

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CANADIAN UNION PROMOTIONS INC., A CORPORATION INCORPORATED
UNDER THE CANADIAN BUSINESS CORPORATIONS ACT**

FACTUM OF ROYAL BANK OF CANADA

October 19, 2020

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PART I – NATURE OF THE MOTION AND CROSS-MOTION

1. Canadian Union Promotions Inc. (the “**Debtor**”) filed for protection under the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) on August 8, 2020 and benefited from a 30-day stay under the BIA (the “**Stay Period**”) to prepare a viable proposal to its creditors.
2. The Debtor’s general secured creditor, Royal Bank of Canada (“**RBC**”), agreed to support one 45-day extension to the Stay Period to October 22, 2020, provided that “*no request is made at any time for the granting of any prior-ranking Court charges to RBC’s position.*”
3. RBC’s support was also conditional on: (i) the intention “*to see RBC’s position be paid out in full by no later than the end of the 45-day stay extension period;*” and (ii) RBC “*not intend[ing] to support any further stay extension request beyond the one 45-day request.*”
4. After having secured RBC’s support for the first 45-day Stay Period extension, and after having obtained this relief and corresponding benefits from the Court, the Debtor is now seeking to withdraw from the very commitments upon which such support, relief and benefits were obtained.

5. The Debtor is now asking for a super-priority Court-ordered administration charge (which the Debtor previously agreed it would not seek) as a purported necessary precondition to allow the Stay Period to be extended for a second time (which RBC advised it would not support), all for the purpose of permitting a marketing and sale process in which a related party to the Debtor wishes to be the stalking horse bidder so that it can walk-away from most of the Debtor's debt (or pocket a break-fee), all at RBC's exclusive risk and expense.

6. The relief now being sought by the Debtor is offensive, and should not be granted.

7. The Debtor has not acted, and is not acting, in good faith or with due diligence. It will not be able to make a viable proposal to its creditors, and, in fact, provides no evidence to suggest that it even intends to try. RBC is the only unrelated general secured creditor, the clear fulcrum stakeholder owed in excess of \$1.15 million and would be materially prejudiced if the Debtor's motion were to be granted.

8. The Debtor's motion should be dismissed, and RBC's cross-motion to terminate the proposal proceedings and trigger an automatic bankruptcy should be granted, thereby allowing RBC to proceed with a liquidation of the Debtor's hard assets, which the evidence supports as being the most credible strategy to maximize value.

PART II - FACTS

Background

9. The secured lending arrangements between RBC and the Debtor are governed by a credit agreement dated April 6, 2018 (as amended thereafter), together with a corresponding general security agreement, master lease agreement and leasing schedules (collectively, the "RBC

Documents”). Registrations in respect of RBC’s security have been duly made pursuant to the *Personal Property Security Act* (Ontario).

**Affidavit of Jerry Tsao sworn October 19, 2020 [Tsao Affidavit] at para. 6,
Responding and Cross-Motion Record of Royal Bank of Canada
dated October 19, 2020, Tab 3.**

10. Certain of the RBC Documents were omitted from the Debtor’s motion record, including, most notably, the most recent amendment to the credit agreement dated September 5, 2019 and accepted September 16, 2019 (the “**Most Recent Amendment**”).

Tsao Affidavit at para. 6.

11. As set out in the RBC Documents, the Debtor is required to conduct its day-to-day banking with RBC. Since the Debtor commenced this BIA proceeding on August 8, 2020, the balance in the Debtor’s bank account with RBC has fluctuated between \$798.12 and \$86,327.30. As at the opening of business on October 16, 2020, the Debtor has a balance of \$31,406.04 in its bank account with RBC.

Tsao Affidavit at para. 7.

12. In contrast, since the Debtor commenced this BIA proceeding on August 8, 2020, the Debtor’s known liabilities to RBC have at all times been in excess of \$1.1 million. As at the opening of business on October 16, 2020, these known liabilities consist of a total of \$1,152,916.56 of principal and interest (excluding recovery costs and accruing interest), as follows:

- (a) \$651,410.41 in respect of a \$650,000.00 demand operating facility;
- (b) \$215,869.79 in respect of credit cards with maximum borrowings of \$200,000; and
- (c) \$285,636.36 in respect of four leasing facilities (inclusive of HST).

Tsao Affidavit at para. 8.

