



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: BK-22-2879869-0031 DATE: 23 February 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: **IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF DIGITCOM TELECOMMUNICATION INC.**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Afshan NAVEED	Toronto Dominion Bank (Creditor)	Afshan.naveed@dentons.com
Jeffrey OLIVER	Proposal Trustee	joliver@cassels.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Yaakov EIZICOVICS	Comwave Telecom (2009) Inc. (Purchaser)	yaakov@gropperlaw.com
Monica SONG		Monica.song@dentons.com
Michael MCQUADE	Frontier Network (supplier)	mmcquade@mjlw.ca
Jason DUTRIZAC	Bell Canada (supplier)	jdutrizac@blg.com
Brendan Bissell	Egate Networks Inc. (supplier)	bissell@gsnh.com

ENDORSEMENT OF JUSTICE KIMMEL:

1. The applicant requests an order (the "Approval and Vesting Order"), approving the sale transaction (the "Transaction") contemplated by the Asset Purchase Agreement (the "Sale Agreement") between Digitcom and Comwave Telecom (2009) Inc. (the "Purchaser"), dated February 9, 2023, and upon closing, vesting in the Purchaser all of the Applicant's right, title and in and to the Purchased Assets (as defined in the Sale Agreement).
2. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Sale Agreement, the Third Koechlin Affidavit, the Order of the Honourable Justice Conway dated November 29, 2022 (the "NOI Process Order"), or the Third Report of the Proposal Trustee dated February 17, 2023 (the "Third Report"), as the case may be.
3. The applicant also seeks an order for ancillary relief (the "Ancillary Order"): (a) extending the time for it to file a proposal under the BIA and the corresponding stay of proceedings ("Stay Extension"); (b) approving the Third Report and activities, fees and expenses of the Proposal Trustee and its counsel; (c) certain declaratory relief for employees who will be terminated under the WEPP Regulations and WEPP Act; (d) authorizations and directions with respect to the proposed Distribution of the Net Proceeds of the Transaction and with respect to the Holdback; (e) authorizations with respect to the payment of any surplus from the Holdback to the secured creditor, TD; and (f) a limited sealing order with respect to certain Confidential Appendices.
4. The relief sought is supported by the Proposal Trustee and the applicant's senior secured creditor, TD. While there were some initial concerns raised by Frontier Network, one of Digitcom's suppliers (largely arising because the supplier contracts are not being assigned or assumed as part of the Transaction), after a brief adjournment, the parties returned to court having reached a commercial arrangement to address that specific supplier's concerns. Counsel for the other suppliers in attendance do not oppose the orders sought today and continue to negotiate with Digitcom and Comwave, but do not consider it necessary for those negotiations to hold up the court's approval of the Transaction and related orders sought today. No one else appeared or indicated any intention to oppose the relief sought today.

The Approval and Vesting Order:

5. The Transaction represents the highest and best offer received pursuant to the court-approved SISP. The SISP was developed by the applicant, with the support of TD, and in consultation with the Proposal Trustee, and was approved by this Court pursuant to the Sale Process Order.
6. In the course of the SISP, 270 Known Potential Bidders were provided with teaser letters and confidentiality agreements. Twelve Potential Bidders executed confidentiality agreements and were provided with access to a confidential data room for the purposes of conducting due diligence. Of the twelve Potential Bidders provided with access to the confidential data room, seven submitted non-binding letters of intent, six of which constituted Qualified LOIs submitted by Qualified Bidders.
7. The bid deadline was extended and eventually four Qualified Bidders submitted Final Bids to the Proposal Trustee by the Revised Bid Deadline. Following the Proposal Trustee's review of the Final Bids, in consultation with Digitcom and TD, three of the Final Bids were determined to be competitive Final Bids (collectively, the "Final Bidders"). The Final Bidders were allowed until 9:00 a.m. (Mountain time) on February 6, 2023 to amend and resubmit their Final Bids. In consultation with TD, the Purchaser, which is an unrelated party, was determined to be the Successful Bidder in the SISP.
8. Among other things, the Sale Agreement and the Transaction contemplated thereby:
 - a. are superior to all of the other Final Bids submitted in the SISP, based on, among other things, purchase price, timing of payment of the purchase price, and conditionality;
 - b. are subject only to customary conditions and requisite approvals, including obtaining the Approval and Vesting Order; and

- c. if consummated, will ensure a going concern result for Digitcom's business for the benefit of its stakeholders, including its vendors, customers and employees.
9. Having considered the non-exhaustive factors under s. 65.13(4) of the BIA and the often concurrently considered factors set out by the Court of Appeal in the case of *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), I am satisfied that the SISP was run and the market was canvassed in accordance with the court's Sale Process Order. The fairness, efficacy and integrity of the sale process has already been established.
10. I am satisfied that the Transaction was reached through a transparent and robust SISP and represents the highest and best price available, and that it achieves a fair and reasonable outcome for the applicant's stakeholders and that the Approval and Vesting Order should be granted, for this among the other reasons outlined in the applicant's factum at paragraph 31. This is reinforced by the fact that it is not being challenged or questioned by any stakeholder.
11. The Approval and Vesting Order is consistent with the form of model order, with appropriate administrative and other changes to reflect the specific circumstances of the applicant and these proceedings.

