

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF DIGITCOM
TELECOMMUNICATIONS INC., A CORPORATION
INCORPORATED UNDER THE LAWS OF ONTARIO**

**FACTUM OF DIGITCOM TELECOMMUNICATIONS INC.
(Returnable November 29, 2022)**

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FACTUM OF THE APPLICANT

PART I: INTRODUCTION

1. Digitcom Telecommunications Inc. ("**Digitcom**" or the "**Applicant**") seeks an order (the "**Order**") pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), among other things:

- (a) extending the time for the Applicant to file a proposal under the BIA, and the corresponding stay of proceedings (the "**Stay Extension**") to and including January 13, 2023;
- (b) authorizing the Applicant and Grant Thornton Limited (the "**Proposal Trustee**") to conduct a sale and investment solicitation process (the "**SISP**"), substantially in the form attached at Schedule "A" to the Order;
- (c) granting a \$100,000 charge on the current and future assets, undertakings and properties of the Applicant of every nature and kind whatsoever (including all real and personal property), and wherever situate, including all proceeds thereof (collectively, the "**Property**") in favour of the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Applicant (the "**Administration Charge**");
- (d) granting a \$75,000 charge on the Property in favour of the Applicant's directors and officers (the "**Directors and Officers**") (the "**D&O Charge**");
- (e) authorizing the Applicant to enter into and otherwise approving an interim credit facility in the maximum amount of \$450,000 (the "**Interim Loan**") with The Toronto-

Dominion Bank ("**TD**" and, in this capacity, the "**Interim Lender**") and approving a corresponding charge on the Property (the "**Interim Lender's Charge**");

- (f) approving a Key Employee Retention Plan ("**KERP**") and a Key Employee Incentive Plan ("**KEIP**"), both as described in the Affidavit of Boris Koechlin affirmed on November 17, 2022 (the "**Koechlin Affidavit**"), and granting:
 - (i) a \$135,000 charge on the Property in favour of certain key employees (the "**Key Employees**"), to secure their KERP entitlements (the "**KERP Charge**");
and
 - (ii) a \$112,500 charge on the Property in favour of the Key Employees, to secure their KEIP entitlements (the "**KEIP Charge**");
- (g) sealing Confidential Exhibit "A" to the Koechlin Affidavit (the "**Confidential Exhibit**");
- (h) approving the First Report to the Court of the Proposal Trustee, to be filed (the "**First Report**") and approving the Proposal Trustee's activities set out therein; and
- (i) ordering and declaring that all enforcement steps taken by 9133-8404 Québec Inc. ("**9113-8404**") in relation to Action 505-17-013284-221 in the Superior Court of Québec were stayed as of October 31, 2022, including all steps taken with respect to the TD Bank Account (as defined below), and authorizing Digitcom to conduct transactions with respect to the TD Bank Account, regardless of such enforcement steps.

2. Digitcom was established in 1991 and is a national leader in voice and data communications. It designs, deploys, and manages information and communications technology for corporations and individuals across Canada. Digitcom is headquartered in Markham and currently has 23 active local sales and service staff, conducting operations from Markham, Montreal, Calgary, and Vancouver.

3. Digitcom's business has suffered losses due to the COVID-19 pandemic and supply chain challenges. A resultant collapse in working capital severely delayed its ability to complete work and invoice customers for that work. Faced with these challenges, Digitcom began conducting an out-of-court strategic process to seek a sale or financing transaction in the spring of 2022. No transaction was concluded.

4. Ultimately, Digitcom was required to file a Notice of Intention to Make a Proposal (the "NOI") on October 31, 2022, pursuant to section 50.4 of the BIA. With the support of its senior secured lender, TD, Digitcom now seeks relief in the NOI proceedings (the "**Proposal Proceedings**") to provide the stability, capital and time necessary to develop a viable proposal and ensure the continuation of its ordinary course business operations while the SISP is conducted.

PART II: FACTS

A. BACKGROUND

5. The facts underlying this motion are more fully set out in the Koechlin Affidavit and the First Report.¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Koechlin Affidavit.

¹ Affidavit of Boris Koechlin affirmed on November 17, 2022 [Koechlin Affidavit], Applicant's Motion Record at Tab 2 [Motion Record]; First Report of the Proposal Trustee, to be filed [First Report].

6. Heading into 2022, Digitcom had built up a multi-million dollar backlog of project work. Despite many of those projects having already begun, they could not be completed. Equipment had been ordered, staff and contractors had been added, but Digitcom was unable to obtain all the necessary inventory to complete the work. For example, lead times that were normally estimated at between two and six weeks shifted to between six and 12 months.²

7. As a result, Digitcom was unable to complete ongoing projects and, therefore, unable to collect the cash associated with these projects. Digitcom's cash and working capital situation deteriorated and it was required to downsize its staff in an attempt to continue operations during its out-of-court strategic process. Staff reductions and the inability to secure critical equipment continued to result in further falling sales and cash challenges.³

8. TD is Digitcom's primary secured lender and, as of November 15, 2022, was owed approximately \$3,555,762.64, plus interest and costs.⁴

9. The other creditors who have registered security interests against Digitcom in the personal property registries of Ontario or Québec (collectively, the "**PPR Registrants**") are:

- (a) Bank of Nova Scotia (with respect to vehicle leases);
- (b) Crestron Electronics, Inc. (with respect to inventory supplied by Crestron);
- (c) Dell Financial Services Canada Limited (with respect to leased computer equipment);
- (d) Toyota Credit Canada Inc. (with respect to leased vehicles); and

² Koechlin Affidavit, *ibid* at para. 9, Motion Record at Tab 2.