13. The Debtor has been experiencing financial difficulties for some time now. It is undisputed that the Debtor lost a major client in 2019 and has been unable to recover a corresponding receivable in excess of \$1.2 million (the “**Lost A/R**”). The Debtor’s materials do not explain why the client was lost or what steps, if any, have been taken to pursue the Lost A/R.

Tsao Affidavit at para. 9.

14. According to Crowe Soberman Inc. (“**CSI**”), acting in its capacity as the Debtor’s proposal trustee (the “**Proposal Trustee**”), the Debtor’s failure to collect the Lost A/R has had a detrimental effect on the Debtor’s cash flow. To put this in perspective, the Lost A/R:

- (a) roughly mirrors the amount that the Debtor owes RBC;
- (b) is roughly five times higher than the \$250,000 purchase price for the Debtor’s entire operations under the proposed stalking horse bid; and
- (c) is roughly 38 times higher than the Debtor’s bank account balance.

First Report of the Proposal Trustee dated September 4, 2020 [First Report] at para. 14, Exhibit “A” to the Tsao Affidavit.

Tsao Affidavit at para. 10.

15. The Debtor also claims in its materials that it has 50 clients, but its most recent aged accounts receivables reporting to RBC reflects six active clients.

Tsao Affidavit at para. 9.

16. As a result of the Debtor’s financial difficulties, the Debtor was transferred to the Special Loans Group in the fall of 2019, being approximately one year ago.

Tsao Affidavit at para. 11.

17. By April 30, 2020, the Debtor was to have submitted to RBC the annual reporting that is required under the RBC Documents within 120 days from the Debtor's financial year end of December 31. RBC approved a one-month extension to May 31, 2020, but the annual reporting was still late (June 11, 2020), incomplete and deficient, in that, amongst other things:

- (a) the Debtor failed to provide a signed compliance certificate for the most recent financial year end of December 31, 2019, certifying compliance with the RBC Documents, including, without limitation, the requisite financial covenants; and
- (b) the Debtor failed to maintain the requisite Debt Service Ratio (as defined in the RBC Documents) as at December 31, 2019.

Tsao Affidavit at para. 12.

18. After discovering the above, and after the Debtor also stopped making credit card payments for over three months and maxed-out two of four credit cards (all four of which credit cards are now maxed-out), RBC wrote to the Debtor's principal on July 27, 2020 to confirm these defaults, advise that RBC would be making formal demand for repayment and invite a call to discuss next steps.

Email to the Debtor dated July 27, 2020 at Exhibit "C" to the Tsao Affidavit.

Tsao Affidavit at para. 13.

19. RBC made formal demand on the Debtor on July 29, 2020 for payment of the demand facility and credit card indebtedness, which demand was accompanied by a Notice of Intention to Enforce Security pursuant to subsection 244(1) of the BIA.

Demand and accompanying notice dated July 29, 2020 at Exhibit "D" to the Tsao Affidavit.

Tsao Affidavit at para. 14.

20. Rather than electing to enter into forbearance arrangements with RBC, the Debtor elected to commence the within BIA proceedings on August 8, 2020.

Tsao Affidavit at para. 15.

The First Stay Extension Agreement

21. Between August 28, 2020 and September 1, 2020, RBC and the Debtor negotiated the basis upon which RBC would support one 45-day extension to the Stay Period (the “**First Stay Extension**”). These negotiations resulted in an agreement between RBC and the Debtor on September 1, 2020 (the “**First Stay Extension Agreement**”).

First Stay Extension Agreement at Exhibit “E” to the Tsao Affidavit.

Tsao Affidavit at para. 18.

22. As set out in the First Stay Extension Agreement, RBC agreed to support one stay extension if, amongst other things, “*no request is made at any time for the granting of any prior-ranking Court charges to RBC’s position.*”

Tsao Affidavit at para. 19.

23. The First Extension Agreement was also conditional on the dual understandings that: (i) “*the intention is to see RBC’s position be paid out in full by no later than the end of the 45-day stay extension period;*” and (ii) “*RBC does not intend to support any further stay extension request beyond the one 45-day request.*”

Tsao Affidavit at para. 20.

24. In response, and as also set out in the First Stay Extension Agreement, the Debtor’s counsel confirmed that RBC’s position “*matches the request*” made by the Debtor.

Tsao Affidavit at para. 21.