The Ancillary Order:

The Proposed Holdback and Distributions

12. In connection with the proposed Distribution, the Proposal Trustee has obtained opinions from its counsel, confirming that, subject to customary assumptions and qualifications, TD's security is valid and enforceable.
13. The proposed Distribution accords with the priorities that exist under the BIA, at law and pursuant to the previous orders of this court in this matter.
14. The concurrence of TD, the senior secured creditor that will suffer a shortfall in the repayment of its debt, with the proposed Holdback and Distribution is an important consideration in the court's approval of this aspect of the Ancillary Order.

The WEPP Declaration

15. Upon or immediately after the Closing Date (as defined in the Sale Agreement), those of Digitcom's employees, who are not offered employment by the Purchaser in accordance with the Sale Agreement, if any, will have their employment terminated. At such time, the only employees that will be retained by the Applicant will be those necessary to wind down Digitcom's operations. The WEPP Declaration is intended to ensure that Digitcom's terminated employees, if any, will have timely access to the benefits conferred under the WEPP Act and the WEPP Regulations.
16. Read together, section 5(5) of the WEPP Act and section 3.2 of the WEPP Regulations expressly contemplate the making of declarations akin to the WEPP Declaration sought by the Applicant in proposal proceedings under the BIA.
17. Applying section 5(5) of the WEPP Act and section 3.2 of the WEPP Regulations, courts, including this court, have previously granted declarations analogous to the proposed WEPP Declaration in the context of BIA proposal proceedings. See *In the Matter of the Notice of Intention to Make a Proposal of The Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens*, (August 11, 2022) Toronto, BK-22-02835198-0031 (Order) at para 6; *In the Matter of the Notice of Intention to Make a Proposal of Nilex Inc. and Nilex USA Inc.* (December 13, 2022) Edmonton, 24-2878531 (Order) at para 3.

The Confidentiality and Sealing Order

18. To protect the integrity of the SISP in the event that the Transaction does not close, the applicant is seeking a sealing order in respect of the Confidential Appendices until the closing of the Transaction. The Confidential Appendices are comprised of the unredacted Sale Agreement, including the Purchase Price and the Deposit and information concerning the Final Bids submitted in the SISP. While the

parties hope to close the Transaction in escrow as soon as possible with an effective date of February 27, 2023, there could be unexpected delays.

19. The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the contemplated transaction is completed and the Proposal Trustee's Certificate has been filed). I am satisfied that it is necessary to protect commercially sensitive information that could negatively impact the debtor and stakeholders if this transaction is not completed and further efforts to sell the property have to be undertaken.
20. The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved sale Transaction. These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings.
21. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with the approval and vesting orders.
22. The applicant is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed.

Activities and Fee Approvals

23. The professional fees claimed for the Proposal Trustee and its counsel are supported by affidavits and reflect the work that has been done in the applicable time period. The fees are commensurate with the tasks performed. I find them to be fair, reasonable and justified in the circumstances.
24. The approval of the activities of the Proposal Trustee as described in the Third Report contains the appropriate provisional/qualifying language limiting the reliance on such approval to the Proposal Trustee.

The Stay Extension

25. The applicant revised its requested stay extension so that it is now requested to March 20 instead of April 9, 2023. This reflects the time that the applicant and the Proposal Trustee believe is needed after the closing of the Transaction to receive the post-NOI filing invoices for goods and services provided after the NOI Process Order, and to allow it to make the contemplated distributions before the applicant is deemed bankrupt.
26. The Proposal Trustee's Revised Cash Flow Forecast illustrates that the applicant is forecast to have sufficient liquidity to fund its obligations and the costs of the Proposal Proceedings through the end of the proposed Stay Extension.
27. The criteria of s. 50.4(9) of the BIA are satisfied in the circumstances of this case, for the reasons outlined in paragraphs 46-52 of the applicant's factum.
28. Orders (the Approval and Vesting Order and Ancillary Order) to go in the forms signed by me today.



KIMMEL J.