Court File No. CV-17-580840-00CL

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 INDEX ENERGY MILLS ROAD CORPORATION

(the "**Applicant**")

FACTUM OF THE APPLICANT

(Motion for Sale Approval and Stay Extension)
(Returnable December 11, 2017)

December 7, 2017

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Shayne Kukulowicz LSUC# 30729S
Tel: 416.860.6463
Fax: 416.640.3176
skukulowicz@casselsbrock.com

Jane Dietrich LSUC# 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Lance Williams
Tel: 604.691.6112
Fax: 604.691.6120
lwilliams@casselsbrock.com

Lawyers for Index Energy Mills Road Corporation

TO: THE SERVICE LIST

INDEX

Court File No. CV-17-580840-00CL

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 INDEX ENERGY MILLS ROAD CORPORATION

(the "**Applicant**")

FACTUM OF THE APPLICANT

(Motion for Sale Approval and Stay Extension)
(Returnable December 11, 2017)

PART I – OVERVIEW

1. Index Energy Mills Road Corporation (the "**Applicant**") seeks, among other things, an approval and vesting order (the "**Sale Approval and Vesting Order**") with respect to the transaction (the "**Transaction**") contemplated by an asset purchase agreement dated September 1, 2017 (the "**Purchase Agreement**") between the Applicant and Index Residence AB (publ) (the "**Stalking Horse Purchaser**").

2. A sale and investment solicitation process (the "**SISP**"), approved by the Court by Order dated September 11, 2017 (the "**SISP Approval Order**"), included approval of the Purchase Agreement for the purpose of its use as a Stalking Horse Bid under the SISP.[1] The SISP was conducted in accordance with the SISP Approval Order and no other Qualified Bid was received, such that the Monitor has determined that that Transaction is the Accepted Bid.

3. Pursuant to the Purchase Agreement, the Stalking Horse Purchaser, who is a party related to the Applicant, assigned its interests under the Purchase Agreement, other than

[1] Capitalized terms not defined in this section have the meaning ascribed to them in the SISP. A summary of the SISP is contained in the Second Report of Grant Thornton Limited in its capacity as Monitor, dated November 30, 2017 ("**Second Report**"), beginning at para 15.

certain litigation against HMI Construction Inc. ("**HMI**") and its counsel as well as certain holdback funds (the "**HMI Litigation Assets**"), to Index Energy Ajax Corporation (the "**Purchaser**"), and assigned its interests in the HMI Litigation Assets to Mills Road Corporation (the "**Litigation Purchaser**"). Pursuant to the SISP, the Applicant now seeks the Sale Approval and Vesting Order to vest the purchased assets in the Purchaser and the Litigation Purchaser free and clear of encumbrances.

4. The Purchase Agreement also requires that the Applicant change its name to a name that does not include "Index Energy Mill Road Corporation" or any variation thereof. As such, the requested Sale Approval and Vesting Order contains provisions authorizing and directing the Applicant to file articles of reorganization to change its name to its numbered company name.

5. The Applicant also seeks this Court's authorization to distribute, from the cash proceeds of the Transaction, the amount of $20 million (the "**Distribution**"), to National Bank of Canada, in its capacity as administrative Agent ("**Agent**") for the syndicate of senior secured lenders of the Applicant (the "**Syndicate**").

6. As a separate order, to provide the Applicant with time to complete the Transaction (should the requested Approval and Vesting Order be granted) and deal with certain post closing matters, the Applicant seeks an extension of the stay period until February 28, 2018 (the "**Stay Extension Order**"). As well, the Applicant seeks ancillary relief, including the approval of the Second Report of the Monitor (the "**Second Report**") and the activities of the Monitor described therein, as well as the approval of the fees and disbursements of the Monitor and those of the Monitor's counsel, Goodmans LLP ("**Goodmans**"), for their work through November 24, 2017.

PART II– FACTS

BACKGROUND AND GRANTING OF INITIAL ORDER

7. The Applicant 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**").[2]

8. The Applicant encountered difficulties in retrofitting the Biomass Facility and has been engaged in protracted litigation with its former engineering, procurement and construction contractor, HMI (the contract between the Applicant and HMI having been terminated prior to the commencement of these proceedings).

