Estate No. 32-2853708
Court File No. 32-2853708

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

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

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF IS5 COMMUNICATIONS INC., OF THE CITY OF MISSISSAUGA IN THE PROVINCE OF ONTARIO

FACTUM OF THE MOVING PARTY, IS5 COMMUNICATIONS INC.

August 5, 2022

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Dylan Chochla (LSO#: 62137I)
dchochla@fasken.com
Tel: 416 868 3425

Lawyers for the Moving Party, iS5 Communications Inc.

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FACTUM OF IS5 COMMUNICATIONS INC.

PART 1 - OVERVIEW[1]

1. Is5 Communications Inc. ("**Is5**" or the "**Company**"), filed a Notice of Intention to Make a Proposal ("**NOI**") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") on August 5, 2022.

2. Grant Thornton Limited was named as proposal trustee in connection with the NOI (the "**Proposal Trustee**").

1 Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Clive Dias, sworn August 5, 2022 (the "**Dias Affidavit**").

3. This motion is brought by the Company seeking an order substantially in the form of the draft Order included at Tab 1A of the Motion Record, *inter alia*:

(a) approving the DIP term sheet (the "**DIP Term Sheet**") between the Company and Phoenix Contact Venture Funds I to provide interim financing to the Company (the "**DIP Loan**") through its affiliated company Phoenix Contact GmbH & Co. KG ("**Phoenix**"), in the initial maximum amount of USD $1,100,000, and granting a charge over all of the assets, rights, undertakings and properties of the Company as security for amounts advanced under the Company's DIP Loan (the "**DIP Charge**") ranking ahead of all other encumbrances other than the Administration Charge (defined below) and the D&O Charge (defined below) and validly perfected security in favour of equipment lessors;

(b) establishing the Administration Charge (as defined below) in the maximum amount of CDN $150,000;

(c) declaring that the directors and officers of the Company shall be indemnified for obligations and liabilities that they may incur in their capacity as directors or officers (as the case may be) after the commencement of these proceedings and granting the D&O Charge (as defined below) in the maximum amount of CDN $200,000, as security for the aforesaid indemnity, which charge will rank behind the Administration Charge and ahead of the DIP Charge; and

(d) authorizing the Company to pay pre-filing amounts owing to certain suppliers if necessary to ensure the ongoing operations of the Company, in the maximum amount of USD $120,000.

PART 2 - THE FACTS

4. The facts with respect to this motion are more fully set out in the Affidavit of Clive Dias sworn August 5, 2022 (the "**Dias Affidavit**"). The facts relevant to specific issues herein are reviewed in the submissions relating to such issues.

PART 3 - ISSUES

5. The issues of this motion are as follows:

(a) Should this Court approve the DIP Term Sheet and DIP Charge?

(b) Should this Court grant the Administration Charge?

(c) Should this Court approve the D&O indemnity and D&O Charge?

(d) Should this Court authorize the Company to pay pre-filing amounts owing to certain suppliers?

PART 4 - LAW AND ARGUMENT

A. COURT SHOULD APPROVE THE DIP TERM SHEET & DIP CHARGE

6. The Company is seeking approval of the DIP Term Sheet and DIP Charge. The purpose of the DIP financing is to provide the Company with the funds it needs to complete the negotiation of a binding stalking horse purchase agreement with Phoenix, and once the stalking horse purchase agreement is executed, to commence a stalking horse sale process.

7. It is a condition of the DIP Term Sheet that it be approved by the Court and that Phoenix be granted a priority court-ordered charge on all the assets, rights, undertakings and properties of the Company as security for amounts advanced under the DIP Loan (the "**DIP Charge**"), ranking ahead of all other charges other than the Administration Charge and the D&O Charge and validly perfected security in favour of equipment lessors.

8. Section 50.6 of the BIA expressly authorizes the Court to approve interim financing and order a priority charge as security for amounts advanced to a debtor pursuant to said financing and provides, in part, as follows:

> ***50.6 (1)*** *On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by*

the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
[...]

