

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

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF BARZEL INDUSTRIES CANADA INC.**

Applicant

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**FACTUM OF THE APPLICANT  
(Application Returnable September 15, 2009)**

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**FACTUM OF THE APPLICANT**

**PART I ~ OVERVIEW**

1. The issue raised on this Application is whether this Court has the jurisdiction under the *Companies' Creditors Arrangement Act* (the "**CCAA**") to provide the relief sought to allow the Applicant to effect a going concern sale of its business in circumstances where the Applicant does not contemplate filing a formal plan of compromise or arrangement.

2. The Applicant submits that this Court has the jurisdiction to grant it protection under the CCAA to allow it to effect the sale of its business as a going concern. .

**PART II ~ FACTS**

3. The Applicant seeks protection under the CCAA to provide it with the necessary forum, time and a stable operational environment so as to effect and implement a going concern sale of its business (the "**CCAA Application**").

Affidavit of Karen Narwold, sworn September 15, 2009 ("Narwold Affidavit"), at para. 2.

4. The Applicant is a corporation incorporated under the *Canada Business Corporations Act* having assets and carrying on business in Ontario and Québec. The Applicant's registered office and chief place of business is in Ontario and the total claims against the Applicant exceed \$5 million. As discussed in greater detail below, the Applicant is currently insolvent.

Narwold Affidavit, at para. 3.

### **The Applicant**

5. The Applicant is a wholly-owned indirect subsidiary of Barzel Industries Inc., a corporation organized under the laws of the State of Delaware. Barzel Industries Inc. and certain of its U.S. subsidiaries (the "**US Debtors**") filed voluntary petitions for relief under title 11 of the United States Code, 11 U.S.C. §101-1532 (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware on September 15, 2009 (the "**Chapter 11 Proceedings**") and will be seeking first day orders on September 16, 2009 before the United States Bankruptcy Court for the District of Delaware. The U.S. Debtors intend to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. It is not expected that any trustee or examiner will be appointed in the U.S. Debtors' cases.

Narwold Affidavit, at para. 4.

6. The US Debtors together with the Applicant and 632422 N.B. Ltd. are collectively referred to herein as the "**Barzel Group**".

Narwold Affidavit, at para. 5.

7. The Applicant itself owns, directly or indirectly, all of the shares or other equity interests in 632422 N.B. Limited (a New Brunswick corporation), Hencorp LLC (a Delaware corporation) and Chriscorp ULC (a Nova Scotia unlimited liability company). None of these companies have any assets or employees and none of them currently carry on any business.

Narwold Affidavit, at para. 6.

### **Barzel Group's Business Generally**

8. The Barzel Group is a leading one-stop metal manufacturing and service provider headquartered in Norwood, Massachusetts, U.S.A. with an operational hub in Ontario, Canada. The Barzel Group operates an integrated system of fifteen (15) strategically located metal processing, manufacturing and distribution facilities throughout the Northeastern, Mid-Atlantic and Mid-Western United States and the Canadian provinces of Ontario and Québec. From these locations, the Barzel Group employs approximately 570 people in the United States and Canada, who serve over 3,800 customers.

Narwold Affidavit, at para. 8.

### ***Business Lines***

9. The Barzel Group has four primary business lines: (a) tube and pipe production, (b) manufacturing, (c) processing and (d) distribution:

- (a) Tube and Pipe Production. The Barzel Group is a leading North American producer of hollow structural section ("**HSS**") tubes and A53 electric resistance welded ("**ERW**") pipes. Collectively, the HSS tube and A53 pipe markets represent a US\$5 billion market in North America. The

Barzel Group operates five (5) state-of-the-art tube and pipe facilities (including the only A53 ERW pipe facility in the U.S.) that have total annual capacity of approximately 700,000 tons. In 2008, tube and pipe production accounted for approximately 16% of the Barzel Group's total consolidated revenue.

- (b) Manufacturing. The Barzel Group's manufacturing operations are located in Québec, Canada and consist primarily of the production of custom light and heavy fabricated components. Manufacturing services include roll-forming, welding, punching, cutting and assembly. In 2008, manufacturing generated approximately 5% of the Barzel Group's consolidated revenue. Manufacturing is projected to generate approximately 14% of the Debtors' revenue in 2009.
- (c) Distribution. The Barzel Group is also a leading distributor of steel, aluminum and stainless products, including hot and rolled carbon, aluminum, stainless and alloys and coated products in sheet, coil, bar, shapes, tubular and plate forms. The Barzel Group operates five (5) distribution facilities that are strategically located in close proximity to major customers and transportation routes. Distribution services generated approximately 33% of the Barzel Group's total consolidated revenue in 2008.
- (d) Processing. The Barzel Group operates the largest independent continuous process-pickling facility in Canada and offers a range of other metal processing services including slitting, cutting-to length, shearing, levelling and blanking. While the majority of the Barzel Group's processing business involves direct processing (i.e., the processing of raw materials purchased directly by the Barzel Group for sale to its customers) the Barzel Group also provides toll-processing services (i.e., the processing of raw materials purchased directly by the Barzel Group's customers). In 2008, processing generated approximately 46% of the Barzel Group's total consolidated revenue. Because the majority of the Barzel Group's processing business relates to the automotive industry, processing revenues have decreased dramatically and are projected to account for only 3% of the Barzel Group's total consolidated revenue in 2009.

Narwold Affidavit, at para. 10.

### **Customers**

10. The Barzel Group's customer base is well diversified, with no one customer accounting for more than 10% of sales. The Barzel Group's customers include automotive parts manufacturers and stampers, other steel service centers,

general fabricators and manufacturers of transportation equipment, material handling equipment, electrical components, appliances, storage tanks, ship building material, construction and heavy equipment and agricultural equipment.

Narwold Affidavit, at para. 11.

### **Corporate History of the Barzel Group**

11. In April 2006, Symmetry Holdings Inc. ("**Symmetry**") was incorporated in Delaware as a development stage company formed for the purposes of acquiring one or more operating businesses (i.e., a special purpose acquisition company) raising gross proceeds of US\$150 million in its initial public offering in March 2007.

Narwold Affidavit, at para. 12.