9. The Applicant is in default of various obligations owed to the Syndicate and Agent. Prior to the commencement of these proceedings, the Syndicate, through the Agent, made demand for payment of the Applicant's obligations in excess of $44 million.[3]

10. Index Residence AB (publ), a party related to the majority shareholder of the Applicant, is also owed approximately $102 million by the Applicant (the "**Index Secured Debt**"), and is a secured creditor subordinate in priority to the Syndicate.[4]

11. On August 16, 2017, the Applicant was granted protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**")[5] pursuant to an order of the Honourable Regional Senior Justice Morawetz (the "**Initial Order**").[6]

12. The Initial Order, among other things, granted a stay of proceedings (the "**Stay of Proceedings**") in favour of the Applicant, which has since been extended until December 22,

---

[2] Affidavit of Derek Blais, Motion Record, Tab 2 ("**Blais Affidavit**") at para 4.
[3] Blais Affidavit, at para 5(c).
[4] Blais Affidavit, at para 5(d). Further details regarding the Applicant, its background, and its creditors are contained in the Affidavit of Rickard Haraldsson sworn August 15, 2017 in support of the application for the Initial Order, the body of which is attached as Exhibit "A" to the Blais Affidavit (the "**Haraldsson Affidavit**").
[5] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ["***CCAA***"].
[6] Blais Affidavit, at para 6.

2017.[7] The Applicant has also been authorized to borrow the maximum sum of $5,000,000 pursuant to a credit facility (the "**DIP Financing**") as interim financing from Index Equity US LLC.[8]

13. As well, on September 11, 2017, at the request of the Applicant, this Court granted the SISP Approval Order approving the SISP and approving the Purchase Agreement as the Stalking Horse Bid. The SISP was conducted primarily by the Monitor given that the Stalking Horse Purchaser is a party related to the Applicant.

OVERVIEW OF THE APPLICANT'S ACTIVITIES SINCE THE COMEBACK HEARING

14. Since the First Stay Extension Order and the SISP Approval Order were granted, the Applicant has continued its efforts to improve the operations of the Biomass Facility and has been operating the Biomass Facility in the ordinary course of business.[9]

15. In addition, the senior management of the Applicant have been assisting the Monitor with certain aspects of the SISP, including meeting with potential purchasers and responding to information requests of the Monitor and potential purchasers.[10]

16. The Applicant has made three DIP Financing requests since the date of the Extension Order, and the DIP Financing is now fully advanced.[11]

---

[7] The Stay of Proceedings was extended pursuant to the order of RSJ Morawetz on December 22, 2017 [the "**First Stay Extension Order**"].
[8] The First Stay Extension Order and the SISP Approval Order can be found at Exhibits "D" and "E" to the Blais Affidavit, at Tabs 2-D and 2-E to the Applicant's Motion Record. See also the Endorsement of the Honourable Regional Senior Justice Morawetz approving this relief (2017 ONSC 5433) at Exhibit "F" of the Blais Affidavit, or Tab 2-F of the Applicant's Motion Record.
[9] Blais Affidavit*,* at para 13.
[10] Blais Affidavit, at para 14.
[11] Blais Affidavit, at para 15.

SUMMARY OF THE SISP

Identification of Known Potential Bidders

17. On or about August 23, 2017, following the issuance of the Initial Order, the Monitor began to prepare a list of potential bidders to approach as part of the SISP. This included parties known through industry research or direct approaches, and strategic parties identified by the Monitor, in consultation with the Applicant's management. Upon conclusion of this process, the Monitor initially identified 87 potential bidders (the "**Known Potential Bidders**").[12]

18. In consultation with the Applicant and the Agent, the Monitor prepared a number of solicitation process documents and posted them to the electronic data room (the "**Data Room**").[13]

Solicitation of Interest

19. The Monitor contacted all of the Known Potential Bidders by September 20, 2017.[14]

20. The Monitor also posted advertisements in the *Globe and Mail*, and was contacted by an additional 10 parties who expressed interest in the SISP (together with the Known Potential Bidders, and totalling 97, the "**Potential Bidders**").[15]

21. The Monitor provided the Potential Bidders with a non-disclosure agreement ("**NDA**"). To be provided with a copy of the confidential information memorandum ("**CIM**") and access to the Data Room, Potential Bidders were required to provide certain documents to the Monitor, including an executed NDA (collectively the "**Required Documentation**").[16]

---

[12] Second Report, at para 19.
[13] Second Report, at paras 20-21.
[14] Second Report, at para 22.
[15] Second Report, at para 23.
[16] Second Report, at para 24.