³ *Ibid* at para. 10, Motion Record at Tab 2.

⁴ *Ibid* at para. 12, Motion Record at Tab 2.

- (e) His Majesty in Right of Ontario represented by the Minister of Finance (this registration relates to a claim by the Minister that Digitcom owed an amount related to Employer Health Tax. Subsequently, Digitcom had communications with the Minister, in which the Minister confirmed that no amount was owing by Digitcom and, in fact, Digitcom's Employer Health Tax account was in a credit position).

10. The PPR Registrants were served with notice of Digitcom's motion for the Order.⁵

11. As of the date of the NOI filing, Digitcom owed approximately \$2.44 million to its unsecured creditors.⁶ Digitcom owes Canada Revenue Agency ("CRA") approximately \$106,000 with respect to unpaid GST arrears. CRA has been served with notice of Digitcom's motion for the Order.⁷

B. SISP

12. With the support of TD, and in consultation with the Proposal Trustee, Digitcom has developed the SISP. The SISP will solicit offers for the assets, undertakings and interests of Digitcom, on an *en bloc* or piecemeal basis. In an effort to maximize value and flexibility, the SISP will also solicit offers that contemplate a plan of restructuring, recapitalization or other form of reorganization.⁸

C. Proposed Interim Loan and Interim Lender's Charge

13. Digitcom, as borrower (in such capacity, the "**Borrower**"), and TD, as Interim Lender, have agreed to the terms of an interim loan term sheet (the "**Interim Loan Term Sheet**") in respect of the Interim Loan. The Interim Loan is intended to provide Digitcom with the liquidity necessary to fund

⁵ *Ibid* at para. 13, Motion Record at Tab 2.

⁶ *Ibid* at para. 14, Motion Record at Tab 2.

⁷ *Ibid* at para. 15, Motion Record at Tab 2.

⁸ *Ibid* at para. 17, Motion Record at Tab 2.

its ordinary course operations during the Proposal Proceedings.⁹ The proposed Interim Loan is subject to customary conditions precedent, covenants and representations and warranties.¹⁰ Pursuant to the Interim Loan Term Sheet, the proposed Interim Loan is also conditional on the granting of the Interim Lender's Charge, subordinate only to the Administration Charge.¹¹

D. Proposed Administration Charge

14. The Applicant seeks the Administration Charge to secure the fees and disbursements of the Proposal Trustee, along with its counsel, and the Applicant's counsel, incurred in connection with the Proposal Proceedings, up to a maximum of \$100,000. The Administration Charge is proposed to have first-ranking priority over all other charges and encumbrances.¹² The Applicant requires the expertise, knowledge, and continued participation of the proposed beneficiaries of the Administration Charge during the Proposal Proceedings. Each of the beneficiaries of the Administration Charge will have distinct roles in the Proposal Proceedings.¹³

E. Directors' and Officers' Indemnification and Charge

15. Digitcom does not have directors and officers' insurance. Given that, in certain circumstances, directors and officers can be held liable for certain obligations of a company owing to employees and government entities, Digitcom needs to secure its obligations to indemnify the Directors and Officers.¹⁴ Digitcom requires the active involvement of its officers during the Proposal Proceedings. Given the lack of available insurance, it is important to secure the continued service and involvement

⁹ *Ibid* at para. 39, Motion Record at Tab 2.

¹⁰ *Ibid*, Motion Record at Tab 2.

¹¹ *Ibid* at para. 41, Motion Record at Tab 2.

¹² *Ibid* at para. 22, Motion Record at Tab 2.

¹³ *Ibid* at para. 23, Motion Record at Tab 2.

¹⁴ *Ibid* at para. 25, Motion Record at Tab 2.

of Digitcom's officers in the Proposal Proceedings by protecting the officers by way of the \$75,000 D&O Charge. The D&O Charge would be subordinate to the proposed Administration Charge and the Interim Lender's Charge, but in priority to all other charges and encumbrances.¹⁵

F. Key Employee Protections

16. In connection with Digitcom's restructuring efforts, Digitcom has considered and devised, in consultation with the Proposal Trustee, the KERP and the KEIP for the benefit of the Key Employees.¹⁶ The Key Employees possess knowledge, experience and skills that are important and required by Digitcom to be able to successfully complete any restructuring. If the Key Employees were to resign, it would be difficult for Digitcom to quickly or efficiently find individuals who could perform their roles in a comparable way. The institutional knowledge that would be lost would be significant and would adversely affect the success of the SISP and the Proposal Proceedings.¹⁷

17. The payments under the KERP and KEIP are proposed to be secured by the KERP Charge and the KEIP Charge, respectively. The KERP Charge would be subordinate to the proposed Administration Charge, the D&O Charge, and the Interim Lender's Charge, but would rank in priority to all other encumbrances. The KEIP Charge would be subordinate to the proposed Administration Charge, the D&O Charge, the Interim Lender's Charge, the KERP Charge, and TD's pre-filing secured debt, but would rank in priority to all other encumbrances.¹⁸

¹⁵ *Ibid*, Motion Record at Tab 2.

