

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 INDEX ENERGY MILLS ROAD CORPORATION

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Shane Kukulowicz*, for the Index Energy Mills Road Corporation

Brian Empey and Melaney Wagner, for Grant Thornton Ltd., Proposed Monitor

Grant Moffat, for the National Bank of Canada, as Agent for a Syndicate of
Lenders

David Bish, for DIP Lender (Index Equity US LLC), Index Equity Sweden AB
and Index Residence AB

HEARD and ENDORSED: August 16, 2017

TYPED REASONS RELEASED: August 23, 2017

ENDORSEMENT

Overview

[1] This application is brought by Index Energy Mills Road Corporation (“Index Energy Ajax” or the “Applicant”) for an order (the “Initial Order”) pursuant to the Companies’ Creditors Arrangement Act (the “CCAA”).

[2] In addition to requesting a stay of proceedings and authorization to carry on business in a manner consistent with the preservation of its property, the Applicant also requests that Grant Thornton Ltd. (“GTL”) be appointed as monitor (the “Monitor”); authorization for the Applicant to borrow \$5 million pursuant to a credit facility (the “DIP Facility”) as interim financing from Index Equity US LLC (“Index US”), in such capacity, (the “DIP Lender”) with a maximum amount of \$1.6 million being advanced by the DIP Lender prior to the CCAA comeback hearing (the “Comeback Hearing”); and a sealing order with respect to certain confidential information described in the pre-filing report of the Monitor (the “Pre-Filing Report”).

[3] Index Energy Ajax owns and operates an electrical co-generation facility located in Ajax, Ontario that generates electricity by burning wood waste from the construction industry to produce steam to drive turbine generators (the “Biomass Facility”).

[4] Index Energy Ajax has encountered difficulties in retrofitting the Biomass Facility and energy output has been lower and operational costs higher than anticipated. Index Energy Ajax has also been engaged in litigation with its former engineering, procurement and construction contractor, HMI Construction Inc. ("HMI"), and has also been forced to deal with numerous liens arising from the construction associated with the Biomass Facility, including a lien claim of approximately \$31.3 million registered by HMI (the "HMI Lien Claim"). The sum of \$7,053,890 plus HST has been paid into court as an agreed upon holdback (the "Holdback Funds").

[5] Index Energy Ajax is in default on various obligations to a syndicate of lenders comprised of National Bank of Canada, Canadian Western Bank, Laurentian Bank of Canada and Business Development Bank of Canada (collectively, the "Syndicate"). National Bank of Canada is the agent of the Syndicate (in that capacity, the "Agent"). The Syndicate has made demand for payment of amounts in excess of \$45 million. Mr. Rickard Haraldsson, a Director of Index Energy Ajax has stated in his affidavit that Index Energy Ajax is insolvent.

[6] The Applicant is of the view that its underlying business remains strong, but that it ultimately requires a restructuring to inject new funds into its operations to address the various deficiencies in the Biomass Facility. Accordingly, Index Energy Ajax states that it requires protection under the CCAA to allow it a period of time to develop and implement a sales and investment solicitation process ("SISP") and to access interim financing on a priority basis to preserve value for all stakeholders and ensure its viability as a going concern.

[7] The Applicant has advised that it is currently in negotiations with Index US and the Syndicate to reach agreement on terms of a mutually acceptable SISP, which would include a stalking-horse bid, and to allow further advances under the DIP Facility beyond the initial permitted draw amount.

The Facts

[8] The facts have been set out in detail in the affidavit of Rickard Haraldsson (the "Haraldsson Affidavit").

[9] Index Energy Ajax was incorporated pursuant to the laws of Ontario on November 7, 2006. Its registered office is located at 170 Mills Road, Ajax, Ontario.

[10] Index Energy Ajax is owned by three shareholders. Index Energy Sweden is the owner of 70% of the common shares, R. Andrews Investment Company, LLC ("R. Andrews") is the owner of 10% of the common shares and Jacqueline Kerr ("J. Kerr") is the owner of 20% of the common shares.

[11] Index Energy Ajax was incorporated to retrofit the existing energy plant located in Ajax (the "Property") to become the Biomass Facility.

[12] Index Energy Ajax entered into a feed-in-tariff with the Ontario Power Authority in 2010 (the "FIT Contract"). In order to retrofit the Biomass Facility, Index Energy Ajax entered into a construction contract with HMI in 2012 (the "EPC Contract"). Since 2015, there has been substantial litigation between Index Energy Ajax and HMI with regard to the HMI Lien Claim.