25. Relying on the terms of the First Stay Extension Agreement, RBC supported the First Stay Extension, which was granted by The Honourable Mr. Justice Hainey.

His Honour's Order and endorsement at Exhibit "F" to the Tsao Affidavit.

Tsao Affidavit at para. 22.

The Debtor's Blatant Refusal to Honour the First Stay Extension Agreement

26. After having secured RBC's support for the First Stay Extension, and after having obtained the First Stay Extension and its benefits, the Debtor is now seeking to withdraw from the very commitments upon which such support and benefits were obtained.

Tsao Affidavit at para. 23.

27. As the Debtor's counsel stated in an email dated October 5, 2020, the Debtor is now "*asking for a different position*" (the "**Different Position Email**"), namely, for the Court to grant the very things that: (i) the Debtor agreed it would not seek; and/or (ii) RBC advised it would not support.

Different Position Email at Exhibit "G" to the Tsao Affidavit.

Tsao Affidavit at para. 24.

28. Specifically, the Debtor is now asking for a super-priority Court-ordered administration charge (which the Debtor previously agreed it would not seek) as a purported necessary precondition to allow the Stay Period to be extended for a second time (which RBC advised it would not support), all for the purpose of permitting a marketing and sale process in which a related party to the Debtor wishes to be the stalking horse bidder so that it can walk-away from most of the Debtor's debt (or pocket a break-fee), all at RBC's exclusive risk and expense.

Tsao Affidavit at para. 25.

29. The Debtor's motion materials describe the purported efforts of the Debtor and the Proposal Trustee to seek refinancing to repay the indebtedness owing to RBC and the supposed "go-forward" necessity of the proposed super-priority administration charge. But none of this information was provided to RBC prior to the service of the Debtor's motion record, factum and compendium, all of which were served on Friday, October 16 at 5:57 p.m.

Tsao Affidavit at para. 26.

30. RBC was not even advised that the Debtor would be seeking a super-priority administration charge, and learned about it for the first time in the Debtor's motion materials.

Tsao Affidavit at para. 27.

31. This disclosure was withheld from RBC until the last moment, despite the Different Position Email advising that the Debtor wishes "*to be as transparent as possible with the bank*" and that "[*if there is a need to fund proposal trustee fees for a sales process through a charge, [which the Debtor previously agreed it would not seek,] ... I will discuss and let you know.*"]"

Tsao Affidavit at para. 28.

32. RBC is extremely concerned by the Debtor's repeated lack of transparency and overall conduct in this BIA proceeding. Not only does the Debtor's motion essentially constitute the very thing that the Debtor previously agreed it would not do, but the Debtor's motion materials contain numerous falsehoods and misrepresentations about: (i) the Debtor's relationship with RBC; and (ii) the purported justification for the relief that the Debtor is now improperly seeking.

Tsao Affidavit at para. 29.

The Debtor's Misrepresentations to this Court about RBC

33. The Debtor's motion materials misrepresent the facts about all three categories of lending facilities that the Debtor has with RBC – the demand operating loan, the credit cards and the leases – and improperly try to assign blame to RBC for the Debtor's failure to keep these facilities in good standing.

Tsao Affidavit at para. 30.

34. With respect to the demand operating loan, the Debtor misleadingly advises in its motion materials that its loan structure with RBC *“includes a revolving demand facility that was initially \$650,000 and later increased to \$850,000,”* and that *“In the fall of 2019, ... [the Debtor] worked with RBC special loans to reduce the amount of the operating line from \$850,000 to \$650,000.”*

Affidavit of Shy Jacoby sworn October 16, 2020 [October Jacoby Affidavit] at paras. 11 and 13, Motion Record of Canadian Union Promotions Inc., Tab 2.

Tsao Affidavit at para. 31.

35. In fact, the RBC Documents appended to both the Debtor's motion materials and RBC's motion materials clearly reflect that the demand operating facility was initially \$400,000 on July 24, 2018 (not \$650,000) and later increased to \$650,000 on December 7, 2018. The Most Recent Amendment that was omitted from the Debtor's motion materials further reflects that the demand operating facility was then temporarily increased for 14 days on September 16, 2019 to \$900,000, before reducing to \$650,000.00 on September 30, 2019.

Exhibits “B” and “C” to the Affidavit of Shy Jacoby sworn September 4, 2020 [September Jacoby Affidavit], Motion Record of Canadian Union Promotions Inc., Tab 3.

