested extension of the Proposal Period.

Second Report at para. 30.

20. The Proposal Trustee is of the view that the extension of the Proposal Period is appropriate for the following reasons:

(a) it will allow for the completion of the Liquidation Sale;

(b) it will enable the Applicants to consider next steps in the Proposal Proceedings, with the benefit of the results from the completed Liquidation Sale;

(c) it will allow GESL to continue to market the Real Property, will allow for final payroll to be paid which will include most KERA payments and payments on the stay bonus and incentive program to employees;

(d) the Applicants are acting in good faith and with due diligence in taking steps to monetize their assets for the benefit of their stakeholders; and

(e) it is the Proposal Trustee's view that the Extension will not prejudice or adversely affect any group of creditors.

Second Report at para. 31.

PART III - ISSUES AND THE LAW

21. The issue on this motion is whether the Court should extend the Proposal Period to June 17, 2019.

A. It is Appropriate to Grant the Extension of the Proposal Period

22. The Proposal Period currently expires on May 3, 2019.

23. Since March 9, 2019, the Applicants, the Consultant, the Proposal Trustee and their advisors have been working together to carry out the Liquidation Sales, address employee, supplier, customer and other stakeholder issues, and otherwise advance the Proposal Proceedings. The Consulting Agreement contemplates that the Liquidation

Sales will be completed by June 30, 2019 and the Applicants are on track to complete the Liquidation Sales ahead of this deadline.

24. A 45-day extension of the Proposal Period would give the Applicants the time needed to complete the Liquidation Sales and consider next steps in these Proposal Proceedings having the benefit of the results from the completed Liquidation Sales.

25. This Court has authority to grant the requested extension under section 50.4(9) of the BIA, which states that such an extension may be granted where the Court is satisfied 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 creditors would be materially prejudiced if the extension being applied for were granted.

BIA, s. 50.4(9).

Colossus Mineral Inc. (Re), 2014 ONSC 514at paras. 38-43, Tab 2.

In the Matter of the Notice of Intention to Make a Proposal of Karrys Bros. Limited, Karrys Software Limited and Karbro Transport Inc., Court File No. 32-1942339/1942340/1942341, Endorsement of Justice Penny dated December 24, 2014 at paras. 26-28, Tab 3.

26. In this case, each of these factors has been met. The Applicants have acted and continue to act in good faith in pursuing the Liquidation Sales and wind-down of their operations. The extension will permit the Applicants to complete the Liquidation Sales and consider next steps in the Proposal Proceedings, with the benefit of the results from the completed Liquidation Sales, and no creditors will be prejudiced by the requested extension of the Proposal Period.

27. Further, the cash flow projections prepared by the Applicants, with the assistance of the CRA and Proposal Trustee, indicate that the Applicants have sufficient cash flow to fund both operating costs and the costs of these Proposal Proceedings during the requested extension of the Proposal Period.

28. The Proposal Trustee supports the extension of the Proposal Period.

PART IV - ORDER REQUESTED

60. The Applicants request that the Court grant the Extension Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of April, 2019.

Kyla Mahar
MILLER THOMSON LLP

Lawyer for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Colossus Mineral Inc. (Re),* 2014 ONSC 514.

2. In the Matter of the Notice of Intention to Make a Proposal of Karrys Bros. Limited, Karrys Software Limited and Karbro Transport Inc., Court File No. 32-1942339/1942340/1942341, Endorsement of Justice Penny dated December 24, 2014.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH ENVIRONMENTAL PRODUCTS AND GREEN EARTH STORES LTD.