12. On November 15, 2007, Symmetry acquired Novamerican Steel Inc., a corporation incorporated under the laws of Canada, and its subsidiaries (collectively, "**Novamerican**"), for US\$585.2 million by way of a leveraged buy out pursuant to an arrangement agreement and in accordance with the terms of a court-approved statutory plan of arrangement under the *Canada Business Corporations Act*.

Narwold Affidavit, at para. 13.

13. The acquisition of Novamerican was financed by US\$112 million reserved from Symmetry's initial public offering, US\$15 million from a private placement sale of additional equity in Symmetry, and debt financing including US\$315 million of senior secured notes and borrowings under an asset based lending facility, each of which is discussed more fully below.

Narwold Affidavit, at para. 14.

14. Symmetry operated under the "Novamerican" name until February 13, 2009, when the "Novamerican" name was changed to "Barzel," which means "steel" in many different languages.

Narwold Affidavit, at para. 16.

15. From February 17, 2009 through August 20, 2009, Barzel Industries Inc.'s common stocks and warrants were traded publicly on the NASDAQ Global Market under the symbols "TPUT" and "TPUTW," respectively.<sup>1</sup>

Narwold Affidavit, at para. 17.

### **Applicant's Business**

16. All of the Applicant's operations are located in Ontario and Québec and integrate into the overall tube and pipe, manufacturing and processing business lines of the Barzel Group.

Narwold Affidavit, at para. 18.

### ***Applicant's Facilities***

17. The Applicant has two tube and pipe facilities, four manufacturing facilities and one processing facility. The Applicant's tube and pipe facilities are located in Baie d'Urfé, Québec and Mississauga, Ontario. The Applicant's manufacturing facilities are located in Granby, St. Hubert and Shawinigan, Québec. The Applicant's processing facility is located in Stoney Creek, Ontario. Some of the facilities are owned while others are leased from third party landlords.

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<sup>1</sup> On or about September 14, 2009, Barzel Industries Inc.'s common stock and warrants will be delisted because their closing prices fell below the minimum bid price required for listing on the NASDAQ Global Market.

Narwold Affidavit, at para. 19.

18. The Applicant also leased a house in Mississauga, Ontario, three apartments in Toronto, Ontario and one apartment in Montreal, Québec for certain of its executives. Notices of termination have been provided to each of the respective landlords for each of the Ontario leases and, accordingly, such leases will terminate between September 14, 2009 and October 31, 2009. The lease in Montreal expires on December 31, 2009.

Narwold Affidavit, at para. 20.

### **Employees**

19. As of September 9, 2009, the Applicant had 343 employees comprised of 126 active salaried employees (plus 2 on layoff and 6 on leave) and 153 active hourly workers (plus 49 on layoff and 7 on leave).

Narwold Affidavit, at para. 21.

20. The United Steelworks of America, Local 6136, is the union for the hourly workers at the Léon Harmel and St. Vallier facilities in Granby, Québec, currently representing the 72 active hourly employees at these facilities, plus the 9 hourly employees on temporary layoff and 1 hourly employee on leave. The current collective bargaining agreement expires on February 21, 2011. None of the Applicant's other facilities are unionized.

Narwold Affidavit, at para. 23.

21. There is also one person in the Applicant's human resources department which, while critical to the ongoing activities of the Applicant given its restructuring and continued downsizing, is on contract with the Applicant. In order to retain this person's

critical services, the Applicant will need to pay all amounts owed to this person as if such amounts were otherwise wages of an active employee.

Narwold Affidavit, at para. 24.

22. The Applicant does not have any defined benefit pension plans. The Applicant does have two defined contribution pension plans, one which is a registered plan pursuant to the *Pension Benefits Act* (Ontario) and the other which is a registered plan pursuant to the *Supplemental Pension Plans Act* (Québec). The Applicant's required contributions to this defined contribution plan are equal to approximately \$87,000 per month and there are no contributions which have become due which have not been paid.

Narwold Affidavit, at para. 25.

23. In addition to the foregoing, the Applicant also maintains various other employment benefit plans for its salaried and hourly employees.

Narwold Affidavit, at para. 26.

24. The Applicant expects to continue to make all statutorily required contributions to its registered defined contribution pension plans as they come due. The Applicant expects to continue making all other employment and post employment benefit payments in the ordinary course.

Narwold Affidavit, at para. 27.

### **Suppliers**

25. All of the Barzel Group's contractual supply arrangements are with Barzel Industries Inc. on its own behalf and on behalf of its subsidiaries and affiliates.

However, the Applicant is the major purchaser of product under some of these contracts. Most of the Applicant's supply purchases have been on a "cash on delivery" basis for some time now.

Narwold Affidavit, at para. 28.

***Inter-company Arrangements***

26. The Applicant's operations are highly integrated with those of the other members of the Barzel Group. All finance, public issuer regulatory matters, treasury, cash management and executive functions for the Applicant and the Barzel Group are provided by Barzel Industries Inc. out of the U.S. In addition, all supply contracts and processing contracts for the benefit of the Barzel Group are with Barzel Industries Inc. as the named counterparty. However, all operational decisions and functions for the Barzel Group are managed from the Applicant's head office in Mississauga, Ontario and the Applicant has its own customer service, marketing, human resources, accounts payable and accounts receivables teams.

Narwold Affidavit, at para. 29.

27. While the Applicant sells some product direct to end customers, the Applicant also processes or manufactures products that it then sells on to certain U.S. affiliates in the Barzel Group that finish processing such product and then sell it to end customers. Some products are initiated by the Applicant, sold to a U.S. affiliate and then sold back to the Applicant for final processing and sale to the end customer.

Narwold Affidavit, at para. 30.

28. Given the foregoing, the Applicant has transfer pricing agreements in place with each of Nova Tube & Steel Inc., Nova Tube Indiana, LLC and American Steel and Aluminum Corporation (all U.S. affiliates of the Applicant).

Narwold Affidavit, at para. 31.

29. All research and development activities for the Barzel Group are conducted by the Applicant and the Applicant owns all of the intellectual property associated with the products manufactured by the Barzel Group although there are no formal intercompany license agreements in respect of such product-related intellectual property.

Narwold Affidavit, at para. 32.