Exhibit “B” to the Tsao Affidavit.

Tsao Affidavit at para. 32.

36. Accordingly, other than 14 days in September 2019, the maximum authorized ceiling under the demand operating facility was always \$650,000 or less (not \$650,000 or more), and the Debtor's ongoing failure to stay within its borrowing limits (particularly after the September 30, 2019 deadline) was one of the factors that led to the Debtor's transfer to the Special Loans Group in the fall of 2019.

Tsao Affidavit at para. 33.

37. It is therefore also incorrect for the Debtor to claim, as it has done, that this facility is "revolving" and "has remained current in principal and interest." Even now, this facility is overdrawn and has therefore been capped (i.e., does not revolve).

September Jacoby Affidavit at paras. 11 and 17.

Tsao Affidavit at para. 34.

38. With respect to the Debtor's credit cards, the Debtor also alleges that "*The advice from RBC about being over on the Visa cards was news to [the Debtor].*" In fact, the RBC Documents clearly reflect that the credit card facilities are capped at \$200,000. The Debtor is responsible for managing and monitoring its own credit card spending and payments to ensure that it does not exceed its credit card limits. In the Debtor's case, the Debtor simply stopped making payments for months on end, and the Debtor's default should therefore not come as "*news*" to the Debtor.

September Jacoby Affidavit at para. 14.

Exhibits "B" and "C" to the September Jacoby Affidavit.

Exhibit "B" to the Tsao Affidavit.

Tsao Affidavit at para. 35.

39. The Debtor also misrepresents its leasing arrangements with RBC by claiming that the failure to take monthly payments from the Debtor's account was "*not as a result of anything that [the Debtor] did.*" This too is false.

September Jacoby Affidavit at para. 27.

Tsao Affidavit at para. 36.

40. It was the Debtor that requested a deferral of its lease payments with RBC. The Debtor's request was made on March 24, 2020 and was granted by RBC on March 26, 2020. At the time, the Debtor was advised that lease payments for the four respective leases would be deferred for approximately six months, and that payments would be required to resume on October 4, 8, 14 and 28, 2020, respectively.

Exhibit "H" to the Tsao Affidavit.

Tsao Affidavit at para. 37.

41. On October 7, 2020, the Debtor was advised that it "*must resume making the regular monthly payments, retroactive to the beginning of October, on each of its four leases with RBC,*" but it has not done so.

Exhibit "P" to the Tsao Affidavit.

Tsao Affidavit at para. 38.

42. As set out on the face of the RBC Documents, the Debtor's four monthly lease obligations to RBC total \$24,261.40. Of this amount, \$17,830.68 has already come due in October 2020 and has not been paid, despite: (i) the Debtor's ongoing use of the equipment and its corresponding depreciation; and (ii) the general requirement that post-filing amounts be paid.

Exhibit "B" to the Tsao Affidavit.

Tsao Affidavit at para. 39.

43. In addition to the Debtor's specific misrepresentations and conduct identified above, the general theme throughout the Debtor's motion materials is that RBC is somehow to blame for the Debtor's misfortunes (i.e., the Debtor's factum states that RBC "*was the one who precipitated the insolvency event.*") This is false. The Debtor was transferred to RBC's Special Loans group in the fall of 2019 *because* of the Debtor's financial problems, not the other way around.

Factum of Canadian Union Promotions Inc. dated October 16, 2020, at para. 50.

Tsao Affidavit at para. 40.

44. RBC believes that the Debtor's deliberate mischaracterizations constitute bad faith and are being done to try and push through a sale process for the exclusive benefit of the Debtor's related purchaser group.

Tsao Affidavit at para. 40.

The Debtor's Proposed Relief and Its Improper Purpose

45. In addition to seeking a second 45-day extension of the Stay Period, the Debtor is also seeking, in substance:

- (a) approval of a marketing and sale process for the Debtor's assets, inclusive of the approval of a \$250,000 stalking horse bid from (and \$7,500 break-fee for) an entity related to the Debtor; and
- (b) approval of a super-priority administration charge in favour of the Proposal Trustee and its counsel, equal to 20% of the quantum of the stalking horse bid and 200% of the quantum of the stalking horse bid's deposit.

Tsao Affidavit at para. 2.