50.6(3) *The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.*
[...]

9. There are three criteria in section 50.6(1) that must be satisfied:

(a) notice has been given to secured creditors likely to be affected by the DIP Charge;

(b) the amount to be granted under the proposed DIP financing facility be appropriate and required having regard to the debtors' cash-flow statement; and

(c) the DIP Charge does not secure an obligation that existed before the DIP order was made.

10. These three criteria have been satisfied in this case:

(a) notice has been given to the Company's senior secured creditor, SVB, and to its second ranking Secured Noteholders. The Company's other secured creditors are equipment financiers. The charges sought on this Motion will rank subordinate in priority to any validly perfected security interests of the equipment financiers and they have therefore not been provided with notice of this motion.

Dias Affidavit at para. 78

(b) the Company's Cash Flow Statement filed with the court shows that, without the financing provided under the DIP Loan, the Company will be unable to fund its operations or pursue the negotiation of the stalking horse purchase agreement.

Dias Affidavit at para. 75.

(c) The DIP Charge will not secure any obligations owing to Phoenix that were incurred prior to the NOI Proceeding.

Dias Affidavit at para. 74.

11. Section 50.6(5) of the BIA sets out the factors to be considered by the Court in deciding whether to grant an order approving DIP financing and a DIP financing charge:

> ***50.6 (5)*** *In deciding whether to make an order, the court is to consider, among other things,*
>
> *a) the period during which the debtor is expected to be subject to proceedings under this Act;*
>
> *b) how the debtor's business and financial affairs are to be managed during the proceedings;*

> c) *whether the debtor's management has the confidence of its major creditors;*
>
> d) *whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;*
>
> e) *the nature and value of the debtor's property;*
>
> f) *whether any creditor would be materially prejudiced as a result of the security or charge; and*
>
> g) *the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.*

12. The following additional factors support the approval of the DIP Term Sheet and the DIP Charge and satisfy the criteria set out above at section 50.6(5) of the BIA:

(a) As evidenced by the Cash Flow Statement, the amounts to be advanced to the Company as contemplated in the DIP Term Sheet are both necessary and sufficient to fund the Company's cash requirements until at least November 4, 2022, which is the expected outside date to close a transaction. The DIP Loan has been structured in two advances: (i) the first advance of USD $600,000 is intended to provide the Company with liquidity to continue negotiating a binding stalking horse purchase agreement; and (ii) the second advance of USD $500,000 (subject to further approval of the Court) is intended to fund the Company through the stalking horse sale process until the closing of a transaction.

(b) the Company will operate as a going concern, under the supervision of the Proposal Trustee and in accordance with the Cash Flow Statement, to allow it to continue negotiating a binding stalking horse purchase agreement, and if executed, to commence a sale process to identify an acceptable sale or restructuring of the Company.

(c) the Company has the confidence of its major creditors. The Company's senior secured creditor SVB has indicated that it does not oppose the relief sought on this motion. The Company's largest Secured Noteholders have also expressed support for the Company's restructuring plan.

(d) the DIP Loan will provide the Company with the liquidity to continue negotiating a binding stalking horse purchase agreement with a view of maximizing value for the Company's stakeholders. The successful completion of a sale of the Company will enhance the prospects of a viable proposal being made to creditors.

(e) the value of the Company will be preserved as a result of the DIP Loan, which allows the Company to continue carrying on business as a going concern. In the absence of the interim financing sought at this motion, there is a substantial risk that the directors resign and the Company is liquidated.

(f) the DIP Charge will prime the Company's senior secured creditor SVB. The Company has worked with SVB to minimize the prejudice suffered by SVB and SVB has indicated that it does not oppose the relief sought on this motion.