Identification of Interested Parties

22. Of the Potential Bidders, 12 provided the Monitor with the Required Documentation (collectively, the "**Prospective Bidders**").[17]

23. Upon review of the CIM, four Prospective Bidders (of which one attended a meeting with the Monitor) indicated that they would not be pursuing the SISP opportunity further. The remaining eight (8) bidders are referred to as the "**Interested Bidders**".[18]

24. Each of the Interested Bidders was provided with access to the Data Room. Throughout the SISP, the Monitor updated the documents in the Data Room as necessary, based on the requests of the Interested Bidders and when new documents, and financial and production data became available.[19]

Site Visits

25. Initial site visits were scheduled and attended by four Interested Bidders (the "**Shortlisted Bidders**"). The Monitor was present for all site visits conducted and for meetings/communications between the Applicant's management and the Shortlisted Bidders.[20]

Shortlisted Bidders

26. One of the Shortlisted Bidders, the most active participant in the SISP retained engineering consultants, legal counsel, and attended two additional follow-up plant visits (on October 24, 2017 and November 14, 2017) and several calls with management and the Monitor throughout the SISP.[21]

27. Throughout the SISP, this Shortlisted Bidder, its consultants, and its legal counsel sent multiple information request lists requesting additional detailed information on a consistent basis

---

[17] Second Report, at para 25.
[18] Second Report, at para 26.
[19] Second Report, at para 27.
[20] Second Report, at para 29.
[21] Second Report, at para 32.

and was active and engaged in the SISP until the eve of the Bid Deadline, November 21, 2017.[22]

28. On November 21, 2017, that Shortlisted Bidder indicated to the Monitor that it would not be submitting a bid. No bids were received by the Bid Deadline of 5:00 p.m. on November 21, 2017. None of the Shortlisted Bidders requested more time nor have they contacted the Monitor since the passing of the Bid Deadline.[23]

Results of the SISP

29. The SISP did not yield a Qualified Bid other than the Purchase Agreement, and as a result, in accordance with the terms of the SISP, the Purchase Agreement was declared the Accepted Bid.[24]

30. The Monitor is of the view that the property and business of the Applicant have been adequately exposed to the market through the SISP, and that the SISP provided for a process that was reasonable in the circumstances. The Monitor is of the view, supported by the results of the SISP, that the Transaction represents the best value for the Applicant's assets and business, as no superior offers were received.[25]

THE PURCHASE AGREEMENT

31. Pursuant to the terms of the Purchase Agreement:[26]

    (a) the Purchaser agreed to purchase substantially all of the Applicant's assets and property on an "as is where is" basis;[27]

    (b) the Purchaser has the option of excluding Assets prior to the Closing Time;[28]

---

[22] Second Report, at para 33.
[23] Second Report, at para 34.
[24] Second Report, at para 35.
[25] Second Report, at paras 39-40.
[26] Capitalized terms not defined in this section shall have the meanings assigned to them in the Purchase Agreement. The Purchase Agreement can be found in its entirety at Exhibit "G" to the Blais Affidavit, at Tab 2-G of the Applicant's Motion Record ["**Purchase Agreement**"].
[27] Purchase Agreement, at sections 2.1-2.4.

(c) the Purchaser has agreed to offer employment, on substantially the same terms, to all current employees of the Applicant and to assume all obligations to such employees;[29]

(d) the Purchaser has also agreed to assume the Assumed Liabilities, which include the obligations under the Contracts which are assigned to the Purchaser, all trade obligations payable or accrued of the Business until the Closing Date, all liabilities and obligations with respect to Assumed Employees, all obligations for withholding Taxes, all liabilities relating to Permitted Encumbrances, the Index Secured Debt and all other ordinary course obligations incurred between the date of Purchase Agreement and the Closing Date;[30] and

(e) the Purchaser has not agreed to assume the Excluded Liabilities, which include those obligations not specifically included as Assumed Liabilities and which include any other intercompany accounts payable, any amounts owing to the Syndicate or the liabilities and obligations in connection with the HMI Litigation.[31]

32. Along with the assumption of the Assumed Liabilities, the Purchase Price ("**Purchase Price**") is comprised of a cash component equal to (i) the Escrowed Purchase Price Amount of approximately $10 million held by the Monitor; (ii) $10 million; and (iii) cash equivalents to satisfy amounts secured by encumbrances that rank in priority to the debt owing to the Syndicate, including pursuant to the Administration Charge, the DIP Lenders' Charge and the Directors' Charge.[32]

---

[28] Purchase Agreement, at section 2.2.
[29] Purchase Agreement, at section 7.6.
[30] Purchase Agreement, at section 2.3
[31] Purchase Agreement, at section 2.4.
[32] Purchase Agreement, at section 3.1.