## **The Applicant's Financial Status**

### ***The Notes***

30. On or about November 15, 2007, Barzel Finco Inc. issued US\$315 million of 11.5% Senior Secured Notes due 2015 (the "**Notes**") pursuant to an indenture dated November 15, 2007. The Notes have a maturity date of November 15, 2015, and they pay interest at an annual rate of 11.5% semi-annually in arrears on May 15 and November 15.

Narwold Affidavit, at para. 38.

31. As discussed above, the proceeds of the Notes were used to fund the acquisition of Novamerican.

Narwold Affidavit, at para. 39.

32. The Notes are guaranteed by each of the U.S. Debtors.

Narwold Affidavit, at para. 40.

33. Two-thirds of the Notes are held by JPMorgan Chase Bank, N.A. ("**JPM**"), and one-third of the Notes are held by CIBC World Markets Corp. ("**CIBC**" and together with JPM, the "**Holders**").

Narwold Affidavit, at para. 41.

34. Of the gross proceeds from the issuance of the Notes, US\$125 million was loaned by Barzel Finco Inc. to the Applicant in accordance with the terms of the acquisition of Novamerican and in exchange for secured intercompany demand promissory notes from the Applicant totalling US\$125 million. These secured intercompany promissory notes were also pledged, subject to certain limitations, as first-priority collateral to the trustee for the Notes for the benefit of the Holders. The intercompany demand notes are secured on all of the present and after acquired property of the Applicant.

Narwold Affidavit, at para. 42.

***The ABL Facility***

35. On or about November 15, 2007, Barzel Industries Inc. obtained additional financing for the Novamerican acquisition and the Barzel Group's general operations pursuant to a credit agreement dated as of November 15, 2007 (as amended, the "**Credit Agreement**"), by and among Barzel Industries Inc., Barzel Finco Inc. and the Applicant (collectively, the "**ABL Borrowers**"), as borrowers, and JPM, CIBC and other lender parties thereto (collectively, the "**ABL Lenders**"), as lenders, and JPM, CIT Business Credit Canada Inc. and The CIT Group/Business Credit Inc., as agents.

Narwold Affidavit, at para. 43.

36. Pursuant to the Credit Agreement, the ABL Lenders extended to the ABL Borrowers a five (5) year revolving credit facility of up to US\$175 million (the "**ABL Facility**"), subject to a borrowing base.

Narwold Affidavit, at para. 44.

37. The ABL Facility is guaranteed by each of the U.S. Debtors that is not one of the ABL Borrowers and the Applicant's borrowings under the ABL Facility are guaranteed by 632422 N.B. Ltd.

Narwold Affidavit, at para. 45.

38. As of September 8, 2009, approximately US\$17.5 million was outstanding under the ABL Facility. Of this total amount, approximately US\$14 million was owing by the Applicant for its direct borrowings under the ABL Facility.

Narwold Affidavit, at para. 49.

### ***Trade Debt***

39. As of July 25, 2009, the total outstanding trade debt of the Applicant was approximately CDN\$93 million.

Narwold Affidavit, at para. 50.

### ***Cash Management***

40. In the ordinary course of business, the Barzel Group uses a centralized cash management system to collect funds from its operations and to pay operating and administrative expenses (the "**Centralized Cash Management System**"). The Centralized Cash Management System is similar to the centralized cash management systems used by other companies to collect, transfer, and disburse funds in a

cost-effective and efficient manner. The Applicant's collection and disbursement accounts are part of the Centralized Cash Management System.

Narwold Affidavit, at para. 51.

41. The Centralized Cash Management System is carefully managed through oversight procedures and controls implemented by the Barzel Group's treasury department. Through their control over the Centralized Cash Management System, the Barzel Group is able to facilitate cash forecasting and reporting, monitor collection and disbursement of funds, and maintain control over the administration of various bank accounts required to effect the collection, disbursement, and movement of cash.

Narwold Affidavit, at para. 52.

42. The Centralized Cash Management System primarily operates through United States bank accounts maintained at Bank of America, with one primary concentration operating account at Bank of America acting as the central operating account. Revenues typically reach the operating account through daily transfers from nine (9) separate corporate lockbox accounts maintained at Bank of America.

Narwold Affidavit, at para. 53.

43. It is critical that the Applicant continue to remain part of the Centralized Cash Management System so that the Barzel Group remain able to manage cash and centrally coordinate transfers of funds in order to efficiently and effectively operate their business operations. Disrupting the Applicant's current cash management procedures would impair the Applicant's and the Barzel Group's ability to preserve and enhance

their respective going concern value and to successfully complete a sale during these restructuring proceedings.

Narwold Affidavit, at para. 54.

44. The Centralized Cash Management System provides significant benefits to the Applicant and the Barzel Group, including the ability to: (a) closely track, and thus control, all corporate funds through the provision of near-continuous status reports on the location and amount of all such funds, (b) ensure cash availability, and (c) reduce administrative expenses by facilitating the movement of funds and the development of timely and accurate account balance and presentment information. Indeed, the Applicant believes that any disruption in the Centralized Cash Management System would likely cause delays in the collection and disbursement of funds, thus impeding the Applicant's ability to carry out their normal business operations to the detriment of the Applicant's employees, customers and suppliers.

Narwold Affidavit, at para. 55.

45. The Centralized Cash Management System allows the Barzel Group to centrally manage all of its cash flow needs and includes the necessary accounting controls to enable the Applicant, as well as its creditors and the Monitor, to trace funds through the system and ensure that all transactions are adequately documented and readily ascertainable. The Applicant will continue to maintain detailed records reflecting all transfers of funds. Any changes to the Applicant's bank accounts or its treasury systems that report on account activity and generate wire transfers would be disruptive to the Applicant's business operations and could undermine the effectiveness of such systems.

Narwold Affidavit, at para. 56.

46. Therefore, it is both essential and in the best interests of the Applicant that the Centralized Cash Management System be maintained. Furthermore, the Applicant's efforts to consummate a coordinated sale of its business operations with the rest of the Barzel Group (as discussed below) will be facilitated by preserving the "business as usual" atmosphere and avoiding the distractions that would be associated with disruptions in the Centralized Cash Management System.

Narwold Affidavit, at para. 57.