[13] In March 2017 Index Energy Ajax paid an agreed holdback amount of \$7,053,890 plus HST (the "Holdback Funds") into court and all subcontractor lien claims were vacated from title to the Property

Index Energy Ajax's Creditors

[14] In 2013, Index Energy Ajax entered into a credit agreement (the "Syndicate Credit Agreement") with the Syndicate. Pursuant to the Syndicate Credit Agreement, the Syndicate agreed to provide a non-revolving construction facility in the maximum sum of \$60 million and a non-revolving term facility once the retrofit was satisfactorily completed (collectively, the "Syndicate Facilities").

[15] Index Energy Ajax has been in default of the Syndicate Agreement since at least May 2015.

[16] On January 18, 2017, the Agent sent Index Energy Ajax a demand letter (the "Demand Letter") demanding full payment of all amounts owing to the Syndicate under the Syndicate Facilities, which at that date totaled \$49,427,871.94, with interest.

[17] Other creditors include Index Residence for an amount in excess of \$102 million and trade creditors for an amount in excess of \$4 million.

[18] The proposed monitor has filed a pre-filing report which details the efforts Index Energy Ajax has taken, with the assistance of the Monitor, to solicit an appropriate DIP financier. After consulting with Index Sweden and Index Residence, one party was selected as a potential DIP lender, however, after protracted negotiations, the parties were not able to come to terms. As an alternative, Index US has agreed to act as DIP Lender with the consent of the Syndicate, on terms more favourable to Index Energy Ajax than those offered by this potential lender. Details are provided in the Pre-Filing Report at paragraphs 46-53 and in the Haraldsson Affidavit at paragraph 94.

[19] The DIP Lender has agreed to provide Index Energy Ajax with a DIP Facility in order for Index Energy Ajax to meet its immediate funding requirements.

[20] The DIP Facility, extended by the DIP Lender is the maximum amount of \$5 million (the "Principal Amount") with a maximum amount of \$1.6 million being advanced by the DIP Lender prior to the CCAA Comeback Hearing pursuant to the DIP Credit Agreement.

[21] The DIP Facility requires that the DIP Lender receive a court ordered priority charge over the assets of Index Energy Ajax (the "DIP Lender's Charge") which Charge will attach to all of the Index Energy Ajax Property other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of Index Energy Ajax other than Caterpillar Financial Services Limited, who has a specific security interest over a construction loader (the "Loader").

The Law

[22] The CCAA applies to a “debtor company” with total claims against it for more than \$5 million. I am satisfied that Index Energy Ajax is such a “debtor company” and is entitled to relief under the CCAA.

[23] I am also satisfied that Index Energy Ajax is insolvent. Index Energy Ajax’s liabilities exceed the current value of its assets and Index Energy Ajax has insufficient funds to pay its debts and has ceased to meet its obligations as they become due.

[24] I am also satisfied that Index Energy Ajax has met the other threshold requirements include the filing of cash-flow statements required by Section 10 of the CCAA. Further, since the chief place of business of Index Energy Ajax is Ajax, Ontario, this court has jurisdiction to hear this application.

[25] I am also satisfied that it is both necessary and appropriate to grant a stay of proceedings to Index Energy Ajax. The stay is crucial as it preserves the status quo among the stakeholders while Index Energy Ajax stabilizes operations and considers its alternatives. Index Energy Ajax has indicated that it wishes to embark on a SISP and a stay is necessary to allow the time for the SISP to unfold.

[26] Index Energy Ajax also seeks authorization to pay pre-filing expenses up to the amount of \$450,000 if it is determined, in consultation with the Monitor, to be necessary for the continued operation of the business or preservation of the Property.

[27] Index Energy Ajax takes the position that the continued availability of supplies is necessary to ensure a successful SISP and ultimate emergence of a restructured business in some form. Mr. Haraldsson states that a number of the suppliers to Index Energy Ajax are vital to its ongoing operations and it may be necessary for them to be paid all or a portion of the obligations arising prior to the date of the Initial Order to ensure their survival and their continued ability to provide supplies to Index Energy Ajax.

[28] Mr. Haraldsson states that the operation of the Biomass Facility, and the maximizing of value for the stakeholders would be materially prejudiced if the required suppliers ceased to carry on business and ceased to supply.

[29] Accordingly, Index Energy Ajax seeks authority to pay such amounts as they are required, including amounts owing prior to the date of the Initial Order, to ensure continued supply and successful restructuring.

[30] There is authority to authorize an applicant to pay certain amounts, including pre-filing amounts to suppliers where the applicant is not seeking a charge in respect of critical suppliers (see: *Cinram International Inc.*, 2012 ONSC 3767 (Ont. SCJ [Comm. List]), at para. 68 of Schedule “C”, (“Cinram”) and *Smurfit-Stone Container Canada Inc.*, 2009 CanLII 2493 (Ont. SCJ [Comm. List], at para. 21 (“Smurfit-Stone”)).

