

ACTION NO: 1003 05560
BANKRUPTCY ACTION NO.: 24-115359

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

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

AND 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 COW HARBOUR CONSTRUCTION LTD.

BENCH BRIEF OF COW HARBOUR CONSTRUCTION LTD.
FOR THE APPLICATION TO BE HEARD APRIL 7, 2010
BEFORE THE HONOURABLE MR. JUSTICE K.D. YAMAUCHI

Reynolds, Mirth, Richards & Farmer LLP
Barristers & Solicitors
3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Lawyer: Michael J. McCabe, Q.C.
Telephone: (780) 425-9510
Facsimile: (780) 429-3044
File No: 108939-001-MJM

TABLE OF CONTENTS

	Page
A INTRODUCTION	1
B. PRELIMINARY MATTERS	1
C. FACTS	1
D. SERVICE OF APPLICATION	2
E. INITIAL APPLICATION	2
Documents	2
Burden	3
F. FORM OF INITIAL ORDER	4
DIP Financing	4
Administration Charge	4
Critical Suppliers' Charge	5
Fairness	5
Jurisdiction	6
Directors' Charge	7
G. QUALIFICATIONS OF MONITOR	7
H. DUTIES OF MONITOR	8
I. SERVICE OF ORDER	8
J. ADVERTISING	8
K. CHIEF RESTRUCTURING OFFICER	8
L. RELIEF SOUGHT	9
M. LIST OF ATTACHMENTS	10

A. INTRODUCTION

1. The Applicant, Cow Harbour Construction Ltd. (“Cow Harbour” or the “Company”), applies for an initial order under the *Companies’ Creditors Arrangement Act* (“*CCAA*”).

B. PRELIMINARY MATTERS

2. In the fall of 2009, amendments to the *CCAA* that had been passed some time ago were finally proclaimed and came into force. In some cases the amendments are substantial (for example, the monitor’s duties) and in some cases the amendments are trivial (for example, S. 11(6) was renumbered to S. 11.02(3)). Parliament also passed Regulations prescribing representations necessary from a debtor company at an initial application.
3. One obviously unintended effect of these amendments is to render the Alberta Court’s template *CCAA* order partially obsolete.
4. At **Tab “A”** hereto is an annotated draft of the order the Applicant seeks. The comments in red are in respect of portions of the order based upon portions of the *CCAA* that did not change with the amendments. The portions in green are based on the amendments to the *CCAA*. The italicized green are excerpts from the *CCAA*.
5. At **Tab “B”** hereto is a copy of the *CCAA* and at **Tab “C”** are the new Regulations to the *CCAA* that apply to, among other things, an Initial Application.

C. FACTS

6. The facts are straight forward and are set out in the Affidavit of Demetri Koumarelas (“Koumarelas”) and in the Report of Deloitte & Touche Inc. (“D&T”) (the “D&T Report”).
7. The rapid growth of Cow Harbour is shown in paragraph 12 of the Affidavit of Koumarelas. The latest snapshot available is in the January 2010 monthly statement¹. It shows that Cow Harbour has assets of about \$364 million and liabilities of about \$271 million and the income shows that it was profitable. But, it is unable to pay its liabilities

generally as they become due². It has an operating loan with the Royal Bank of Canada (“Royal Bank”) authorized at \$30 million, but there is \$10 million overdraft³. Cow Harbour simply does not have the cash needed to meet its current liabilities. It is a classic “asset rich, cash poor” situation.

8. Cow Harbour’s major assets are about 260 pieces of heavy, earth moving and hauling equipment⁴. Cow Harbour has about 600 employees of which about 500 are unionized equipment operators.

D. SERVICE OF APPLICATION

9. Historically, *CCAA* orders have been granted *ex parte* or, at best, with informal notice to the major creditors. With the amendments to the Act, that practice will change for the Act now requires that if debtor in possession (DIP) financing is sought, creditors affected must be given notice. As will be seen, Cow Harbour does seek DIP financing. Cow Harbour gave that notice by letter to all secured creditors on Thursday, April 1, 2010.