47. As of July 25, 2009 the Applicant had total liabilities of approximately CDN\$238 million and total assets of approximately CDN\$133 million.

Narwold Affidavit, at para. 59.

#### **Reasons for the Applicant's Insolvency**

48. The Barzel Group has suffered mounting operating losses and liquidity issues during 2008 and 2009. The Barzel Group's losses are due, in large part, to the current global economic recession and credit crisis, and the resulting dramatic downturn in the automotive, transportation, manufacturing and construction industries in the United States and Canada which account for many of the Barzel Group's customers.

Narwold Affidavit, at para. 60.

49. The Barzel Group's losses have been exacerbated by an unprecedented increase in customer inventories through mid-2008 due to a run-up in steel prices through that time which, upon the onset of the recession, led to an inventory overhang that depressed demand over and above that caused by the recession. In addition, the

Barzel Group's losses have been exacerbated by the unprecedented reduction, subsequent to mid-2008, in the overall price of steel, which was exacerbated by a decrease in consumer confidence resulting from the global financial crisis and recessionary environment.

Narwold Affidavit, at para. 61.

50. The reduced demand and lowered prices for the Barzel Group's goods and services resulted in a significant decrease in revenue. The Barzel Group's declining operating performance reduced liquidity and limited the Barzel Group's ability to borrow under the ABL Facility or obtain new financing to fund their operations.

Narwold Affidavit, at para. 62.

51. To offset these factors, the Barzel Group has taken numerous steps over the past eighteen (18) months to reduce expenses and improve operations. Among other things, the Barzel Group has closed or sold six (6) redundant distribution and processing facilities, reduced their workforce by approximately 350 people, lowered annual operating expenses by approximately US\$33 million and reduced inventory levels by approximately US\$110 million.

Narwold Affidavit, at para. 63.

52. Despite these efforts, the Barzel Group was not able to make the interest payment due under the Notes on May 15, 2009. Accordingly, on May 14, 2009, the Debtors and the Holders entered into a deferral agreement (as amended, the "**Deferral Agreement**") with respect to the Notes. Pursuant to the Deferral Agreement, the interest payment due on May 15, 2009 was deferred until August 14, 2009. On July 17,

2009, the Debtors and the Holders amended the Deferral Agreement and further deferred payment of outstanding interest until October 13, 2009.

Narwold Affidavit, at paras. 64-65.

53. Under the Deferral Agreement, the Debtors were required to pursue an expedited sale and marketing process for substantially all of their assets.

Narwold Affidavit, at para. 66.

54. On June 1, 2009 and July 17, 2009, the ABL Facility was also amended to provide the Debtors with limited liquidity to enable them to pursue and consummate the sale process contemplated under the Deferral Agreement. The ABL Facility was also amended to take out any of the ABL Lenders that were not Holders, leaving JPM and CIBC as the remaining ABL Lenders.

Narwold Affidavit, at para. 67.

### ***Sale Process***

55. As a consequence of the terms of the Deferral Agreement, on May 2, 2009 the Debtors retained Houlihan Lokey Howard & Zukin Capital, Inc. ("**Houlihan**") to assist them in identifying and pursuing a sale transaction. Upon its engagement, Houlihan prepared written materials, including a confidential information memorandum, to market the Barzel Group's business. During the ensuing weeks, Houlihan identified and contacted over 220 potential strategic and financial buyers/investors known to it. Of those parties, 72 executed confidentiality agreements, received the information memorandum and gained access to an electronic data room to conduct their due diligence. Thereafter, more than thirteen (13) potential buyers and investors received management presentations or conducted facility tours.

Narwold Affidavit, at para. 68.

56. After this initial round of marketing and due diligence, the Barzel Group received twelve (12) offers to pursue a transaction involving substantially all of its assets, including nine (9) offers from financial buyers/investors and three (3) offers from strategic buyers/investors. After the deadline for submitting first-round offers expired, the Barzel Group also received proposals from two (2) additional strategic buyers/investors.

Narwold Affidavit, at para. 69.

57. After reviewing these offers, Barzel Industries Inc.'s board of directors directed Houlihan and its management to initiate an in-depth diligence process and conduct a final round of bidding. Eight (8) offers were submitted during the final round of bidding, consisting of offers from five (5) financial and three (3) strategic buyers/investors.

Narwold Affidavit, at para. 70.

58. Between the initial marketing period and first and final rounds of bidding, interested parties have had more than three and a half (3½) months to conduct extensive due diligence of the Barzel Group.

Narwold Affidavit, at para. 71.

59. After carefully reviewing the final round offers, Barzel Industries Inc.'s board of directors directed Houlihan and its management to negotiate with and assist four (4) bidders to expeditiously secure a fully financed bid and definitively documented transaction that maximized the value reasonably obtainable under the circumstances

and to continue to work with other bidders who might reasonably be expected to submit a bid in a sale process under section 363 of the Bankruptcy Code.

Narwold Affidavit, at para. 72.

60. After allowing a reasonable time for securing bids that satisfied such criteria and reviewing the status of bids then available for acceptance, Barzel Industries Inc.'s board of directors selected Chriscott USA Inc. and 4513614 Canada ("**Metco**") to serve as a stalking horse purchaser of substantially all of the Barzel Group's assets.

Narwold Affidavit, at para. 73.

61. Given the financial condition of the Barzel Group, Metco was not prepared to purchase any of the assets of the Barzel Group outside of formal insolvency proceedings.

Narwold Affidavit, at para. 74.

### **Elements of the Restructuring**

62. At the time of selecting Metco's offer as the best current offer for the sale of all of the assets of the Barzel Group, the Barzel Group's liquidity constraints were severe. The Barzel Group will need additional liquidity to continue operating during formal insolvency proceedings if it is to conduct a sale of its assets via such proceedings as required by Metco.

Narwold Affidavit, at para. 75.

63. The ABL Lenders have agreed to extend limited debtor-in-possession financing to the Debtors to support the Debtors' operations during the sale process. The ABL Lenders have, however, made clear that they will not finance the Debtors

beyond December 11, 2009. The ABL Lenders also informed the Barzel Group that their willingness to provide such financing was predicated, in part, on the Applicant bringing an independent application for protection under the CCAA rather than being filed as a debtor in the Chapter 11 Proceedings.