Estate/Court File No. 31-2481648
Estate/Court File No. 31-2481649

FACTUM OF APPLICANTS
RE: EXTENSION OF PROPOSAL PERIOD
(returnable April 29, 2919)

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Kyla Mahar LSO#: 44182G
Tel: 416.597.4303 / Fax: 416.595.8695
kmahar@millerthomson.com

Stephanie De Caria LSO#: 68055L
Tel: 416.597.2652 / Fax: 416.595.8695
sdecaria@millerthomson.com

Lawyers for the Applicants

TAB 2

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

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

CITATION: Karrys Bros. Ltd. (Re), 2014 ONSC7465
COURT FILE NO.: 32-1942339/1942340/1942341
DATE: 20141224

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF AN INTENTION TO MAKE A PROPOSAL OF KARRYS BROS., LIMITED, KARRYS SOFTWARE LIMITED AND KARBRO TRANSPORT INC.,

COUNSEL: *E. Pillon and K. Esaw* for the Applicants

L. Rogers for PWC

S. Graft for BMO

C. Armstrong for Core-Mark

HEARD: December 23, 2014

ENDORSEMENT

Overview

[1] On December 23, 2014 I granted orders approving a sale of substantially all of the applicants' assets together with various related administrative orders, with reasons to follow. These are those reasons.

[2] This motion seeks approval of a sale of the applicants' assets out of the ordinary course, authorization to distribute funds to the senior secured lender, a sealing order of certain confidential information and various administrative orders, including:

(i) extending the time for filing a proposal;

(ii) approving a key employee retention agreement;

(iii) approving an administrative charge;

(iv) approving the consolidation of the applicants' proposal proceedings; and

(v) approving the report of the proposal trustee.

Background

[3] Karrys is a wholesale distributor of tobacco, confectionery, snacks, beverages, automotive supplies and other products to retail, gas and convenience stores across Canada. As of November 1, 2014, Karrys' assets were exceeded by its liabilities by over $1 million. Karrys experienced net losses of over $3 million in each of the last two years.

[4] As a result of its financial difficulties, Karrys committed defaults under its loan agreement with the Bank of Montréal in 2013. BMO is Karrys' senior secured lender. BMO agreed to a number of forbearance agreements to enable the sales process which is at the heart of this motion.

[5] Karrys commenced a sales process in December 2013. It retained a financial advisor, Capitalink. Karrys had initial, exclusive negotiations with Core-Mark, itself a wholesale distributor of similar goods, in May through July 2014. Those negotiations did not result in an agreement.

[6] Karrys retained Price Waterhouse Coopers to assist Karrys and Capitalink in undertaking a more expansive sale process. In the fall of 2014, Karrys developed a process in which Core-Mark agreed to make a stalking horse bid for substantially all of Karrys' assets.

[7] Over 53 potential strategic and financial buyers were also invited to bid on the assets. Thirteen of these potential buyers entered into confidentiality agreements and received a confidential information memorandum and access to Karrys' data room. PWC and Capitalink responded to all reasonable requests for information.

[8] By the bidding deadline of noon on December 10, 2014, however, no other bids were received. Core-Mark was, accordingly, declared the successful bidder.

[9] Karrys now asks for the court's approval of the asset purchase agreement with Core-Mark and for a vesting order, together with approval of distribution, from the proceeds, of the amount owed to BMO and other related relief.

The Sale and Vesting Order

[10] Jurisdiction to make orders approving the sale derives from s. 65.13 of the BIA. Factors for the court to consider when asked to approve a sale out of the ordinary course are also listed in s. 65.13.

[11] It is not necessary for the debtor to present its proposal under the BIA before an order approving a sale, *Re Komtech*, 2011 ONSC 3230.

[12] In this case, the sale was the result of a broad and comprehensive marketing process. Two financial advisors were engaged. When initial negotiations with Core-Mark did not produce an amount the applicants originally thought acceptable, another process was initiated with the assistance of PWC. Efforts to lever the Core-Mark offer were, however, although widely promoted, ultimately unsuccessful. The "market" has, in that sense, spoken.

[13] The proposal trustee, PWC, has reviewed the sale process and is supportive of the process and the result. The proposal trustee has, as well, conducted a detailed analysis of the Core-Mark bid measured against a "liquidation in bankruptcy" scenario. Even under a "best case" liquidation scenario, the unsecured creditors would be expected to recover significantly less than under the Core-Mark sale transaction. Under the proposed sale, there is the possibility of surplus for distribution to unsecured creditors. There would be no such possibility under a liquidation scenario. BMO, the senior secured lender, is also supportive of the process and the result.