¹⁶ *Ibid* at para. 28, Motion Record at Tab 2.

¹⁷ *Ibid* at para. 29, Motion Record at Tab 2.

¹⁸ *Ibid* at para. 33, Motion Record at Tab 2.

G. Stay Extension

18. Since the filing of the NOI, Digitcom and its management team have been working diligently and in good faith with the Proposal Trustee, and in consultation with TD, towards a restructuring and formulation of a proposal to creditors.¹⁹ Currently, Digitcom must file a proposal on or before November 30, 2022 (the "**Filing Period**"). Digitcom requires more time to develop a proposal and advance the SISP. It therefore requires the Stay Extension and a corresponding extension of the Filing Period, to and including January 13, 2022. This extension will not prejudice any creditors.²⁰

PART III: ISSUES

19. The issues to be considered on this motion are whether this Court should:

- (a) approve the SISP;
- (b) approve the Interim Loan and grant the Interim Lender's Charge;
- (c) grant the Administration Charge;
- (d) grant the D&O Charge;
- (e) grant the Stay Extension and a corresponding extension of the Filing Period to and including January 13, 2022;
- (f) approve the KERP and KEIP, and grant the KERP Charge and the KEIP Charge;
- (g) grant a sealing order over the Confidential Exhibit;
- (h) approve the First Report and the Proposal Trustee's activities set out therein; and

¹⁹ *Ibid* at para. 46, Motion Record at Tab 2.

²⁰ *Ibid* at paras. 47-48, Motion Record at Tab 2.

- (i) order and declare that any and all enforcement steps taken by 9113-8404 were stayed as of October 31, 2022, including all steps taken with respect to the TD Bank Account, and authorize Digitcom to conduct all transactions with respect to the TD Bank Account, regardless of any such enforcement steps.

PART IV: LAW AND ARGUMENT

A. The SISP Should be Approved

20. When considering approval of a sale process under the proposal provisions of the BIA, this Court has stated that the following four factors should be considered:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
- (d) is there a better viable alternative?²¹

21. Although the decision to approve a sales process is distinct from approving a sale under section 65.13 of the BIA, courts have nonetheless noted that the adequacy of a sales process should be assessed with regard to whether it will result in a transaction that is capable of satisfying the non-exhaustive criteria enumerated in section 65.13,²² namely:

²¹ [Danier Leather Inc. \(Re\)](#), 2016 ONSC 1044 at paras. 23-25 [*Danier*]; [Mustang GP Ltd. \(Re\)](#), 2015 ONSC 6562 at paras. 37-38 [*Mustang*].

²² [Danier](#), *ibid* at paras. 21-23, 34.

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the proposal trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the proposal trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.²³
22. The Applicant submits that the SISP should be approved, because:
- (a) in light of the Applicant's financial circumstances, a sale of its business on a going-concern basis is in the best interests of Digitcom and its stakeholders;
 - (b) the SISP is designed to be flexible and capable of accommodating virtually any type of transaction;
 - (c) the Proposal Trustee believes that the eight-week solicitation period contemplated by the SISP will provide sufficient time to expose Digitcom's assets to the market and

²³ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 s 65.13 [BIA]; *Danier*, *ibid* at paras. [34-35](#).

identify a value-maximizing transaction, in light of the fact that Digitcom already conducted its own strategic process starting in Spring 2022;

- (d) a sale of the Applicant's assets or business will maximize value for stakeholders, including potentially for its 23 employees, and can be expected to provide a better and higher result than a bankruptcy or liquidation;
- (e) the SISP will be conducted by the Proposal Trustee in a fair and transparent manner;
- (f) the SISP will be conducted with minimal disruption to the Applicant's ordinary course operations; and
- (g) the Proposal Trustee and TD are supportive of the SISP and believe it is the best option for Digitcom to preserve the value of its business and continue as a going-concern.²⁴

B. The Interim Loan and Interim Lender's Charge Should be Granted

23. Subsection 50.6(1) of the BIA expressly provides this Court with the jurisdiction to order a charge to secure interim financing advanced to a debtor "on notice to the secured creditors who are likely to be affected by the charge [...] in an amount that the court considers appropriate".²⁵ Such a charge may not "secure an obligation that exists before the order is made".²⁶ Pursuant to subsection 50.6(3) of the BIA, the charge may "rank in priority over the claim of any secured creditor".²⁷ As noted above, all secured creditors, including TD, have been given notice of this motion.

²⁴ Koechlin Affidavit, *supra* note 1 at paras. 19-21, Motion Record at Tab 2.

²⁵ *BIA*, *supra* note 23 s 50.6(1).

²⁶ *Ibid.*

²⁷ *Ibid* s 50.6(1), s 50.6(3).