46. The rationale put forward by the Debtor for the super-priority administration charge is disingenuous, namely, that it is required “*to ensure payment of [the Proposal Trustee’s] fees, and that similar fees would be incurred by any other licensed insolvency trustee whether acting in trustee in bankruptcy or as a receiver for RBC.*”

October Jacoby Affidavit at para. 47.

Tsao Affidavit at para. 41.

47. The fact is that RBC, as secured creditor, would be entitled under a bankruptcy to deal with its collateral, in which case RBC could avoid CSI’s fees, both as Proposal Trustee and bankruptcy trustee. It was precisely for this reason that RBC’s support for the First Stay Extension was conditional upon there being no request made “*at any time*” for the granting of a prior-ranking charge to RBC’s position, as RBC’s preferred realization strategy beyond the First Stay Extension is to repossess and liquidate collateral of material value, including, without limitation, RBC’s leased equipment.

Tsao Affidavit at para. 41.

48. RBC is also concerned about the statement that “*the equity and debt markets are not currently in a position where there is going to be a viable way to take out RBC (whether by Oct. 22 or later).*” The Debtor’s motion materials give reason to be concerned about what the Debtor means by a “*viable*” way to take out RBC, and what options the Debtor has deliberately not pursued because of: (i) the competing interests of the related purchaser group; and (ii) Mr. Jacoby’s unwillingness to put any “*skin in the game*” to support any of the risk that his proposed sale process creates.

Different Position Email at Exhibit “G” to the Tsao Affidavit.

Tsao Affidavit at para. 42.

49. For example, the Debtor advises that an offer was in fact made by a third-party (the “**Third-Party Offer**”), but was rejected by the Debtor because of “*a high commitment fee, a high rate of interest above 18% per annum, and a requirement for collateral security and/or guarantees.*” According to the Debtor’s principal, Mr. Jacoby, “*such a high rate of interest would be untenable beyond a very short period of time.*” Mr. Jacoby also comments that “*there are no guarantees for RBC’s current facilities.*” These observations lead Mr. Jacoby to conclude that the “*prudence*” of the Third-Party Offer is “*doubtful.*”

October Jacoby Affidavit at para. 32(h).

Tsao Affidavit at para. 43.

50. What Mr. Jacoby really appears to be saying is that the Third-Party Offer is not prudent for him personally, given the risk that the Debtor would default after a short period of time and that Mr. Jacoby would then face liability for any shortfall. While that is a legitimate concern for Mr. Jacoby to have and a legitimate reason for not accepting the Third-Party Offer, it is completely inappropriate for Mr. Jacoby to expect RBC to continue to assume risks of a similar nature that Mr. Jacoby is not prepared to assume, particularly because it was already agreed in the First Stay Extension Agreement that RBC would not assume such risks.

Tsao Affidavit at para. 44.

51. Before RBC became aware of the Third-Party Offer and the proposed super-priority charge by reading about them for the first time in the Debtor’s motion materials, RBC had already offered not to rely on the terms of the First Stay Extension Agreement (and therefore to support further Stay Period extensions) if Mr. Jacoby or someone else were prepared to give a secured guarantee to RBC.

Tsao Affidavit at para. 45.

52. Like the Third-Party Offer, RBC's offer was also rejected by the Debtor (even though it involved no increased interest rate or commitment fee), with Mr. Jacoby noting that "*[the Debtor] and its principals are not, however, prepared to grant RBC more security or collateral than it took when it made the loan.*"

October Jacoby Affidavit at para. 45.

Tsao Affidavit at para. 45.

53. RBC therefore believes that when the Debtor says it has been unable to find a "*viable*" way to take out or otherwise deal with RBC, the Debtor really means a way in which no one other than RBC assumes any risk.

Tsao Affidavit at para. 46.

54. Mr. Jacoby describes the Debtor's proposed stalking horse process as being "*a way*" to protect the Debtor's employees and contractors from a bankruptcy. The Debtor therefore acknowledges that there are other ways to avoid a bankruptcy, and therefore other ways to protect the Debtor's employees and contractors. It's just that these other ways involve the Debtor and its principals assuming some of the risk, which apparently they are not prepared to do.

October Jacoby Affidavit at para. 41.

Tsao Affidavit at para. 47.