E. INITIAL APPLICATION

Documents

10. Section 10(2) requires all financial statements and a weekly projected cash flow. These are contained in the D&T Report.
11. Section 10(2)(b) is new. It now requires that the report contain prescribed representations of the debtor company regarding preparation of the cash flow statement. “Prescribed” is a defined term meaning that it is in the Regulations and, indeed, S. 4 of the Regulations (Tab “C” hereto) contains the required representations. Those representations are contained in the D&T Report and adopted as accurate in the Affidavit⁵.

¹ D&T Report, Appendix “C”.

² Affidavit of Koumarelas, para. 4.

³ Affidavit of Koumarelas, para. 13.

⁴ D&T Report, para. 11.

⁵ Affidavit of Koumarelas, para. 19.

Burden

12. Although renumbered, the provisions regarding the burden on an initial application remain the same⁶. The burden is upon the Applicant to show:
 - a. that it is acting in good faith;
 - b. that it is acting with due diligence;
 - c. that it is an appropriate case for an order.
13. It is submitted that the test of determining whether it is an appropriate case is a two part test:
 - a. Is it viable; is there a prospect for a viable plan that can be reached between the applicant's creditors; and
 - b. Is there material prejudice to an interested party in granting the order?
14. There are many cases dealing with this issue and they are all fact specific.
15. In the case of Cow Harbour, it is submitted that it is obvious that it can make a viable plan. Its assets greatly exceed its liabilities and it is profitable. Its only problem is that it has a working capital shortage; it is "cash strapped".
16. The cash flow statements clearly show that it can turn around. The Monitor has reviewed these cash flow statements and recommends protection under the *CCAA* as it will enable Cow Harbour to stabilize its operations.
17. That Cow Harbour is acting in good faith and with due diligence is equally obvious. Not only has it requested the assistance of D&T at a very early stage in the process, it has hired an experienced Chief Restructuring Officer ("CRO") and proposes to have that CRO formally appointed by the Court.
18. It is submitted that an initial order should be granted.

F. FORM OF THE INITIAL ORDER

19. The initial order sought by Cow Harbour is, to the extent possible, that of the Alberta Court's standard template. Some portions of it deserve comment.

DIP Financing

20. As the cash flow statements show, DIP financing of \$15 million is necessary to get through the restructuring period. It is projected that the DIP financing should be repaid by October 2010.
21. The factors to be taken into account contemplating DIP financing are now statutory⁷. The six factors set out in this section are expressly addressed in paragraph 25 of the Affidavit of Koumarelas and all support the granting of DIP financing under the circumstances.
22. The Court is again reminded that Cow Harbour's problem is a shortage of working capital. Its assets exceed its liabilities by far more than the amount of the charges sought in this order.

Administration Charge

23. In times past, the granting of an administration charge was part of the exercise of the inherent jurisdiction of the Court. It has now been codified in S. 11.52.
24. Again, the granting of an administration charge is fact specific. Here, while Cow Harbour has significant equity and is profitable, it does not have the cash flow to hire the professionals necessary to carry out the *CCAA* process. Therefore, the administration charge is required.

⁶ CCAA, S. 11.02(3) (Tab "B").

⁷ CCAA, S. 11.2(4) (Tab "B").