24. When determining whether to grant a charge securing interim financing, subsection 50.6(5) of the BIA requires the Court to consider, among other things:

- (a) the period during which the debtor is expected to be subject to proceedings under the BIA;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.²⁸

25. Recognizing that a charge securing interim financing will invariably "impact all creditors' positions to some degree",²⁹ courts have granted such charges where:

- (a) declining to approve interim financing and an attendant charge would result in the cessation of the debtor's business;

²⁸ *Ibid* s 50.6(5); *Eureka 93 Inc. et al (Re)*, 2020 ONSC 1482 at para. 16 [*Eureka*].

²⁹ *Re P.J. Wallbank Manufacturing Co. Limited*, 2011 ONSC 7641 at para. 24 [*Wallbank*]; *Mustang*, *supra* note 21 at para. 29; *OVG Inc. (Re)*, 2013 ONSC 1794 at para. 34.

- (b) the interim financing and a corresponding charge were supported by the proposal trustee; and
- (c) the interim financing provided "at least the prospect of increased value and a successful proposal".³⁰

26. The circumstances in which courts have granted interim financing and a charge securing same reflect the remedial purposes of the BIA's proposal provisions – to "avoid the social and economic losses resulting from liquidation of an insolvent company" and "create conditions for preserving the *status quo*" while an insolvent company has an opportunity to establish a proposal.³¹

27. Applied to this case, the statutory considerations enumerated in subsection 50.6(5) of the BIA and the remedial purpose of the BIA's proposal provisions support the granting of the Interim Loan and Interim Lender's Charge, namely:

- (a) as the Cashflow Projection illustrates, the Applicant requires additional financing to continue its ordinary course business operations while the SISP and the Proposal Proceedings are conducted;
- (b) absent additional financing, Digitcom would be forced to cease its business operations immediately, with the consequence that the SISP could not be completed and there would be very little chance for a viable proposal to be put forward;
- (c) the potential for the preservation of the value and going concern operations of the Applicant's business, which will be enabled by the Interim Loan and Interim Lender's

³⁰ *Mustang*, *ibid* at para. [28](#); *Wallbank*, *ibid* at para. [24](#); *Eureka*, *supra* note 28 at para. [24](#).

³¹ *In the Matter of the Proposal of Cogent Fibre Inc.*, 2015 ONSC 5139 at para. [8](#) [*Cogent*]; *Clothing for Modern times Ltd., Re*, 2011 ONSC 7522 at para. [11](#), citing *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60.

Charge, is in the best interests of the Applicant and its stakeholders, including its employees;

- (d) the Interim Loan is conditional upon the Interim Lender's Charge being granted;
- (e) as the Cashflow Projection demonstrates, with the benefit of the Interim Loan, the Applicant will have sufficient liquidity to fund its obligations, the SISP and the costs of the Proposal Proceedings; and
- (f) the Proposal Trustee is supportive of the Interim Loan and the Interim Lender's Charge and does not believe that creditors will be prejudiced as a result of its approval.³²

28. The Applicant submits that the approval of the proposed Interim Loan and Interim Lender's Charge will enhance the prospect of a viable proposal being made, is consistent with the BIA's purposes and is necessary to prevent the "devastating social and economic effects of bankruptcy".³³

C. The Administration Charge Should be Granted

29. The Applicant is seeking the Administration Charge, in the amount of \$100,000, to secure the professional fees and disbursements of the Proposal Trustee, along with its counsel, and the Applicant's counsel. Section 64.2 of the BIA authorizes this Court to grant a super-priority charge on a debtor's property to secure professional fees, and states:³⁴

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 [...] is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

³² Koechlin Affidavit, *supra* note 1 at paras. 38-40, Motion Record at Tab 2.

³³ *Mustang*, *supra* note 21 at paras. 30-31, citing *Comstock Canada Ltd. (Re)*, 2013 ONSC 4756.

³⁴ BIA, *supra* note 23 s 64.2; *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 at para. 12 [*Colossus*].

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.³⁵

30. Subsection 64.2(2) provides that the Court "may order that the security or charge rank in priority over the claim of any secured creditor".³⁶ Such administration charges are routinely granted where, as here:

- (a) the debtor has limited means to obtain professional assistance;
- (b) the involvement of professional advisors is critical to the success of the proceedings under the BIA; and
- (c) the quantum of the proposed charge is commensurate with the complexity of the debtor's business.³⁷

31. The Applicant submits that it is appropriate for this Court to exercise its jurisdiction to grant the Administration Charge given, among other things, that:

- (a) Digitcom requires the assistance of professional advisors to navigate the Proposal Proceedings;
- (b) the professional advisors would not participate in the Proposal Proceedings absent the Administration Charge;

³⁵ [BIA](#), *ibid* s 64.2(1).

³⁶ [BIA](#), *ibid* s 64.2(2).

³⁷ [Mustang](#), *supra* note 21 at para. [33](#); [Colossus](#), *supra* note 34 at paras. [13-14](#); [Danier](#), *supra* note 21 at para. [57](#).