[14] Because the purchase price represents, through an extensive sales process, the highest price realizable and an amount which is greater than what could be realized under a liquidation, the consideration to be received for the assets is reasonable and fair. Further, the sale will enable Karrys to make the payments contemplated under s. 65.13(8) of the BIA.

[15] The fact that the sales process was not pre-approved by the court is not a bar to the court's approval in this case. Is clear on the evidence that the Core-Mark transaction is the best available option in the circumstances. No one has come forward to argue otherwise. The test is the same whether approval is sought before or after the process – the principles in *Soundair* govern. The *Soundair* test has been met. A judgment call had to be made whether to further extend the process in hopes of perhaps finding a better bid. Further delay would just as likely have resulted in a greater erosion of value. An immediate sale was, on the evidence, the only way to maximize recovery.

[16] In addition, the process actually followed is indistinguishable from what the court might reasonably have approved had prior authorization been sought. There is no evidence, or likelihood, that Karrys or its creditors would be in a better position if some further, or other, sales process had been followed.

[17] The sale is approved and the vesting order shall issue.

The Key Supplier Issue

[18] On the very day Karrys filed its notice of intention to make a proposal, Karrys' principal tobacco supplier delivered a substantial quantity of tobacco. A dispute arose over payment. The supplier took the position it was under no legal obligation to continue to supply and that it would not supply unless payment was received. Karrys' supply agreement had expired and the parties were operating on the basis of an informal supply arrangement.

[19] Ensuring ongoing tobacco supply from this supplier was critical to Karrys in terms of the ongoing operations of the business pending the closing of the sale to Core-Mark, the satisfaction of conditions precedent to the closing with Core-Mark, including the loss of potential customers should their tobacco requirements not be satisfied, and the resulting risk that the Core-Mark transaction would be lost as a result.

[20] Karrys and its legal advisers considered there was significant litigation risk relating to the ability to enforce a stay of proceedings against the supplier in any event and, accordingly, entered into negotiations with the tobacco supplier.

[21] These negotiations resulted in a substantial payment to the supplier which, arguably, involved post-filing payment for a pre-filing obligation. Given the importance of this supplier to ongoing operations and to the success of the Core-Mark sale, however, Karrys, along with its advisors, had little option but to reach a settlement.

[22] Unlike the CCAA, the concept of "critical suppliers" is not found in the proposal provisions of the BIA. Nevertheless, in my view, similar considerations can and should be taken into account in appropriate circumstances. In this case, Karrys and its advisors reasonably believed that the ongoing viability of the business and the Core-Mark sale (which, as found

above, represents the highest realizable price for Karrys' assets available in the circumstances) required the ongoing availability of this critical source of supply. There is also a significant net benefit to Karrys arising from sales of the product supplied. The supply contract negotiated, in the context of both the importance of the supply and significant litigation risk, was, I find, reasonable in the circumstances.

BMO Distribution

[23] BMO delivered notices of intention to enforce its security. The unchallenged evidence before the court is that BMO holds a valid, perfected security interest over each of the applicants' assets. BMO is entitled to a distribution of proceeds from the sale in satisfaction of its claim.

Sealing Order

[24] I am satisfied that the confidential appendices should be sealed until the deal is closed. There is an important public interest in maximizing returns in proceedings of this kind. It is important, therefore, that until the deal is concluded, commercially sensitive information about the deal not be publicly disclosed. Failure to grant the order would impair the integrity of any subsequent process. In addition, in the context of the key employee retention agreement, there is sensitive personal information which ought not to be disclosed.

[25] The *Sierra Club* test has been met on the facts of this case, *Elleway Acquisitions Ltd.*, 2013 ONSC 7009. The salutary effects of granting the sealing order outweigh the limited deleterious effect of restricting access to these limited pieces of evidence.

Extension

[26] Section 50.4(9) of the BIA grants the jurisdiction to grant the extension. The initial proposal period expires on January 12, 2015. The Core-Mark transaction will not close until February 2015.