Critical Suppliers' Charge

Fairness

25. The concept of the critical supplier charge was, again, an exercise of the Court's inherent jurisdiction. However, as with the other charges, it is now legislated.⁸
26. Cow Harbour is in the business of overburden removal services to oil producers. Its main customer is Syncrude.
27. The removal of overburden is work preparatory to, or in connection with, the recovery of a mineral, namely oil. It is the type of "work" that is lienable under the *Builders' Lien Act*.⁹
28. The persons who supply materials to, or work for Cow Harbour (collectively, the "Lien Claimants"), also have lien rights. Those lien rights are created when the work is begun or the first material is furnished.¹⁰
29. These Lien Claimants are secured creditors of Cow Harbour. Obviously, the continuity of their work or supply to Cow Harbour is critical to Cow Harbour's continued work for Syncrude.
30. Cow Harbour seeks a declaration that the Lien Claimants are critical to Cow Harbour's continued operation (S. 11.4(1)), that they be required to continue to supply goods or services (S. 11.4(2)), that they be provided with a charge in their favour (S. 11.4(3)), in such priority as this Honourable Court deems just (S. 11.4(4)).
31. Additionally, Cow Harbour seeks an order preventing the Lien Claimants from filing liens.

⁸ CCAA, S. 11.4 (Tab "B").

⁹ *Builders' Lien Act*, S. 6 (Tab "D").

¹⁰ *Builders' Lien Act*, S. 10 (Tab "D").

32. It is submitted that what Cow Harbour seeks is fair to all concerned; *prima facie* the Lien Claimants are secured creditors, removing their right to lien and exchanging it with a charge on the property of Cow Harbour is neutral; they were secured and they remain secured. The Lien Claimants are not detrimentally affected, nor are any of the other creditors.
33. Requiring Lien Claimants to continue to supply goods and services is not offensive; the CCAA contemplates it and they are being secured.
34. As to any amounts owing to the Lien Claimants at the date of the Notice of Intention (“NOI”), the order contemplated will see them paid, promptly.

Jurisdiction

35. In essence, Cow Harbour asks this Honourable Court to prohibit the filing of builders’ liens by the Lien Claimants, to replace their security with a Critical Suppliers’ Charge and to direct that Syncrude pay the whole of the monies owing by it to Cow Harbour, without deduction.
36. It is submitted that for reasons above, the request is an efficacious one, prejudicing no one. For reasons that follow, it is submitted that the Court has the jurisdiction to make that order and should make that order.
37. The leading case in Alberta dealing with the prohibition of the filing of builders’ liens is *Re Scaffold Connection Corp.*¹¹ In that decision, Wachowich A.C.J. (as he then was) says¹²:

While the CCAA clearly is only one piece of the existing body of insolvency legislation, it must be kept in mind that the goal of the CCAA is to enable insolvent companies the opportunity to reorganize in order to continue operating, where that appears to be a realistic goal. It may be that in particular circumstances, leave to pursue a lien claim would not jeopardize the company’s efforts at reorganization. However, this must be determined on the facts of each case. In cases where such a claim would

¹¹ *Re Scaffold Connection Corp.*, (2000), 15 C.B.R. (4th) 289 (Tab “E”).

¹² *Scaffold (supra)*, para. 22.

endanger the survival of the company, the courts' jurisdiction enables it to say proceedings, even those concerning third parties. It would greatly hamper the usefulness of this legislation if such jurisdiction did not exist, as stays would in some cases (such as the present one) be rendered futile. (emphasis added)

38. The above emphasized words fit the Cow Harbour situation precisely.
39. To similar effect, in Alberta, see *Re Sulphur Corp. of Canada Ltd.*¹³ (per LoVecchio J.) and *Re Kerr Interior Systems*¹⁴ (per Bielby J., as she then was).
40. What is proposed in Cow Harbour varies from what was done in *Scaffold* in that while in both cases, the Lien Claimants are prohibited from liening, in the Cow Harbour situation, it is proposed to give them a replacement security.

Director's Charge

41. Cow Harbour was created by Alphonse Hutchings ("Hutchings") and made into a company generating hundreds of millions of dollars of income every year and employing hundreds of people. If Hutchings is to stay on as Director, he runs the risk of director's liabilities for employees, employee withholdings and G.S.T.
42. As with the other charges, the granting of a director's indemnification charge is now statutory. One of the prerequisites is that the Court must be of the opinion that the company could not obtain adequate indemnification insurance at a reasonable cost.
43. In his Affidavit, Koumarelas states the obvious, Cow Harbour cannot obtain such insurance.