In addition, the DIP Loan has been structured in two advances, with the first advance being limited to the minimum amount of funds required to allow the Company to continue its negotiations with Phoenix and to execute a binding stalking horse purchase agreement. In the absence of interim financing, the Company is unable to pay amounts due to its employees for unpaid wages and accrued vacation pay, or to remain current to its vendors. In the absence of funds to pay wages owing to employees, there is a substantial risk that the Company's board of directors will resign and the negotiation of the proposed stalking horse purchase agreement will end. In *Re OVG Inc.*, the Court recognized that all DIP financing coupled with a DIP financing charge will impact creditors' positions to some degree and potentially reduce the amount recoverable to them. However, the Court held that in the event that the debtor's business would close because of the failure to approve DIP financing and the DIP financing charge, on balance, the benefit to stakeholders of the proposed DIP facility significantly outweighs any prejudice to creditors.

***Re OVG Inc*., 2013 ONSC 1794 at para 34; Dias Affidavit paras. 63-64.**

(g) Phoenix has indicated that it is only prepared to advance the proposed DIP financing if the DIP Charge is granted.

Dias Affidavit at para. 69.

(h) the Proposal Trustee has indicated that it is supportive of the DIP Term Sheet and the DIP Charge.

Dias Affidavit at para. 77.

B. COURT SHOULD GRANT THE ADMINISTRATION CHARGE

13. The Company is seeking a first-ranking charge on all of its property, in priority to all other charges in the maximum amount of CDN $150,000 (the "**Administration Charge**") to secure the fees and disbursements of the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Company incurred in connection with services rendered to the Company both before and after the commencement of this NOI Proceedings.

14. Section 64.2 of the BIA provides statutory jurisdiction to grant an administration charge and to grant super-priority status to such charge and states as follows:

> ***64.2 (1)*** *On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of*
>
> > *(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;*

> *(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and*
>
> *(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.*
>
> ***Priority***
> *(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.*
> […]

15. In the present matter, the Company respectfully submits that the proposed Administration Charge in favour of the proposed beneficiaries is supported by the following factors:

(a) the proposed beneficiaries will provide essential financial and legal services throughout this NOI Proceeding and the continued participation of each of the professionals is critical to the success of the contemplated stalking horse purchase agreement and sale process;

(b) the Administration Charge is necessary to ensure that the proposed beneficiaries' fees and disbursements are protected; and

(c) the quantum of the proposed Administration Charge is reflective of the complexity of the Company's business and is both fair and reasonable in the circumstances of the NOI Proceeding, including the timeline required to commence a stalking horse sale process and close a transaction with the successful purchaser.

C. COURT SHOULD GRANT THE D&O INDEMNITY AND CHARGE

16. The Company is seeking an order to indemnify its directors and officers for obligations and liabilities that they may incur as in their capacity as directors or officers of the Company from and after the commencement of the NOI Proceeding and creating a charge on the assets of the Company in the maximum amount of CDN $200,000 (the "**D&O Charge**"), as security for the aforesaid indemnity. The D&O Charge is proposed to rank behind the Administration Charge and ahead of the DIP Charge. Phoenix has consented to the D&O Charge.

17. Section 64.1 of the BIA expressly provides for the granting of directors' and officers' charge on a priority basis:

> ***64.1 (1)*** *On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.*

> ***(2)*** *The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.*
> ***(3)*** *The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.*
> ***(4)*** *The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.*
>
> […]

18. The Company maintains directors' and officers' liability insurance (the "**D&O Insurance**") for its directors and officers. The current D&O Insurance policy provide a total of $3 million in coverage but is subject to numerous exclusions and limitations of coverage which may leave the directors and officers without coverage under the D&O Insurance. The presence of these exclusions and coverage limits create a degree of uncertainty with respect to whether the D&O Insurance will adequately cover potential claims.

Dias Affidavit at para. 86.

19. In addition, there are contractual indemnities which have been given by the Company to its directors and officers. The Company does not have sufficient funds to satisfy those indemnities should the directors and/or officers incur obligations and liabilities after the commencement of these proceedings.

Dias Affidavit at para. 87.

20. In the present matter, the Company submits that the D&O charge should be granted on the following basis:

(a) the Company's directors and officers have advised that, due to the potential for personal liability, they are unwilling to continue their services and involvement with the Company without the protection of the D&O Charge;

Dias Affidavit at para. 88.