Narwold Affidavit, at para. 76.

64. Late in the evening on September 14, 2009, the Debtors and Metco executed an asset purchase agreement (the "**APA**") pursuant to which Metco agreed to purchase substantially all of the Debtors' assets for US\$65 million, subject to certain adjustments and the assumption of certain liabilities.

Narwold Affidavit, at para. 77.

65. As the value of Barzel Group's assets appears to be significantly less than what is owed to the Holders and ABL Lenders, and the Applicant will not be able to consummate a sale of its assets without additional liquidity being afforded to it and the Barzel Group, the only alternative to an imminent bankruptcy of the Applicant is to seek protection under the CCAA so as to avail itself of the additional financing being offered by the ABL Lenders and attempt to complete the implementation a sale of its assets as contemplated in the APA.

Narwold Affidavit, at para. 79.

***The Monitor***

66. Deloitte & Touche Inc. ("**Deloitte**") has agreed to act as Monitor in connection with this CCAA Application if so appointed by the Court.

Narwold Affidavit, at para. 80.

***DIP Financing***

67. The Applicant does not have sufficient sources of working capital, including cash collateral, to operate its business while it attempts to preserve its going concern value during the implementation of a sale process. Indeed, the Applicant's ability to obtain sufficient working capital to operate through such a sale process and closing is critical to preserving the Applicant's going concern value and maximizing the realizable value of the Applicant's assets.

Narwold Affidavit, at para. 82.

68. Consequently, JPM and CIBC (in this capacity, the "**DIP Lenders**") have agreed to make working capital financing available to the Applicant and the US Debtors on a super-priority basis during these proceedings pursuant to a senior secured, super-priority debtor-in-possession revolving credit agreement among Barzel Industries Inc., Barzel Finco Inc. and the Applicant and JPM, as administrative agent (the "**DIP Credit Agreement**"). The DIP Credit Agreement provides for a revolving credit facility in an aggregate principal amount not to exceed US\$30 million (the "**DIP Facility**"). Either Barzel Finco Inc. or the Applicant can borrow under the DIP Facility up to the aggregate maximum amount permitted thereunder.

Narwold Affidavit, at para. 83.

69. However, the DIP Credit Agreement provides that until the Final Order Entry Date and the expiration of the Canadian Appeal Period (as each term is defined in the DIP Credit Agreement) (the "**Interim Period**"), the total amount available under the DIP Facility is limited to the lesser of (1) US\$17.5 million and (2) the sum of (a) US\$7 million, plus (b) an amount equal to the aggregate Interim Reimbursed Amounts (as

defined in the DIP Credit Agreement) applied to repay the Prepetition Credit Agreement Obligations (as defined in the DIP Credit Agreement) pursuant to Section 5.18 of the DIP Credit Agreement, and (c) the amount of any loan deemed requested pursuant to Section 2.03(b) of the Credit Agreement.

Narwold Affidavit, at para. 84.

70. The effect of the foregoing provisions is that during the Interim Period, any and all amounts of Cash Collateral (as defined in the DIP Credit Agreement) shall be deemed to be used to pay down the Prepetition Credit Agreement Obligations and an advance in equal amount shall be deemed to have been effected under the DIP Credit Agreement. The deemed pay down and advance shall be effected by book entries only. In addition, on the Filing Date (as defined in the DIP Credit Agreement) Barzel Finco Inc. will be deemed to have requested a loan to effect a pay down of the Prepetition Credit Agreement Obligations in an amount equal to the aggregate amount of funds on deposit in any account of the Barzel Group (other than payroll accounts) in excess of US\$2 million.

Narwold Affidavit, at para. 85.

71. Aside from the deemed pay down of Prepetition Credit Agreement Obligations as advances under the DIP Facility for the Interim Period, borrowings under the DIP Facility may only otherwise be used for working capital and other general corporate needs in the ordinary course of business, restructuring expenses, adequate protection payments as may be required in the Chapter 11 Proceedings, and repayment of any outstanding Prepetition Credit Agreement Obligations.

Narwold Affidavit, at para. 86.

72. The DIP Facility will mature on the earliest of (i) December 11, 2009, (ii) the date of consummation of any sale of all or substantially all of the US Debtors' assets pursuant to section 363 of the Bankruptcy Code coordinated with the sale of substantially all of the Applicant's assets under the proposed CCAA proceedings, and (iii) thirty (30) days after the Filing Date (as defined in the Credit Agreement) if the US Court or the Canadian Court fails to approve the DIP Credit Agreement on a final basis.

Narwold Affidavit, at para. 87.

73. The ability to obtain advances under the DIP Facility is subject to, among other things, compliance with certain milestones for a sale of substantially all of the US Debtors' and Applicant's assets pursuant to section 363 of the Bankruptcy Code and the CCAA (the "**363 Sale**") including (i) a motion to approve the sale (including bid and auction procedures) being filed by no later than two (2) business days after the Filing Date, (ii) an order approving the bid procedure motion having been entered into no later than eighteen (18) days after the Filing Date, (iii) bids for the 363 sale being due by no later than thirty-five (35) days after the Filing Date, (iv) if applicable, an auction occurring by no later than forty (40) days following the Filing Date, (v) the hearing to confirm the 363 Sale having been concluded and the order confirming the 363 Sale having been entered no later than forty-five (45) days after the Filing Date, and (vi) the 363 Sale having been consummated by no later than sixty (60) days following the Filing Date.

Narwold Affidavit, at para. 88.

74. The Applicant does not have sufficient sources of working capital to operate its business while it attempts to implement the 363 Sale process without the financing being offered by the DIP Lenders. Due to their financial condition, the Applicant and US Debtors were not able to procure sufficient financing from an alternative lender on more favourable terms than those that govern the DIP Facility.

Narwold Affidavit, at para. 89.

75. The Applicant's and US Debtors' ability to continue operating is critical to preserving the Applicant's going concern value and ensuring that the value of the realizable value of the Applicant's assets is maximized. The Applicant, its employees and other stakeholders will suffer irreparable harm if the DIP Facility is not approved and if the Applicant does not obtain the working capital it needs to consummate a sale of its business as a going concern.

Narwold Affidavit, at para. 90.