- (c) the involvement of the beneficiaries of the Administration Charge, each of which has a critical role, is essential to the success of the Proposal Proceedings;
- (d) the roles of the beneficiaries of the Administration Charge are not duplicative;
- (e) the quantum of the proposed Administration Charge accords with the size and complexity of Digitcom's business;
- (f) the Proposal Trustee supports the granting of the Administration Charge; and
- (g) TD is supportive of the Administration Charge.³⁸

D. The D&O Charge Should be Granted

32. The Applicant is seeking the D&O Charge in the amount of \$75,000 to secure the indemnity of its directors and officers for liabilities they may incur during the Proposal Proceedings.³⁹

Subsection 64.1(1) of the BIA authorizes this Court to grant the D&O Charge and provides that:

[o]n application by a person in respect of whom a notice of intention is filed under section 50.4 [...] and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention.⁴⁰

33. Pursuant to subsection 64.1(2), the charge may "rank in priority over the claim of any secured creditor".⁴¹

³⁸ Koechlin Affidavit, *supra* note 1 at paras. 22–24, Motion Record at Tab 2.

³⁹ *Ibid* at paras. 25–27, Motion Record at Tab 2.

⁴⁰ [BIA](#), *supra* note 23 s 64.1(1).

⁴¹ [BIA](#), *ibid* s 64.1(2).

34. This Court has previously approved charges in favour of a debtor's indemnity obligations to its directors and officers where:

- (a) the existing insurance coverage may have been insufficient to cover all potential claims;
- (b) the continued involvement of the debtor's directors and officers was essential to a successful proceeding under the BIA;
- (c) the debtor's directors and officers may not have been willing to continue to provide their services absent the protection of a court-ordered charge; and
- (d) the proposal trustee was supportive of the proposed charge.⁴²

35. The Applicant does not have existing directors' and officers' liability insurance.⁴³ In the event any liability is found, which may include obligations owing to employees and government entities, such as unpaid accrued wages and unpaid accrued vacation pay, together with unremitted excise, sales, goods and services, and harmonized sales taxes, the Applicant's officers are unprotected. Given the risks attending the Proposal Proceedings, the D&O Charge is necessary to ensure that the Applicant continues to benefit from the knowledge and expertise of Digitcom's and officers. The Proposal Trustee and TD are supportive of the D&O Charge.

E. The Court Should Grant the Stay Extension and Extend the Filing Period

36. The automatic stay period afforded to the Applicant as a result of filing the NOI expires on November 30, 2022. The Applicant is seeking the Stay Extension and a corresponding extension of

⁴² *Danier*, *supra* note 21 at paras. 65-71; *Mustang*, *supra* note 21 at para. 35; *Colossus*, *supra* note 34 at paras. 17-21.

⁴³ Koechlin Affidavit, *supra* note 1 at para. 25, Motion Record at Tab 2.

the Filing Period, until and including January 13, 2023. These extensions will afford Digitcom the breathing space necessary to conduct the SISP and develop a viable proposal for the benefit of its stakeholders.

37. Subsection 50.4(9) of the BIA authorizes this Court to grant the Stay Extension where it 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 creditor would be materially prejudiced if the extension being applied for were granted.⁴⁴

38. These criteria apply where, as here, an extension of time is necessary to allow a debtor company to pursue a SISP and assess the merits of a proposal.⁴⁵

(i) The Applicant Has Acted and is Acting in Good Faith and with Due Diligence

39. Prior to and following the commencement of the Proposal Proceedings, the Applicant has acted and continues to act in good faith and with due diligence.⁴⁶ Specifically, the Applicant has taken the following steps to address its liquidity issues and implement a restructuring that would see its business emerge as a going concern:

- (a) with the assistance of the Proposal Trustee and the Applicant's legal advisors, undertaking an analysis of its restructuring options for the benefit of Digitcom's stakeholders, including its customers, suppliers and employees;

⁴⁴ BIA, *supra* note 23 s 50.4(9).

⁴⁵ *Mustang*, *supra* note 21 at para. 41; *Colossus*, *supra* note 34 at paras. 37-38.

⁴⁶ Koechlin Affidavit, *supra* note 1 at para. 49, Motion Record at Tab 2.

- (b) developing the SISP in consultation with the Proposal Trustee;
- (c) arranging for the Interim Loan to ensure that Digitcom has the necessary liquidity to fund the Proposal Proceedings, continue its ordinary course business operations, and meet its obligations while the SISP is conducted;
- (d) disclaiming uneconomic leases;⁴⁷ and
- (e) continuing to operate its business in the ordinary course.⁴⁸

(ii) The Applicant is Likely to Make a Viable Proposal if the Extension is Granted

40. It is well-established that the purpose of the BIA proposal provisions is to give an insolvent company an opportunity to put forward a proposal.⁴⁹ To this end, the BIA proposal provisions offer insolvent debtors breathing space in the form of a stay of proceedings so that a viable proposal may be developed. This breathing space has previously been afforded to insolvent debtors to conduct a SISP and evaluate whether a viable proposal can be formulated for the benefit of their creditors.⁵⁰ The alternative for such insolvent debtors, as recognized in *Mustang GP Ltd. (Re)*, is a bankruptcy – a result that surely forecloses any possibility of a proposal.⁵¹

41. Here, the Applicant has commenced the Proposal Proceedings to conduct the SISP and consummate a value-maximizing transaction that will see Digitcom continue as a going concern. Not only is the SISP in the best interest of Digitcom and its stakeholders, it may permit the Applicant to develop a viable proposal for its creditors.⁵² Ultimately, the Stay Extension will ensure that the

⁴⁷ First Report, *supra* note 1.