33. The Purchase Agreement contemplates a closing date of January 12, 2018, or such other date as the parties and the Monitor agree to, acting reasonably.[33]

34. The closing of the Transaction is conditional on, among other things: (i) the issuance of the Sale Approval and Vesting Order by December 15, 2017, (ii) the consent of the Independent Electricity System Operation ("**IESO**") to the assignment of the Feed-in-Tariff agreements between the Applicant and the IESO by no later than February 28, 2018, and (iii) the provision of the documents required to effect the change in the Applicant's corporate name.[34]

DISTRIBUTION OF PROCEEDS

35. In conjunction with the closing of the Transaction, the Applicant seeks approval for the distribution of $20 million from the proceeds of the Transaction to the Agent in partial repayment of the obligations of the Applicant to the Syndicate.

36. The Syndicate holds security for the Applicant's obligations over all of the Applicant's personal property and charges on the Applicant's real property located at 170 Mills Road, Ajax and 176 Mills Road, Ajax (collectively, the "**Syndicate Security**"). The Monitor's independent legal counsel, Goodmans, conducted a security review of the Syndicate Security. On August 29, 2017, Goodmans provided an opinion to the Monitor confirming the validity and enforceability of the Syndicate Security as at the date of the opinion, subject to standard assumptions and qualifications typically contained in security opinions of this nature.[35]

37. The proceeds from the Transaction will be insufficient to satisfy the obligations of the Applicant to the Syndicate in full.[36]

---

[33] Purchase Agreement, at section 1.1(r).
[34] Purchase Agreement, at sections 6.1-6.3.
[35] Blais Affidavit, at para 43.
[36] Second Report, at para 44.

PART III– ISSUES

38. The issues to be addressed on this Motion are:

(a) Should this Court approve the Transaction and vest the purchased assets in the Purchaser and Litigation Purchaser free and clear of claims and encumbrances?

(b) Should this Court authorize the filing of articles of reorganization to change the name of the Applicant, effective after the closing of the Transaction?

(c) Should this Court approve the Distribution to the Agent on behalf of the Syndicate?

(d) Should the Stay of Proceedings be extended?

(e) Should Confidential Appendix 1 to the Second Report be sealed?

(f) Should the activities of the Monitor and the fees and disbursements of the Monitor and its counsel Goodmans be approved as requested?

PART IV- LAW

I. <u>APPROVAL OF THE TRANSACTION AND VESTING OF THE PURCHASED ASSETS IN THE PURCHASER AND LITIGATION PURCHASER</u>

39. It is well-established that the Court has the jurisdiction to approve a sale of all or substantially all of the assets of a debtor company under the CCAA in the absence of a plan of arrangement where the sale is in the best interests of stakeholders generally.[37]

40. Pursuant to section 36 of the CCAA, the Court must approve any sale of assets outside of the ordinary course of business. Section 36(3) of the CCAA provides the following list of non-exhaustive factors for the Court to consider in determining whether to approve such a sale:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

---

[37] *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) at paras 35-40 and 48, Book of Authorities of the Applicant, Tab A.

(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.[38]

41. The factors largely correspond with the *Soundair* factors that governed under pre-2009 amendment CCAA case law.[39]

(a) The process leading up to the proposed sale was reasonable in the circumstances

42. At the commencement of these proceedings, the Applicant previewed that it would seek to enter into a SISP to explore a restructuring or sale transaction.[40] The SISP was approved in the SISP Approval Order with the Purchase Agreement as the Stalking Horse Bid.

43. The Monitor has conducted the SISP in accordance with its terms.[41] There has been no opposition to the SISP raised nor has the SISP Approval Order been the subject of any leave to appeal motion.