55. It is telling that the Debtor's proposed stalking horse transaction apparently came to life when the Debtor "*approached some of the existing shareholders and friends of [the Debtor] (who we had approached about a possible loan or equity injection to repay RBC) about making an offer for [the Debtor's] assets and business.*"

October Jacoby Affidavit at para. 37.

56. Mr. Jacoby advises that these same shareholders and friends, who now comprise the stalking horse purchaser, were unable or unwilling to lend money to the Debtor because “[t]he timeframe and current circumstances of [the Debtor]’s position in special loans at RBC while undergoing revenue shrinkage due to the pandemic did not permit any successful agreements to be reached.”

October Jacoby Affidavit at paras. 28(g) and 37.

57. In substance, the proposed stalking horse process is nothing more than an opportunistic attempt by the Debtor group to put its interests ahead of its creditors.

Tsao Affidavit at para. 49.

58. The purported rationale put forward by Mr. Jacoby for proceeding with a sale process instead of a liquidation is that “*the business of [the Debtor] is likely worth more than its hard assets,*” but this rationale is undermined by: (i) the Debtor’s own appraisal of the operating business (Confidential Exhibit “F” to the October Jacoby Affidavit); and (ii) the proposed assumption by the stalking horse purchaser of the Debtor’s leased equipment from RBC (\$285,636.36 at October 16, 2020, being more than the purchase price for the Debtor’s business of \$250,000).

October Jacoby Affidavit at para. 36.

Confidential Exhibit “F” to the October Jacoby Affidavit.

Tsao Affidavit at para. 50.

59. In addition to the Debtor’s four leases with RBC, the stalking horse bidder proposes to assume 20 additional personal property leases with eight other leasing institutions. The stalking horse agreement does not disclose the balances owing under these 20 other leases, but the

Debtor's initial statement of affairs signed by Mr. Jacoby on August 8, 2020 (the "**Initial Statement of Affairs**") reflects the following balances for the non-RBC leases:

- (a) \$91,245 owing to Add Capital Corporation under two leases;
- (b) \$25,666 owing to Axiom under one lease;
- (c) \$32,307 owing to CWB National Leasing Inc. under one lease;
- (d) \$34,123 owing to Dell Financial Services Canada Ltd. under four leases;
- (e) at least \$220,819 owing to Grenke under at least five leases (with the stalking horse purchase agreement reflecting eight leases with Grenke);
- (f) \$28,389 owing to Gould Leasing Ltd. under one lease;
- (g) \$29,803 owing to IndCom Transportation Leasing Inc. under one lease;
- (h) \$19,906 owing to LBC Capital under one lease; and
- (i) \$40,949 owing to LBC Capital under a second lease.

Exhibit "E" to the October Jacoby Affidavit.

Exhibit "J" to the Tsao Affidavit.

Tsao Affidavit at para. 51.

60. In total, the outstanding balance reflected in the Initial Statement of Affairs for the non-RBC leases totals at least \$523,207, such that, with the RBC leases, the stalking horse purchaser proposes to assume approximately \$800,000 of leasing equipment obligations.

Exhibit "E" to the October Jacoby Affidavit.

Exhibit "J" to the Tsao Affidavit.

Tsao Affidavit at para. 52.

61. Similarly, the Debtor's most recent annual financial statements at December 31, 2019 reflect "*Property and equipment, net*" of \$1,420,605.

Appendix "B" to the First Report.

Tsao Affidavit at para. 53.

62. When these hard asset figures are compared with the confidential business operations appraisal results, there is very good reason to question Mr. Jacoby's belief that "*the business of [the Debtor] is likely worth more than its hard assets.*"

October Jacoby Affidavit at para. 36.

Tsao Affidavit at para. 54.

63. The Debtor is entitled to its own opinion as to whether a sale process or a liquidation would yield a better recovery on the indebtedness owing to RBC. However, given the Debtor's acknowledgment that the net proceeds under either process would be insufficient to repay RBC, the decision as to which process would be most beneficial should rightly belong to creditors.

Tsao Affidavit at para. 55.

64. At this stage, given the totality of the circumstances outlined above, RBC would prefer the certainty of a bankruptcy over the continued risk and cost associated with a sale process in debtor-in-possession proceedings with a Debtor that RBC no longer trusts.

Tsao Affidavit at para. 56.