⁴⁸ Koechlin Affidavit, *supra* note 1 at paras. 17, 39, 51, Motion Record at Tab 2.

⁴⁹ *Cogent*, *supra* note 31 at para. 8.

⁵⁰ *Mustang*, *supra* note 21 at para. 41; *Colossus*, *supra* note 34 at paras. 37-43.

⁵¹ *Mustang*, *ibid*; *Colossus*, *ibid*.

⁵² Koechlin Affidavit, *supra* note 1 at paras. 49, 51, Motion Record at Tab 2.

Applicant is able to conduct the SISP and assess the viability of a proposal while it continues its operations in the ordinary course.

(iii) No Creditor is Likely to be Materially Prejudiced by the Stay Extension

42. The Applicant is not aware of any creditor who would be materially prejudiced if the Stay Extension were granted. As the Cashflow Projection illustrates, the Applicant is forecast to have sufficient liquidity to fund its obligations and the costs of the Proposal Proceedings, with the Interim Loan, through the end of the Stay Extension. The Applicant's continued operations in that time will preserve value for the benefit of its stakeholders.⁵³

43. For the foregoing reasons, the Applicant believes the granting of the Stay Extension is in the best interests of Digitcom and its stakeholders, meets the statutory requirements under the BIA, and is appropriate in the circumstances.

F. The KERP and KEIP Should be Approved, and the KERP Charge and the KEIP Charge Should be Granted

44. In order to protect the Applicant's business and ensure that the SISP is successful, Digitcom must retain the Key Employees. Accordingly, the Applicant seeks approval of the KERP and KEIP and the granting of the KERP Charge and the KEIP Charge, in order to retain the Key Employees and maximize value from any potential sale for all of Digitcom's stakeholders.

45. In *Aralez Pharmaceuticals Inc. (Re)*, this Court affirmed that the following non-exhaustive factors should be considered in determining whether to approve plans like the KERP and KEIP:

⁵³ Koechlin Affidavit, *supra* note 1 at paras. 38-39, 49-51, Motion Record at Tab 2.

- (a) whether the court-appointed officer supports the retention plan;
- (b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;
- (c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring, including the effective operation of the business and the effectiveness of a marketing process;
- (d) the key employees' history with and knowledge of the debtor;
- (e) the difficulty of finding replacements for the key employees;
- (f) whether the plans and charges were approved by the board of directors;
- (g) whether the payments are supported by the secured creditors; and
- (h) whether the payments are payable at the conclusion of the process.⁵⁴

46. While *Aralez* involved a proceeding under the CCAA, it applies equally to BIA proposal proceedings, within which key employee retention plans are frequently approved.⁵⁵

47. The Proposal Trustee and TD support the KERP and KEIP, and the KERP Charge and the KEIP Charge. The Applicant has named only three Key Employees (out of a total of 23 employees), all of whom manage key aspects of Digitcom's business and its relationships with customers and

⁵⁴ [*Aralez Pharmaceuticals Inc. \(Re\)*, 2018 ONSC 6980](#) at para. 29 [*Aralez*], citing [*Cinram International Inc. \(Re\)*, 2012 ONSC 3767](#); [*Danier*](#), *supra* note 21 at para. 76, citing [*Re Grant Forest Products Inc.*, \[2009\] 57 CBR \(5th\) 128](#) (SCJ [Commercial List]) at paras. 8-22.

⁵⁵ [*Danier*](#), *ibid* at para. 77; [*In the Matter of the Notice of Intention to Make a Proposal of the Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*](#), (June 8, 2022) Toronto, 31-2835198 (Extension Order) at para. 14; [*In the Matter of the Notice of Intention to Make a Proposal of the Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*](#), (June 8, 2022) Toronto, CV-22-00682153-00CL (Endorsement).

suppliers. The Key Employees have deep knowledge of the Applicant's operations and they would be difficult to replace.⁵⁶

48. These Proposal Proceedings are occurring in the context of a strong labour market and, without the assurances of the KERP and KEIP, there is much less incentive for the Key Employees to remain with Digitcom. The payments to be made under the KERP and KEIP are relatively modest in size, and both plans have been designed carefully to retain and incentivize the Key Employees, given that payments will only be made at the conclusion of the SISP.⁵⁷

G. The Sealing Order Should be Granted

49. The Applicant is seeking a sealing order over the contents of the Confidential Exhibit pursuant to subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.⁵⁸ The Confidential Exhibit contains the names of the Key Employees, the details of the KERP and KEIP, and the salaries, vacation entitlements, and bonus structures of the Key Employees.⁵⁹

50. The Supreme Court recently addressed the test to be applied by courts in determining whether to grant sealing orders in *Sherman Estate v Donovan*. The party asking the court to exercise its discretion in a way that limits the open court presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

⁵⁶ Koechlin Affidavit, *supra* note 1 at paras. 28-29, 34, Motion Record at Tab 2.