76. Subject to the approval of the Canadian Court, and corresponding approval by the US Court, the Applicant proposes to enter into the DIP Credit Agreement and all related and collateral documentation required by the DIP Credit Agreement.

Narwold Affidavit, at para. 91.

***D&O Charge***

77. Given the Applicant's current financial circumstances, the directors and officers of the Applicant are not prepared to remain in such offices without knowing that they will be fully protected from any liability which may arise during their continuance as such directors and officers. Accordingly, the Applicant requests a charge over the

Applicant's assets in favour of the Applicant's directors and officers against obligations and liabilities that they may incur as a director or officer during the restructuring period. The directors may be personally liable for wages and related amounts, including, without limitation, provincial retail sales taxes, vacation pay, *Income Tax Act* employee withholdings, *Canada Pension Plan* employee and employer remittances, *Employment Insurance Act* employee and employer remittances, *Excise Tax Act* GST collected and pension plan contributions. The directors' continued service to the Applicant will be dependent upon a D&O charge to ensure that any strict liability amounts (e.g., wage and vacation arrears), other possible statutory liability amounts and any defence costs associated therewith are provided for. The Applicant estimates rolling exposure to such liabilities at approximately CDN\$2.3 million. The Secured Lenders have consented to the granting of this priority charge in the amount of CDN\$2.3 million.

Narwold Affidavit, at para. 92.

78. Deloitte has assisted the Applicant in arriving at this figure. As to current insurance covering the Applicant's directors, Barzel Industries Inc. is the policy holder of a directors, officers and private company liability insurance policy written by Chubb Specialty Insurance and XL Specialty Insurance Company. The limit of liability is US\$7.5 million in the aggregate, including defence costs. The current policy covers the period from November 15, 2008 to November 15, 2009 and covers all subsidiaries of Barzel Industries Inc. The policy covers claims made against the Applicant's directors or officers in connection with the Applicant's failure to pay wages or to make the required statutory deductions, withholdings, or remittances pertaining to salary and wages.

Narwold Affidavit, at para. 93.

## **Conclusion**

79. Barzel Finco Inc., pursuant to a unanimous shareholder declaration, has resolved that it is in the best interest of the Applicant to file for protection under the CCAA under the current circumstances. Barzel Finco Inc. has determined, based on the advice of its financial advisors, that absent CCAA protection and the accommodations of its Secured Lenders, the only recourse for the Applicant would be to declare bankruptcy, a result that would be detrimental to the interests of the all of Applicant's creditors, as well as its customers, employees, and suppliers.

Narwold Affidavit, at para. 98.

## **PART III ~ ISSUES**

80. The issue raised on this Application is whether this Court has the jurisdiction to provide the Applicant protection under the CCAA in order to allow the Applicant to effect a going concern sale of its business in circumstances where the Applicant will not propose a formal plan of compromise.

## **PART IV ~ LAW**

### **Overview**

81. The Applicant submits that this Court has the jurisdiction to provide the Applicant protection under the CCAA in circumstances where the Applicant does not contemplate filing a formal plan of compromise or arrangement.

82. In *Re Anvil Range Mining Corp.*, Justice Farley recognized explicitly that it is entirely appropriate for a debtor to use CCAA proceedings to effect a sale of its business. According to Farley J.:

"While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company – or enterprise, even if the company does not survive, **the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate** circumstances. ... Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directed solely at secured creditors" (emphasis added)

*Re Anvil Range Mining Corp.*, [2001] O.J. No. 1453 (S.C.J.) at paras. 11-12

83. More recently, in a decision of the Manitoba Court of Queen's Bench, Justice Suche recognized that it was entirely appropriate for a debtor to avail itself of CCAA protection in circumstances where no plan of arrangement or compromise is contemplated at the time of filing. In *Re Winnipeg Motor Express Inc.*, Justice Suche held:

"... to require a debtor company to utter some magic incantation that it intends to propose a plan of arrangement, as a prerequisite for relief under the CCAA, is overly technical and inconsistent with this remedial objective. The result of such conclusion may simply be that applicants would make a statement in some pro forma or boiler plate language, or go through an exercise for no valid purpose." (emphasis added)

*Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at para. 42

84. Justice Suche's decision is consistent with the decisions of courts across Canada which have found that is entirely appropriate to use CCAA proceedings to effect the sale of a business in circumstances which preserves the business as a going concern.

85. On September 18, 2009 certain amendments to the CCAA will come into force that codify the well-established practice of courts approving asset sales within CCAA proceedings.

*Canada Gazette Part II, Vol. 143, No. 17, 1711-1712*

### **Section 36 of the CCAA**

86. On September 18, 2009, a new Section 36 of the CCAA will come into force. Section 36 explicitly authorizes the court to approve asset sales in CCAA proceedings. Subsection 36(1) reads as follows:

"Restriction on disposition of business assets

36.(1) A debtor company in respect of which an order has been made under this Act 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.**"  
(emphasis added)

87. Subsection 36(2) requires that the debtor seeking authorization for a sale of assets must give notice to secured creditors who are likely to be affected by the sale. Subsection 36(2) reads:

"Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition."

88. Subsection 36(3) sets out the factors the court should consider in deciding whether to approve an asset sale. Subsection 36(3) reads:

"Factors to be considered

(3) 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 monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor 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."

89. Section 36 of the CCAA is essentially identical to Section 65.13 of the *Bankruptcy and Insolvency Act*.

90. The addition of section 36 to the CCAA codifies the existing practice by which courts have approved the sale or disposition of all or substantially all of the assets of a debtor company within a CCAA proceeding in the absence of a plan of arrangement. .

*Nortel Networks Corp. (Re)*, [2009] O.J. No. 3169 (Commercial List)

## Judicial Discretion under the CCAA

91. Prior to section 36 of the CCAA coming into force, the Courts have relied on the judicial discretion afforded them by the CCAA to approve asset sales in the absence of a formal plan or creditor vote.