---

[38] *CCAA,* at s 36(3).
[39] *Re Canwest Global Communications Corp.,* 2010 ONSC 2870 at para. 13, Book of Authorities of the Applicant, Tab B, citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) ["***Soundair***"] at para. 16. The *Soundair* criteria are: (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently, (b) the interests of all parties, (c) the efficacy and integrity of the process by which offers have been obtained, and (d) whether there has been unfairness in the working out of the process. The *Soundair* case can be found in the Commercial List Authorities Book.
[40] Second Report, at para 15.
[41] Second Report, at para 17.

44. The SISP resulted in an appropriate market testing for the Applicant's business and assets. The Monitor, with the assistance of management, actively solicited interested parties for nearly three months. In total 97 Potential Bidders were considered to be interested in the SISP, and ultimately eight Interested Bidders proceeded to enter the Data Room to conduct diligence on the Applicant's business and assets. Site visits were arranged for, and attended by, four Shortlisted Bidders.[42]

45. Although ultimately no party submitted a bid superior to the Purchase Agreement by the Bid Deadline, the Applicant submits that the SISP was executed in a fair and reasonable manner that fully and fairly canvassed the market.

(b) This Court approved the SISP and the Monitor supported its approval

46. As discussed above, on the Monitor's recommendation, this Court granted the SISP Approval Order.

(c) The Monitor believes the Transaction is more beneficial to the Applicant's creditors than a sale or disposition under a bankruptcy

47. The Monitor has noted that the Transaction represents the fair value of the property, assets and operations of the Applicant and that the Transaction is the best viable alternative for a going-concern transaction for the benefit of the Applicant's stakeholders.[43]

(d) Stakeholders were consulted during the SISP

48. The Applicant's stakeholders were consulted throughout the SISP. The Agent, which represents the senior secured creditors of the Applicant and is the stakeholder with the primary economic interest in the results of the SISP, was consulted in the development of the SISP.

[42] Second Report, at paras 19, 23, 26, and 29.
[43] Second Report, at para 74.

Parties identified by the Agent, or who had approached the Agent indicating an interest in the Applicant, were added to the initial list of Known Potential Bidders. These parties were all contacted by the Monitor. The Agent was again consulted by the Monitor in its preparation of Data Room materials.[44]

(e) The Transaction will have a positive effect on the Applicant's stakeholders

49. The Transaction will allow the Biomass Facility and the business to continue operating as a going concern, providing material benefit to the Applicant's employees, suppliers, and customers.

50. The Purchase Agreement contemplates that the Purchaser will offer employment on substantially similar terms to all of the current employees of the Applicant (the "**Assumed Employees**"), and will assume all obligations pursuant to Employee Plans and in respect of payment obligations to the Assumed Employees.[45]

(f) The Purchase Agreement provides fair and reasonable consideration for the Purchased Assets

51. The Purchase Agreement represents the sole offer for the business and assets of the Applicant following a comprehensive court-approved process.[46] In the circumstances, the Purchase Agreement represents a fair and reasonable value for the purchased assets.

52. In addition, pursuant to section 36(4) of the CCAA, where a proposed sale is to a related party, the court may only grant the authorization if it is satisfied that:

---

[44] Second Report, at paras 15, 17, 19, and 21.
[45] In this respect, no amounts are expected to be owing to employees as priority payments required to be satisfied by s 36(7) of the CCAA.
[46] Second Report, at paras 35 and 39.

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.[47]

53. The SISP garnered the interest of numerous non-related parties, certain of whom gained access to the Data Room and attended site visits to learn more about the Applicant's business. One Shortlisted Bidder showed a particularly active interest in the SISP, engaging professional advisors and participating in a total of three site visits, before ultimately declining to submit a bid on the Bid Deadline.[48] As such, it is apparent that good faith efforts to solicit bids from other interested bidders were made throughout the SISP.

54. As no other bid was submitted on the Bid Deadline, the consideration to be received from the Stalking Horse Purchaser is superior to the consideration to be received from the other parties who participated in the SISP.

55. Therefore, the Applicant respectfully submits that the criteria of section 36(4) are met in these circumstances and the Transaction should be approved.

II. ARTICLES OF REORGANIZATION

56. The Purchase Agreement provides that on or promptly following the closing of the Transaction, the Applicant is to discontinue the use of the name "Index Energy Mills Road Corporation" and file Articles of Reorganization to change its name.[49]

---

[47] *CCAA,* at s 36(4).
[48] Second Report, at paras 32-33.
[49] Purchase Agreement, at section 7.8.