⁵⁷ *Ibid* at paras. 30, 32, Motion Record at Tab 2.

⁵⁸ [Courts of Justice Act, RSO 1990, c. C. 43](#) s 137(2).

⁵⁹ Koechlin Affidavit, *supra* note 1 at paras. 35-36, Motion Record at Tab 2.

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁶⁰

51. The test from *Sherman Estate* is satisfied here. The sealing order serves a valid public interest, in that it protects the Key Employees from the disclosure of their sensitive personal information. It also protects Digitcom's confidential business information, including the compensation structures of its Key Employees. The only method by which the confidential information can be protected is by means of the sealing order and the salutary effects of such an order vastly outweigh any detriment. Recognizing the salutary effects of sealing the personal and remuneration details of employees, this Court has frequently granted sealing orders over the information contained in KERPs and KEIPs.⁶¹

H. The TD Bank Account

52. On September 9, 2022, the Superior Court of Quebec granted a judgment against Digitcom in favour of 9133-8404, one of Digitcom's creditors, in the amount of \$105,000, plus interest. On or about October 12, 2022, 9133-8404 took enforcement steps against a bank account (account number ending 5027438) maintained by Digitcom with TD in Sainte-Julie, Québec (the "**TD Bank Account**"). On or about October 7, 2022, Digitcom was advised that 9133-8404 had attempted to seize or garnish the funds held to the credit of Digitcom in the TD Bank Account.⁶²

53. On November 2, 2022, Digitcom's counsel sent a letter to 9133-8404's counsel, informing 9133-8404 of the filing of the NOI and the imposition of the automatic stay of proceedings.⁶³ TD is

⁶⁰ *Sherman Estate v Donovan*, 2021 SCC 25 at para. 38.

⁶¹ *Danier*, *supra* note 21 at paras. 79-86; *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 22-27; *Canwest Global Communications Corp. (Re)*, [2009] 59 CBR (5th) 72 (SCJ [Commercial List]) at paras. 49-52; *In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation*, (March 6, 2009) Toronto, 09-CL-7950 & 09-CL-7951 (Endorsement) at paras. 5-6, 14-19; *In the Matter of the Notice of Intention to Make a Proposal of the Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*, (June 8, 2022) Toronto, 31-2835198 (Extension Order) at paras. 14, 21; *In the Matter of the Notice of Intention to Make a Proposal of the Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*, (June 8, 2022) Toronto, CV-22-00682153-00CL (Endorsement).

⁶² Koechlin Affidavit, *supra* note 1 at para. 42, Motion Record at Tab 2.

⁶³ *Ibid* at para. 43, Motion Record at Tab 2.

currently holding the funds (over \$68,000) and will only give Digitcom access to those funds if this Honourable Court grants an order permitting such access.⁶⁴

54. Under section 69 of the BIA, an automatic stay of proceedings came into effect on October 31, 2022, when Digitcom filed the NOI. As stated in subsection 69(1) of the BIA, on the filing of a notice of intention:

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.⁶⁵

55. The effect of this subsection is that the stay comes into effect *immediately* upon the filing of the NOI, effectively ceasing any ongoing execution attempts by creditors to collect pre-filing debts, including in the following circumstances:

- (a) requiring CRA to repay funds that it garnished after the filing of a notice of intention to collect payroll withholdings for periods prior to the filing;⁶⁶
- (b) staying the physical seizure and removal of a debtor's vehicles by a civil enforcement agent acting on behalf of a judgment creditor;⁶⁷ and
- (c) requiring a creditor to repay the proceeds of a cheque from the debtor that it received prior to the filing of a notice of intention, but negotiated for payment after the filing.⁶⁸

56. 9133-8404's enforcement actions are subject to the stay of proceedings. Digitcom is entitled to the Order being sought, allowing it to conduct all transactions with respect to the TD Bank Account, regardless of the attempted enforcement steps. The funds held in the TD Bank Account are not

⁶⁴ *Ibid* at para. 44, Motion Record at Tab 2.

⁶⁵ [BIA](#), *supra* note 23, s 69(1).

⁶⁶ [Hamachi House Fine Japanese Cuisine \(Re\)](#), 2016 NSSC 58 at paras. 6-8, 23-24.

⁶⁷ [Re Hover](#), 2000 ABQB 938 at paras. 36-37.

⁶⁸ [Startek Computer Inc \(Trustee of\) v Samtack Computer Inc](#), 2000 BCSC 1316 at paras. 11-13.

included in the Cashflow Projection, and if Digitcom is allowed to access those funds, its liquidity will improve, requiring it to borrow less under the Interim Loan. This will benefit all its creditors.

PART V: RELIEF REQUESTED

57. The Applicant submits that the relief sought in the within motion is appropriate in the circumstances and consistent with prior orders of this Court,⁶⁹ and respectfully requests that this Court grant the proposed Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22 DAY OF NOVEMBER, 2022.