(b) the continued involvement of the current directors and officers is critical to the success of the contemplated stalking horse purchase agreement and sale process; and

(c) the amount of the cap on the D&O Charge of CDN $200,000 has been estimated by the Company's Board of Directors in consultation with management and the Proposal Trustee.

Dias Affidavit at para. 89.

D. COURT SHOULD PERMIT THE COMPANY TO MAKE PRE-FILING PAYMENTS TO KEY SUPPLIERS

21. The Company is seeking permission to make pre-filing payments to certain vendors that are critical to the Company's ongoing operation.

22. The Company owes various trade suppliers the aggregate approximate amount of USD $803,500. The Company is dependent on the continued supply of product from its vendors to ensure that it is able to meet the needs of its customers. Disruption to the continued supply of goods and services from some of these vendors could severely impact the ongoing financial performance of the Company.

23. It is therefore contemplated that the Company be permitted to pay pre-filing amounts owing to those vendors that the Company deems critical to its operations, to the extent necessary, in the maximum aggregate amount of USD $120,000, in accordance with the Cash Flow Statement and subject to the express approval of the Proposal Trustee or Order of the Court.

Dias Affidavit at para. 50.

24. Both BIA and CCAA courts have permitted payments in respect of prefiling obligations to persons whose services are critical to the ongoing operations of a debtor company.

***1732427 Ontario Inc. v. 1787930 Ontario Inc.*, 2019 ONCA 947 at paras. 13-14;**

***Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (Ont. S.C.J.) at para. 43.**

25. In *1732427 Ontario Inc. v. 1787930 Ontario Inc.*, the Court of Appeal for Ontario confirmed that to not allow parties to enter into an agreement for the payment of past debts in order to secure future supplies in some cases would undermine the first stage

of the BIA process that serves to encourage a debtor's successful reorganization as a going concern.

***1732427 Ontario Inc. v. 1787930 Ontario Inc.*, 2019 ONCA 947**

26. The Company is thereby requesting that it be authorized to pay pre-filing amounts owing to certain suppliers that the Company deems critical to its operations.

E. URGENCY

27. As described in the Dias Affidavit, the Company is facing an imminent liquidity crisis.

28. The relief sought by the Company is urgent in that the Company requires immediate access to the DIP Loan to fund payroll obligations and other working capital requirements of the Company to allow it to continue negotiating the stalking horse purchase agreement and, if executed, to implement the stalking horse sale process to maximize recoveries for the benefit of the Company's stakeholders, subject to approval of the Court.

29. The stability provided for by the Administration Charge and the D&O Charge is of critical importance to facilitate a successful sale or restructuring of the Company.

PART 5 - ORDER REQUESTED

30. The Company therefore requests an Order substantially in the form of the draft order attached at Tab 1A of the Company's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of August, 2022.

Per: Dylan Chochla

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Dylan Chochla (LSO#: 62137I)
Tel: Tel: 416 868 3425
Fax: 416 364 7813
dchochla@fasken.com

Lawyers for the Moving Party, iS5 Communications Inc.

SCHEDULE A
LIST OF AUTHORITIES

1) *Re OVG Inc, 2013 ONSC 1794,* 228 ACWS (3d) 26.
2) *1732427 Ontario Inc. v. 1787930 Ontario Inc., 2019 ONCA 947*
3) *Canwest Global Communications Corp. (Re), 2009 CanLII 55114 (Ont. S.C.J.)*

SCHEDULE B
RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

50.6 Order interim financing

(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

[…]

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[…]

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[…]

64.1 Security or charge relating to director's indemnification

(1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Restriction - indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

64.2 Court may order a security or charge

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under

subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

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Proceedings Commenced in Toronto

FACTUM OF IS5 COMMUNICATIONS INC.

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON   M5H 2T6

Dylan Chochla (LSO#: 62137I)

Tel: 416 868 3425
Email: dchochla@fasken.com

Lawyers for the Moving Party, iS5 Communications Inc.