57. Pursuant to section 171(3) of the *Business Corporation Act* (Ontario) ("**OBCA**")[50], under which the Applicant is incorporated, an insolvent corporation is not entitled to change its name other than pursuant to articles of reorganization contemplated by court order.[51]

58. This Court has granted similar relief in recent CCAA proceedings involving a sale of substantially all of the assets of a debtor company.[52]

59. Similar to orders granted in other CCAA proceedings, the requested relief sought by the Applicants requires the Monitor to advise the Applicant's secured creditors of the name change.

III. DISTRIBUTION TO AGENT OF SYNDICATE OF SENIOR SECURED LENDERS

60. Following the completion of the Transaction, the Applicant seeks authorization for a distribution of $20 million from the proceeds of the Transaction to the Agent to reduce the obligations of the Applicant to the Syndicate.

61. As at the commencement of these proceedings, the principal amount owing by the Applicant to the Syndicate was approximately $44 million.[53] Following the Distribution, the Syndicate will continue to suffer a material shortfall.

62. The Monitor has obtained an opinion from its counsel that, subject to the standard assumptions and qualifications contained therein, the security held by the Agent creates a valid and perfected security interest in the Applicant's property.[54]

63. For the foregoing reasons, the Applicant requests that the Distribution be approved.

---

[50] *Business Corporations Act* (Ontario), R.S.O. c.B.16 ("***OBCA***").
[51] *OBCA,* at sections 171(3), 186 and 168. Amending the name of a corporation is permitted pursuant to section 168.
[52] See In the Matter of 1735825 Ontario Inc. (formerly known as Grafton Fraser Inc.), Court File No. CV-17-11677-00CL, Approval and Vesting Order of the Honourable Justice Pattillo dated May 2, 2017, at paras 11-13, Book of Authorities of the Applicant, Tab C. See also In the Matter of Bombay & Co. Inc., Bowring & Co Inc., and Benix & Co. Inc., Court File No. CV-14-10659-00CL, Approval and Vesting Order of the Honourable Justice Pattillo dated January 12, 2015, at paras 11-16, Book of Authorities of the Applicant, Tab D.
[53] Second Report, at para 42.
[54] Second Report, at para 43.

IV. EXTENSION OF THE STAY PERIOD

64. The Applicant seeks an extension of the Stay Period up to and including February 28, 2018, which permits time for the Transaction to close (should it be approved) and post-closing matters to be addressed.

65. Under section 11.02 of the CCAA, the Court may extend a stay of proceedings if:

(a) The applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) The applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.[55]

66. Based on the cash flow forecast prepared with the assistance of the Monitor (the "**Cash Flow Projection**") and attached as Exhibit "I" to the Blais Affidavit[56], the Applicant will have enough liquidity to meet its cash flow needs through to the projected closing date of January 12, 2018. The Applicant anticipates that, following the closing date, cash flow will be minimal, given that the business will have been purchased.[57]

67. As well, in the Monitor's view (i) the Applicant has sufficient funds (as demonstrated in the Cash Flow Projection) to continue operations and these proceedings until February 28, 2018; (ii) management and the Applicant are acting in good faith and with due diligence; and (iii) no stakeholder of the Applicant will suffer any material prejudice if the Stay Period is extended as requested.[58]

68. Therefore, the Applicant submits that the requested stay extension should be granted.

---

[55] *CCAA*, at s 11.02(3).
[56] Blais Affidavit, at Exhibit "I", which is found at Tab 2-I of the Applicant's Motion Record.
[57] Blais Affidavit, at para 22.
[58] Second Report, at para 73.

V. SEALING ORDER

69. Confidential Appendix 1 to the Second Report includes a summary of the bidders who participated in the SISP. The information contained in Confidential Appendix 1 is commercially sensitive information compiled by the Monitor to demonstrate the progress of the many interested parties throughout the SISP.

70. This information could have a material detrimental effect if publicly available and the Transaction does not close, and a further SISP or other sales process is required. There is no material benefit to the information being publicly available. Accordingly, the Applicant is seeking to have this exhibit sealed until the closing of the Transaction.

71. Courts will grant a sealing order where:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures would not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible proceedings.[59]

72. The requested sealing order is necessary in order to protect the integrity of the SISP and the identities of the participants therein. Accordingly, sealing these materials outweighs the public interest. Once the Transaction (if approved) is completed, Confidential Appendix 1 will then form part of the public record in these proceedings.