92. The jurisprudence has identified as sources of the court's discretionary jurisdiction, among other things:

- (a) the power of the court to impose terms and conditions on the granting of a stay under section 11(4) of the CCAA;
- (b) the words in the opening of section 11(4) of the CCAA which provide that the court may make an order "on such terms as it may impose"; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11(4)

*Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43

*PSINet Ltd.* (2001), 28 C.B.R. (4<sup>th</sup>) 95 (Ont. S.C.J.) at para. 5

*Nortel Networks Corp.*, *supra* at para. 30

93. The statutory scheme of the CCAA is premised on the exercise of judicial discretion and flexibility. In *Re Skydome Corp.*, Justice Blair noted that the flexibility of the CCAA was particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and myriad interests:

"To my mind the CCAA rubric remains the preferable one for the supervision of the Skydome reorganization in the interests of all creditors, Skydome itself, and its shareholders; and for purposes of dealing with the broader public dimensions which are encompassed in this situation as well."

*Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.) at para. 21

*Nortel Networks Corp., supra* at para. 28

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. 337 at para. 44

94. The court has recognized time and again that the CCAA is flexible remedial legislation that should be liberally construed in a manner consistent with its purpose and the intention of Parliament.

*ATB Financial, supra* at para. 44

*Re Canadian Red Cross Society, supra* at paras. 43, 45

*Nortel Networks Corp., supra* at para. 32

95. The intention of Parliament in enacting the CCAA was to address the "social evils" that followed the forced liquidation of insolvent companies. As the British Columbia Court of Appeal in *Chef Ready Foods* observed:

"The CCAA was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent, liquidation followed because that was the consequence of the only insolvency legislation which then existed... Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment."

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at para. 15

*ATB Financial, supra* at paras. 50, 51

96. The overarching policy of the CCAA is to preserve a business as a going concern. The preservation of a debtor's business as a going concern was specifically identified as a key objective of the CCAA from its inception:

"If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going

concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims..."

Stanley E. Edwards, "Reorganization Under the *Companies' Creditors Arrangement Act*" (1947) 25 Can. Bar Rev. 587 cited in *Chef Ready Foods*, *supra* at 319

97. Since that time, the courts in CCAA proceedings have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community", and that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership. According to Justice Rosenberg in *Citibank Canada v. Chase Manhattan Bank*:

"The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees."

*Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.) at para. 29

*Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5

*Nortel Networks Corp.*, *supra* at para. 33

### **Ontario Case Law**

98. Courts in Ontario have consistently held that the court has the jurisdiction to approve asset sales in CCAA proceedings where such sales would further the objectives of the Act including the preservation of the business as a going concern.

99. The most recent authority on the court's jurisdiction to approve the sale or disposition of significant assets of a debtor company is Justice Morawetz's August, 2009

decision in *Nortel Networks Corp.* In *Nortel* the Applicants sought court approval of a sale agreement in respect of a significant asset in the absence of a formal plan for compromise with creditors or a creditor vote. The sale agreement was to serve as a "stalking horse" bid designed to elicit higher or better offers.

100. Justice Morawetz agreed with the applicants' submission that an auction process was the best way to preserve the business as a going concern and to maximize value and preserve the jobs of Nortel employees and that it did not matter whether the business continued as a going concern under the debtor's stewardship or under new ownership. According to Justice Morawetz:

"In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the 'overarching policy' of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or 'the whole economic community':

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3<sup>rd</sup>) 165 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4<sup>th</sup>) 197 (Ont. C.A.) at para. 5.

Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

...

I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern."

*Nortel Networks Corp., supra* at paras. 32-34, 40

101. Justice Morawetz went on to cite the Ontario Court of Appeal decision in *Re Consumers Packaging* for the proposition that the sale of a business as a going concern during a CCAA proceeding is consistent with the policy goals of the CCAA:

**"In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of CCAA." (emphasis added)**

*Nortel Networks Corp., supra* at para. 36

102. In reaching his decision, Justice Morawetz also cited the decisions of the Ontario Court in *Re Canadian Red Cross Society*, *PSINet Limited* and *Re Stelco Inc.* to support the proposition that the court has the jurisdiction to approve the sale of assets in a CCAA proceeding without a plan of arrangement.

103. In *Re Canadian Red Cross Society*, Justice Blair expressly affirmed the Court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding in the absence of a plan of arrangement. In coming to his decision, Justice Blair relied upon the provisions of the statute as well as his inherent jurisdiction to give effect to the objects of the CCAA:

"It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where

this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy.

I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan'."

*Re Canadian Red Cross Society, supra* at paras. 43, 45

104. Similarly, in *Re PSINet Ltd.*, this Court approved a going concern asset sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. The court identified several factors that were persuasive, including that the alternative was a liquidation which would realize far less than a going concern sale, increase the unsecured claims and result in greater job losses. In *PSINet Ltd.* Justice Farley held that:

"[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecureds, together with the material enlarging of the unsecured claims by the disruption claims of the approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees."

*Re PSINet Ltd., supra* at para. 3

105. In *Re Stelco Inc.*, Justice Farley expressed the view that where the restructuring of the debtor could not be accomplished, the feasibility of selling the operations as a going concern should be explored within the context of a CCAA proceeding:

"I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario would have not only a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – **and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part.**" (emphasis added)

*Re Stelco Inc.* (2004), 6 C.B.R. (5<sup>th</sup>) 316 (Commercial List) at para. 1

### **Other Jurisdictions**

106. The Courts in Quebec, Manitoba and Alberta have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding.

107. In *Re Boutiques San Francisco Inc.*, the Superior Court of Quebec permitted the sale of assets to proceed where the purchase offer was greater than the liquidation value of the company and the sale would result in continued employment of most employees.

*Re Boutiques San Francisco Inc.* (2004), 7 C.B.R. (5<sup>th</sup>) 189 (Qc. C.S.) at paras. 3-4

108. Recently, in the case of *Re Winnipeg Motor Express Inc.*, the Manitoba Court of Queen's Bench granted approval of a sale of assets in circumstances where no plan of arrangement had been prepared or was even contemplated. The Court relied on the fact that the sale was in keeping with the objectives of the CCAA and found that there was "no jurisdictional impediment in granting the order sought". According to Justice Suche:

"In the flight away from receivership resulting from the potential liability of receivers, it seems that CCAA proceedings are becoming not only [the] vehicle of choice, but a necessary remedy where liquidation or bankruptcy would not be in the interests of a debtor company and creditors. Everyone agrees the CCAA is intended to be flexible, and must be given a broad and liberal interpretation to achieve its objectives. I consider those objectives to be both more fundamental and broader than the title of the statute, and go beyond the circumstances of a formal plan of arrangement."