BENNETT JONES LLP

⁶⁹ [*In the Matter of the Notice of Intention to Make a Proposal of the Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*](#), (June 8, 2022) Toronto, 31-2835198 (Extension Order); [*In the Matter of the Notice of Intention to Make a Proposal of Danier Leather Inc.*](#), (February 8, 2016) Toronto, 31-CL-2084381 (Court Order); [*In the Matter of the Notice of Intention to Make a Proposal of Allied Track Services Inc.*](#), (January 22, 2021) Toronto, 32-2705503 (Extension Order); [*In the Matter of the Notice of Intention to Make a Proposal of Muskoka Grown Limited*](#), (May 6, 2020) Toronto, 31-2643278 (NOI Process Order).

SCHEDULE "A"

LIST OF AUTHORITIES

Cases Cited

1. [*Aralez Pharmaceuticals Inc. \(Re\)*, 2018 ONSC 6980](#)
2. [*Canwest Global Communications Corp. \(Re\)*, \[2009\] 59 CBR \(5th\) 72 \(SCJ \[Commercial List\]\)](#)
3. [*Clothing for Modern times Ltd., Re*, 2011 ONSC 7522](#)
4. [*Colossus Minerals Inc. \(Re\)*, 2014 ONSC 514](#)
5. [*Danier Leather Inc. \(Re\)*, 2016 ONSC 1044](#)
6. [*Eureka 93 Inc. et al \(Re\)*, 2020 ONSC 1482](#)
7. [*Hamachi House Fine Japanese Cuisine \(Re\)*, 2016 NSSC 58](#)
8. [*In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation*, \(March 6, 2009\) Toronto, 09-CL-7950 & 09-CL-7951 \(Endorsement\)](#)
9. [*In the Matter of the Notice of Intention to Make a Proposal of Allied Track Services Inc.*, \(January 22, 2021\) Toronto, 32-2705503 \(Extension Order\)](#)
10. [*In the Matter of the Notice of Intention to Make a Proposal of Danier Leather Inc.*, \(February 8, 2016\) Toronto, 31-CL-2084381 \(Court Order\)](#)
11. [*In the Matter of the Notice of Intention to Make a Proposal of Muskoka Grown Limited*, \(May 6, 2020\) Toronto, 31-2643278 \(NOI Process Order\)](#)
12. [*In the Matter of the Notice of Intention to Make a Proposal of the Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*, \(June 8, 2022\) Toronto, 31-2835198 \(Extension Order\)](#)
13. [*In the Matter of the Notice of Intention to Make a Proposal of the Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*, \(June 8, 2022\) Toronto, CV-22-00682153-00CL \(Endorsement\)](#)
14. [*In the Matter of the Proposal of Cogent Fibre Inc.*, 2015 ONSC 5139](#)
15. [*Mustang GP Ltd. \(Re\)*, 2015 ONSC 6562](#)
16. [*Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347](#)
17. [*OVG Inc. \(Re\)*, 2013 ONSC 1794](#)
18. [*Re Hover*, 2000 ABQB 938](#)

19. [*Re P.J. Wallbank Manufacturing Co. Limited*, 2011 ONSC 7641](#)
20. [*Sherman Estate v Donovan*, 2021 SCC 25](#)
21. [*Startek Computer Inc \(Trustee of\) v Samtack Computer Inc*, 2000 BCSC 1316](#)

SCHEDULE "B"

STATUTES RELIED ON

Bankruptcy and Insolvency Act, RSC 1985, c. B-3

Section 50.4

Notice of Intention

(1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "**cash-flow statement**") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

- (a) such release would unduly prejudice the insolvent person; and
- (b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

- (a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;
- (b) shall file a report on the state of the insolvent person's business and financial affairs – containing the prescribed information, if any –
 - (i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and
 - (ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and
- (c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- (c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

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

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period

mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

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

Section 50.6

Order – interim financing

(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

(2) In the case of an individual,

- (a) they may not make an application under subsection (1) unless they are carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

Priority

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

Priority – previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Section 64.1

Security or charge relating to director's indemnification

(1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge - in an amount that the court considers appropriate - in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction - indemnification insurance

(3) The court may not make the order ii in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 64.2

Court may order security or charge to cover certain costs

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

Section 65.13

Restriction on disposition of assets

(1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Section 69

Stay of proceedings – notice of intention

(1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by 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,

(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 by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

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

(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that

(A) refers to subsection 224(1.2) of the Income Tax Act, and

(B) 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, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or 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,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

Limitation

(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 notice of intention under section 50.4 was filed from dealing with those assets;

(b) 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 the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(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. 416]

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 notice of intention 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.

Section 183

Courts vested with jurisdiction

(1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Courts of Justice Act, RSO 1990, c. C.43

Section 137

Documents public

(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgements entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF DIGITCOM
TELECOMMUNICATIONS INC., A CORPORATION INCORPORATED UNDER THE LAWS OF ONTARIO**

Estate/Court File No.: 31-2879869

ONTARIO
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY**

Proceedings commenced in Toronto

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(Returnable November 29, 2022)**

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