PART III – ISSUE

65. The issue to be considered by this Court is whether the Debtor should be allowed to obtain a further Stay Period Extension and associated relief in light of the Debtor's conduct, including, without limitation, the Debtor's breach of the First Stay Extension Agreement.

PART IV – LAW AND ARGUMENT

66. To be granted a second Stay Period extension, the Debtor must satisfy each of the following criteria:

- (a) the Debtor has acted, and be acting, in good faith and with due diligence;
- (b) the Debtor 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.

BIA, ss. 50.4(9) and 50.4(11).

67. While the Debtor must satisfy *each* prong of the above statutory test, RBC respectfully submits that *none* of these prongs has been satisfied.

(a) The Debtor Has Not Acted, and Is Not Acting, in Good Faith or with Due Diligence

68. The “good faith” test in BIA proposal proceedings was recently examined by The Honourable Mr. Justice Sewell. His Honour concluded that “*a person seeking an extension of time with respect to preparing a proposal, an indulgence from the court, owes a duty of utmost good faith to make full disclosure of material facts and in particular not to put forward grounds for that extension which can I think fairly be characterized as misleading.*”

Romspen Investment Corporation v Conian Developments (La Voda) Inc., 2020 BCSC 1222 (<http://canlii.ca/t/j97gv>) at para. 20.

69. In the present case, both the Debtor’s conduct and motion materials are misleading (if not worse than misleading) on multiple key fronts, as examined in detail above. Indeed, the very fact that the Debtor is even bringing this motion in the first place, after making a commitment

earlier in this BIA proceeding not to seek one of the very things that it is now seeking, should, by itself, serve as an insurmountable hurdle over which the Debtor should not be permitted to overcome. RBC supported the First Stay Extension in good faith reliance on the Debtor's commitment not to seek a super-priority charge at any time, and this Court should not sanction the Debtor's unjustifiable withdrawal from this commitment.

Tsao Affidavit at paras. 18-25.

70. Moreover, the Debtor's breach of the First Stay Extension is only one representative example of a troubling pattern of unacceptable behaviour, particularly given the statutory protections that the Debtor currently enjoys and is asking to extend. As set out above, the Debtor paints a misleading picture of: (i) its historical conduct; (ii) its current conduct while under BIA protection; and (iii) its true motivations for the relief it now seeks.

Tsao Affidavit at paras. 18-61.

71. Rather than acknowledging its past shortcomings and attempting to do better on a go-forward basis, the Debtor falsely blames others for the Debtor's problems and attempts to solve these problems at the expense of others.

Tsao Affidavit at paras. 18-61.

(b) There Is No Possibility of the Debtor Making a Viable Proposal

72. Even if it can somehow be argued that the Debtor's repeatedly inappropriate conduct still falls within the bounds of good faith (which it cannot), the fact remains that there is no possibility of the Debtor making a viable proposal to its creditors.

73. As a result of the Debtor's conduct in these proposal proceedings, and RBC's ranking as general secured creditor with a clear veto position, RBC has advised with absolute certainty that it has lost confidence in the Debtor, and that there is no hope of the Debtor being able to put forward a proposal that would be accepted by its creditors. This fact is fatal to any attempt by the Debtor to continue these proposal proceedings.

Tsao Affidavit at para. 57.

***Re Cumberland Trading Inc. (1994)*, 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Gen. Div. [Commercial List]) at para. 9 (Canlii: <http://canlii.ca/t/1wb8x>).**

74. The present case is largely analogous to a 2009 decision of the Alberta Court of Queen's Bench, which granted an order for early termination of the proposal proceedings in circumstances where the debtor would not likely be able to make a viable proposal that would be accepted by creditors. In that case, The Honourable Madam Justice Bielby noted that the bank, as the overwhelming principal creditor, was in a veto position, and it had advised the court that it had lost all confidence in the debtor.

***1252206 Alberta Ltd. v. Bank of Montreal*, 2009 ABQB 355 at paras. 22-26, 36 (CanLii: <http://canlii.ca/t/240gw>).**

75. Moreover, nowhere in the October Jacoby Affidavit does Mr. Jacoby even state that the Debtor has any intention of putting forward a proposal to its creditors, much less that any such proposal would have any chance of acceptance. This is in sharp contrast to Mr. Jacoby's evidence when the Debtor sought the First Stay Extension.

Tsao Affidavit at para. 58.

September Jacoby Affidavit at para. 23.