*Re Winnipeg Motor Express Inc., supra* at paras. 41, 44

109. Significantly, Justice Suche in *Winnipeg Motor Express Inc.* recognized that it was entirely appropriate for a debtor to avail itself of CCAA protection in circumstances where no plan of arrangement or compromise is contemplated at the time of filing and that to find otherwise would be an "overly technical" interpretation of the CCAA and "inconsistent with [its] remedial objective". According to Justice Suche:

**"It also seems to me that a formal plan of arrangement or compromise is, at least theoretically, always a possibility, so to require a debtor company to utter some magic incantation that it intends to propose a plan of arrangement, as a prerequisite for relief under the CCAA, is overly technical and inconsistent with this remedial objective. The result of such conclusion may simply be that applicants would make a statement in some *pro forma* or boiler plate language, or go through an exercise for no valid purpose."**  
(emphasis added)

*Re Winnipeg Motor Express Inc., supra* at para. 42

110. The Alberta Court of Queen's Bench has also determined that it has the jurisdiction to approve major transactions, including a sale of assets, during the course of a CCAA proceeding if the proposed transactions are consistent with the purpose and spirit of the CCAA. In *Re Calpine Energy Ltd.*, the Alberta Court held that:

"It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation."

*Re Calpine Canada Energy Ltd.* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75

*Re 843504 Alberta Ltd.* (2003), 4 C.B.R. (5th) 306 (Alta. Q.B.) at para. 29

***Cliffs Over Maple Bay v. Fisgard Capital Corp.***

111. Despite the overwhelming authority to the contrary, the British Columbia Court of Appeal recently questioned whether the court should authorize a sale of substantially all of a debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale ... be distributed to its creditors".

*Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) at para. 32

112. In *Cliffs Over Maple Bay*, the debtor had no active business and sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction. Nevertheless, in *obiter dicta*, the Court of Appeal questioned whether a court should authorize a sale under the CCAA without requiring the matter to be voted on by creditors.

113. It is submitted that in posing its question the Court of Appeal adopted a narrow view of the purpose of the CCAA, and ignored the well-developed jurisprudence that a primary objective of the CCAA is to ensure that a company remains a going concern. More significantly, the British Columbia Court of Appeal did not question whether the court in a CCAA proceeding has the jurisdiction to grant the requested relief; rather it focussed on whether the court *should* grant the requested relief.

*Cliffs Over Maple Bay*, *supra* at paras. 32-33

114. In *Nortel Networks Corp.*, (discussed above), Justice Morawetz distinguished *Cliffs Over Maple Bay* on several grounds, including that: the debtor had no active business and sought to stave off its secured creditor indefinitely; the creditor opposed the stay; the case did not involve any type of sale transaction; and the B.C. Court of Appeal's decision was focussed on whether the court should grant the relief requested not on whether it had the jurisdiction to grant such relief. After considering the decision in *Cliffs Over Maple*, Morawetz J. held that "the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan".

*Nortel Networks Corp.*, *supra* at paras. 42-48

115. Similarly, courts in Manitoba and Quebec have either not followed or distinguished the decision in *Cliffs Over Maple Bay*.

*Re Winnipeg Motor Express Inc.*, *supra* at para. 39

*Conporec Inc.*, [2009] J.Q. No. 1958 (S.C.) at para. 48 (QL)

*AH (MTL) Inc.*, [2009] J.Q. No. 5091 (S.C.) at para. 6 (QL)

116. In *Re Winnipeg Motor Express Inc.*, discussed above, Justice Suche openly criticized the decision in *Cliffs Over Maple Bay*, expressing the view that the cases which have permitted asset sales even in the absence of a plan more appropriately adhere to the intended purpose of the CCAA.

*Re Winnipeg Motor Express Inc.*, *supra* at paras. 41-43

117. It is respectfully submitted that to the extent that the decision in *Cliffs Over Maple Bay* suggests that this court may not have the jurisdiction to provide an applicant protection under the CCAA in circumstances where an applicant does not intend to propose a plan of arrangement, it should be treated with caution. Any such narrow

construction of the CCAA is clearly inconsistent with the intention of Parliament, as expressed both at the time of CCAA' s enactment and through the recent amendments.

**PART V ~ ORDER SOUGHT**

118. The Applicant respectfully requests that this Court grant the stay of proceedings that is sought in order to permit the Applicant to conclude a transaction to sell its business as a going concern for the benefit of all of its stakeholders.

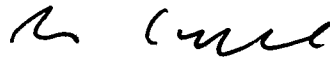
**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

September 15, 2009



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Robin Schwill



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Sean Campbell

Lawyers for the Applicant

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 3169 (Commercial List)
2. *Re Anvil Range Mining Corp.*, [2001] O.J. No. 1453 (S.C.J.)
3. *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.)
4. *Canada Gazette Part II*, Vol. 143, No. 17, 1711-1717
5. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4<sup>th</sup>) 299 (Ont. Gen. Div.)
6. *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Commercial List)
7. *Re Stelco Inc.* (2004), 6 C.B.R. (5<sup>th</sup>) 316 (Commercial List)
8. *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.)
9. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. 337
10. *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311
11. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.)
12. *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
13. *Re Boutiques San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Qc. C.S.)
14. *Re Calpine Canada Energy Ltd.* (2007), 35 C.B.R. (5th) (Alta. Q.B.)
15. *Re 843504 Alberta Ltd.* (2003), 4 C.B.R. (5th) 306 (Alta. Q.B.)
16. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.)
17. *Conporec Inc.*, [2009] J.Q. No. 1958 (S.C.) (QL)
18. *AH (MTL) Inc.*, [2009] J.Q. No. 5091 (S.C.) (QL)

**SCHEDULE "B"**  
**RELEVANT STATUTES**

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended), s.11(4); s. 36 [not in force]

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BARZEL INDUSTRIES CANADA INC.**

Court File No:

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT  
(Application Returnable September 15, 2009)**

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