[27] The applicants are acting in good faith. There is some prospect of surplus funds for distribution to unsecured creditors, given time to close the Core-Mark sale and assess the remaining priorities and claims. The cash flow statements indicate that Karrys has sufficient cash to fund operations through to the end of February 2015. There is no evidence any creditor will be prejudiced by the extension.

[28] Accordingly, the time for filing a proposal is extended to February 23, 2015.

Key Employee

[29] It is often recognized in restructuring proceedings that retention of key employees is vital. Securing payment is, in turn, a vital incentive for the employee to remain.

[30] In this case, there is one employee whose assistance has been, and will remain, key to ongoing operations to the date of sale. The retention bonus in issue is relatively modest. It is supported by the proposal trustee and BMO. Without securing the retention payment, there is a

significant risk the employee would leave. In addition, given the abbreviated timeframe for closing the Core-Mark sale, it would be almost impossible to find a timely replacement.

[31] For these reasons, the retention agreement and charge, as requested, is approved.

Administrative Charge

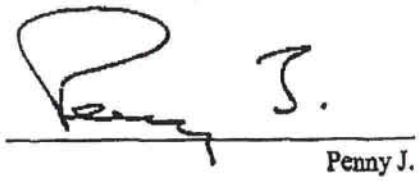
[32] Section 64.2 of the BIA provides for a super-priority to secure the fees for needed professional services during the restructuring. Secured creditors have received notice of this request. The proposal trustee supports the granting of the charge. The amount sought is, in my view, appropriate. The administrative charge requested is approved.

Consolidation

[33] It is clear that the operations of the three applicants are closely intertwined such that it would be difficult to disentangle their affairs. In order to secure the just, most expeditious and least expensive resolution, it is necessary to consolidate these closely related bankruptcy proceedings. This will avoid duplication and reduce cost. The requested order is therefore granted.

Proposal Trustee Report

[34] Given my approval of the elements above, it follows that the first report and activities of the proposal trustee should also be approved.



Penny J.

Date: December 24, 2014

SCHEDULE "B"
RELEVANT STATUTES

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

Extension of time for filing proposal

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Stay of proceedings — Division I proposals

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

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

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

(i) the insolvent person's insolvency,

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

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

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

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

(i) the trustee has been discharged,

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

(iii) the insolvent person becomes bankrupt; and

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

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

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

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

(iii) the trustee has been discharged,

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

(v) the insolvent person becomes bankrupt.

Limitation

3. **(2)** The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the proposal was filed from dealing with those assets;

(b) unless the secured creditor otherwise agrees, to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before

(i) a notice of intention was filed in respect of the insolvent person under section 50.4, or

(ii) the proposal was filed, if no notice of intention under section 50.4 was filedfrom enforcing that security;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed, 2012, c. 31, s. 417]

Limitation

(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the proposal and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of

the *Canada Pension Plan* and the provincial legislation establishes a ***provincial pension plan*** as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

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

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

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

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

Limitation

(4) If, by virtue of subsection 69(3), the stay provided by paragraph 69(1)(c) or (d) does not apply or terminates, the stay provided by paragraph (1)(c) or (d) of this section does not apply.

Secured creditors to whom proposal not made

(5) Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a proposal under subsection 62(1) does not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Where secured creditors vote against proposal

(6) Subject to sections 79 and 127 to 135 and subsection 248(1), where secured creditors holding a particular class of secured claim vote for the refusal of a proposal, a secured creditor holding a secured claim of that class may henceforth realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH ENVIRONMENTAL PRODUCTS AND GREEN EARTH STORES LTD.

Estate/Court File No. 31-2481648
Estate/Court File No. 31-2481649

FACTUM AND BOOK OF AUTHORITIES OF THE APPLICANTS RE: EXTENSION OF PROPOSAL PERIOD (returnable April 29, 2919)

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Kyla Mahar LSO#: 44182G
Tel: 416.597.4303 / Fax: 416.595.8695
kmahar@millerthomson.com

Stephanie De Caria LSO#: 68055L
Tel: 416.597.2652 / Fax: 416.595.8695
sdecaria@millerthomson.com

Lawyers for the Applicants