76. Nor would the Debtor be able to put forward a proposal capable of Court sanction. In *Target Canada*, The Honourable Mr. Chief Justice Morawetz refused even to permit a creditor

vote after a plan had been put forward – calling it “*a waste of time and money*” – because the debtor was proposing to do the very thing that it committed not to do (compromising guarantee claims), and the Court could therefore not sanction it regardless of the views of creditors. This is analogous to the present case where the Debtor is proposing to do the very thing that it committed not to do (proceeding with a super-priority charge), which, even if somehow falling within the bounds of good faith, cannot form the basis at law for a viable proposal.

Target Canada Co. (Re), 2016 ONSC 3166 [Commercial List] (CanLii: <http://canlii.ca/t/gn05p>) [*Target Canada*] at paras. 66 and onwards.

77. What the Debtor is attempting to do with its proposed stalking horse sale process is to achieve indirectly what it knows it cannot do directly – that is, forcing the Debtor’s creditors (and the Court) to accept a compromise on the Debtor’s terms.

Tsao Affidavit at para. 59.

78. It is of little comfort to RBC – and should be of little comfort to this Court – when Mr. Jacoby says that he believes the stalking horse bid represents “*an appropriate level of recovery for the creditors.*” With the greatest of respect to Mr. Jacoby, that is a decision belonging to the creditors and the Court, not Mr. Jacoby.

October Jacoby Affidavit at para. 40.

Tsao Affidavit at para. 59.

(c) The Debtor’s Proposed Relief Is Materially Prejudicial to the Veto-Holding Fulcrum Creditor

79. The proposed second Stay Period extension and associated relief, including, most notably, the proposed super-priority charge to fund the proposed stalking horse sale process, are extremely prejudicial to RBC’s position as the Debtor’s veto-holding creditor, in that, amongst other things:

- (a) the proposed super-priority charge is inconsistent with RBC's desired realization strategy, and is the precise thing that RBC was assured by the Debtor would not be sought at any time, in exchange for RBC having agreed to the First Stay Extension;
- (b) the proposed super-priority charge would rank in front of RBC's security, whereas RBC's security would otherwise prime the existing insolvency professionals in a bankruptcy scenario;
- (c) the proposed super-priority charge is double the amount of the deposit under the proposed stalking horse process, such that RBC is being asked to assume increased risk for a stalking horse process that RBC does not want and that is not designed to benefit RBC;
- (d) there is no evidence that the proposed stalking horse bidder even has sufficient economic resources to close the stalking horse bid, representing a further risk that RBC is being asked to assume;
- (e) there is no evidence that the proposed stalking horse bidder has sufficient economic resources to assume the Debtor's leases, the financial obligations in respect of which well-exceed the purchase price under the stalking horse bid;
- (f) the Debtor's proposed relief would mean that the liquidation value of the Debtor's hard assets would continue to deteriorate; and
- (g) most important, the proposed relief would preclude RBC from proceeding with what it believes is the pathway of maximal realization, being the liquidation of the Debtor's assets (which belief is entirely consistent with the results of the Debtor's own appraisal of the operating business).

PART VI – CONCLUSION AND RELIEF REQUESTED

80. RBC has dealt honestly and in good faith with the Debtor. Unfortunately, this same good faith spirit has not been reciprocated by the Debtor. At this stage, given the totality of the circumstances outlined above, RBC would prefer the certainty of a bankruptcy over the continued risk and cost associated with a sale process in debtor-in-possession proceedings with a Debtor that RBC no longer trusts.

81. It is respectfully submitted that the Debtor's motion should be dismissed, and that RBC's cross-motion should be granted on the terms of the order sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2020.

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SCHEDULE “A”

AUTHORITIES CITED

Jurisprudence

1. *Romspen Investment Corporation v Conian Developments (La Voda) Inc.*, 2020 BCSC 1222.
2. *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Gen. Div. [Commercial List]).
3. *1252206 Alberta Ltd. v. Bank of Montreal*, 2009 ABQB 355.
4. *Target Canada Co. (Re)*, 2016 ONSC 3166 [Commercial List].

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, ss. 50.4(9) and 50.4(11)

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.

...

50.4(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.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CANADIAN UNION PROMOTIONS INC., A CORPORATION INCORPORATED UNDER THE *CANADIAN BUSINESS CORPORATIONS ACT*

Estate No. 31-2663507

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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