G. QUALIFICATIONS OF MONITOR

44. With the amendments to the Act, the proposed monitor must be a trustee in bankruptcy. D&T is a trustee in bankruptcy. Indeed, it is the Trustee of Cow Harbour under the NOI.

¹³ *Re Sulphur Corp. of Canada Ltd.*, (2002) 35 C.B.R. (4th) 304 (Tab "F").

¹⁴ *Re Kerr Interior Systems*, (2008) 42 C.B.R. (5th) 293 (Tab "G") It should be noted that Bielby J's decision was reversed at the Court of Appeal on a finding that there was a trust. That trust was a creature of the *Saskatchewan Builders' Lien Act* which is different than the Alberta Act.

H. DUTIES OF MONITOR

45. The Alberta Court's template is no longer of much assistance in dealing with the duties of the monitor because those duties have been extensively legislated in S. 23 of the *CCAA*.

I. SERVICE OF ORDER

46. The provisions in the Alberta Court's website are made stale by the amended legislation. Section 23 imposes duties upon the monitor respecting the "prescribed information" being dealt with in the "prescribed manner". It is prescribed by regulation.
47. The provision in S. 58(a) of the draft is admittedly redundant. This is required by regulation, but is put in the order for visibility, i.e. so that anyone looking at the order can find the website.

J. ADVERTISING

48. Section 23(1)(a) requires the monitor to publish in a newspaper unless the Court otherwise orders. These proceedings will be notorious in the Fort McMurray community¹⁵. Publishing in a newspaper is pointless. In the grand scheme of things the cost is rather minor, it should be saved.

K. CHIEF RESTRUCTURING OFFICER

49. Operationally, Cow Harbour is strong, but its financial structure needs work. Cow Harbour applies to retain the services of the experienced CRO, Patrick Ross ("Ross"), on the terms outlined in the initial order. It is submitted that this would assist everyone.
50. It is contemplated that payment of Ross' services would be secured as part of the Administration Charge. This is expressly contemplated by S. 11.52(1)(b) and is fair under the circumstances.

¹⁵ Affidavit of Koumarelas, para. 35.

L. RELIEF SOUGHT

51. Cow Harbour seeks and Initial Order under the *CCAA* substantially in the form attached as **Tab “H”** hereto (which form is the same as that in Tab “A” hereto, but without the annotations).

ALL OF WHICH is respectfully submitted this 6th day of April 2010.

Reynolds, Mirth, Richards and Farmer LLP
Solicitors for the Applicant,
Cow Harbour Construction Ltd.

Per:



Michael J. McCabe, Q.C.

M. LIST OF ATTACHMENTS

- A. Annotated draft of the order sought by the Applicant;
- B. *Companies' Creditors Arrangement Act*;
- C. Regulations to *Companies' Creditors Arrangement Act*;
- D. *Builders' Lien Act*, S. 6;
- E. *Re Scaffold Connection Corp.*, (2000), 15 C.B.R. (4th) 289;
- F. *Re Sulphur Corp. of Canada Ltd.*, (2002) 35 C.B.R. (4th) 304;
- G. *Re Kerr Interior Systems*, (2008) 42 C.B.R. (5th) 293;
- H. Initial order sought by the Applicant without annotations.

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

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

**BENCH BRIEF OF
COW HARBOUR CONSTRUCTION LTD.
FOR THE APPLICATION TO BE HEARD
APRIL 7, 2010 BEFORE THE
HONOURABLE MR. JUSTICE K.D. YAMAUCHI**

Reynolds, Mirth, Richards & Farmer LLP
Barristers & Solicitors
3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Lawyer: Michael J. McCabe, Q.C.
Telephone: (780) 425-9510
Facsimile: (780) 429-3044
File No: 108939-001-MJM