[31] In granting this authority, the courts have considered a number of factors, including:

- (a) whether the goods and services are integral to the business of the applicants;
- (b) the applicants dependency on the uninterrupted supply of the goods or services;
- (c) the fact that no payments would be made with the consent of the monitor;
- (d) the monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
- (e) whether the applicant has sufficient inventory of the goods on hand to meet its needs; and
- (f) the effect on the debtors' ongoing operations and ability to restructure if it were unable to make pre-filing payments to their critical suppliers.

[32] In these circumstances, I have been persuaded that it is both necessary and appropriate to provide the requested authorization to Index Energy Ajax.

[33] Pursuant to section 11.7 of the CCAA, the court is required to appoint a monitor. GTL has consented to its appointment as Monitor in this case and I am satisfied that it is appropriate to appoint GTL as Monitor.

[34] The proposed Initial Order provides for the following charges, in the following priority:

- (a) First - the Administration Charge (to the maximum amount of \$1 million);
- (b) Second – the DIP Lender's Charge; and
- (c) Third – the Director's Charge (to the maximum amount of \$250,000).

[35] The Applicant proposes that the Administration Charge rank in priority to the DIP Lender's Charge. The Applicant proposes that the Charge attach to all of its Property, other than the Holdback Funds, to the extent they are valid claims to rank in priority to all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof.

[36] With respect to the DIP Facility, Index Energy Ajax is seeking approval of a \$5 million DIP Facility. The DIP Facility would be secured by a DIP Lender's Charge, which would attach to all of the Applicant's Property, other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof and subject only to the Administration Charge.

[37] As previously noted, the granting of the DIP Lender's Charge is condition precedent under the DIP Credit Agreement and I am satisfied that it is an integral part of the negotiating consideration of the DIP Facility.

[38] The court has jurisdiction to grant a priority DIP financing charge pursuant to section 11.2 of the CCAA.

[39] Subsection 11.2(4) of the CCAA sets out the factors to be considered by the court in determining whether to grant a priority DIP financing charge. The factors are not exhaustive and in *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (SCJ) (“Canwest”), Pepall J. (as she then was) stressed the importance of meeting the following three criteria:

- (a) whether notice has been given to secured creditors likely to be affected by the security of the charge;
- (b) whether the amount to be granted under the DIP financing is appropriate and required having regard to the debtor’s cash-flow statement; and
- (c) whether the DIP charge secures an obligation that existed before the order was made (which it should not).

[40] In this case, I have concluded that the proposed DIP Lender’s Charge satisfies the relevant criteria and should be granted. In arriving at this conclusion, I have considered the following:

- (i) The secured creditors who would be primed by the proposed DIP Lender’s Charge, namely the Syndicate, Index Residence and HMI were given notice of the proposed DIP Lender’s Charge. Caterpillar, the secured creditor who will not be primed, was not given notice;
- (ii) The maximum amount of the DIP Facility is appropriate based on the anticipated cash requirements, as reflected in the cash-flow projections prepared with the assistance of GTL. The amount advanced under the DIP Facility is limited to \$1.6 million until the Comeback Hearing, when more comprehensive service will have occurred;
- (iii) Management of Index Energy Ajax’s business and affairs will have the benefit of additional oversight and consultation provided by the Monitor;
- (iv) It is conceivable that the DIP Facility will enhance the value expected to be available for all stakeholders.

[41] The Proposed Initial Order, contemplates the indemnification of the Applicant’s directors and officers, the creation of a Directors’ Charge and a related stay of proceedings in respect of claims against the directors and officers. The statutory authority for the granting of this relief is found in sections 11.03 and 11.51 of the CCAA.

[42] I am satisfied that it is appropriate to extend coverage to the directors and officers and that it is necessary to grant the requested Charge as Index Energy Ajax does not have any directors’ and officers’ insurance. This relief is accordingly granted.

[43] The Pre-Filing Report contains certain appendices which the Applicant regards as sensitive commercial information relating to the process undertaken to obtain DIP financing and the optimization plan of the Applicant. The Applicant is of the view that if publically available, this information could have a material detrimental effect on the Applicant's restructuring. Having considered the guidance provided by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, (2002) 2 S.C.R. 522, I am satisfied that it is appropriate, in order to protect the integrity and fairness of the process, to grant an order sealing the confidential appendices.

Summary

[44] In the result, the Initial Order is granted in the form requested by Index Energy Ajax. The Comeback Hearing has been scheduled before me on Monday, September 11, 2017 at 8:30 a.m.


Regional Senior Justice G.B. Morawetz

Date: August 23, 2017