VI. APPROVAL OF FEES AND ACTIVITIES

73. The Monitor seeks approval of its activities as outlined in the Second Report.

---

[59] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53, [2002] 2 S.C.R. 522, ["***Sierra Club***"]. Please refer to the Commercial List Authorities Book for a copy of this case.

74. In addition, the Monitor seeks approval of its fees and disbursements from August 1, 2017 (approximately two weeks prior to the granting of the Initial Order) through November 24, 2017, and the fees and disbursements of its counsel, Goodmans, from August 16, 2017 through November 24, 2017.

75. As set out in the Second Report, the Monitor seeks approval in the amount of $369,950.50 for its fees and disbursements and $103,467.92 for Goodmans' fees and disbursements. The Monitor reports that, in its review, Goodmans' fees and disbursements are reasonable. [60]

76. The Applicant is not aware of any issues raised by any party in respect of the approval of the fees and disbursements incurred by the Monitor and its counsel, the Second Report, and the activities described therein.

PART V– RELIEF SOUGHT

77. The Applicant therefore requests that this Honourable Court grant the relief sought by the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2017

Cassels Brock & Blackwell LLP

Cassels Brock & Blackwell LLP

Lawyers for Index Energy Mills Road Corporation

[60] Second Report, at para 70.

TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1 *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

2 *Re Canwest Global Communications Corp.,* 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]).

3 *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.).

4 In the Matter of 1735825 Ontario Inc. (formerly known as Grafton Fraser Inc.), Court File No. CV-17-11677-00CL, Approval and Vesting Order of the Honourable Justice Pattillo dated May 2, 2017.

5 In the Matter of Bombay & Co. Inc., Bowring & Co Inc., and Benix & Co. Inc., Court File No. CV-14-10659-00CL, Approval and Vesting Order of the Honourable Justice Pattillo dated January 12, 2015.

6 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (SCC).

TAB B

SCHEDULE "B"

RELEVANT STATUTES

***Business Corporations Act* (Ontario), RSO 1990, c B.16**

Amendments

168 (1) Subject to sections 170 and 171, a corporation may from time to time amend its articles to add, change or remove any provision that is permitted by this Act to be, or that is, set out in its articles, including without limiting the generality of the foregoing, to,

(a) change its name;

(b) Repealed: 1994, c. 27, s. 71 (20).

(c) add, change or remove any restriction upon the business or businesses that the corporation may carry on or upon the powers that the corporation may exercise;

(d) add, change or remove any maximum number of shares that the corporation is authorized to issue or any maximum consideration for which any shares of the corporation are authorized to be issued;

(e) create new classes of shares;

(f) Repealed: 1994, c. 27, s. 71 (20).

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(l) revoke, diminish or enlarge any authority conferred under clauses (j) and (k);

(m) subject to sections 120 and 125, increase or decrease the number, or minimum or maximum number, of directors; and

(n) add, change or remove restrictions on the issue, transfer or ownership of shares of any class or series.

Articles of amendment

171 (1) Articles of amendment in prescribed form shall be sent to the Director.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 171 (1) of the Act is repealed and the following substituted: (See: 2017, c. 20, Sched. 6, s. 13)

Articles of amendment

(1) Articles of amendment and any other required documents and information shall be sent to the Director. 2017, c. 20, Sched. 6, s. 13.

Application of s. 34 (4, 5)

(2) If an amendment effects or requires a reduction of stated capital, subsections 34 (4) and (5) apply.

Change of name

(3) No corporation shall change its name if,

(a) the corporation is unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets is less than the aggregate of its liabilities.

Reorganization

186 (1) In this section,

"reorganization" means a court order made under section 248, an order made under the *Bankruptcy and Insolvency Act* (Canada) or an order made under the *Companies' Creditors Arrangement Act* (Canada) approving a proposal. 2000, c. 26, Sched. B, s. 3 (9).

Articles amended

(2) If a corporation is subject to a reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 168. R.S.O. 1990, c. B.16, s. 186 (2).

Auxiliary powers of court

(3) Where a reorganization is made, the court making the order may also,

> **(a)** authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and
>
> **(b)** appoint directors in place of or in addition to all or any of the directors then in office.

Articles of reorganization

(4) After a reorganization has been made, articles of reorganization in prescribed form shall be sent to the Director. R.S.O. 1990, c. B.16, s. 186 (4).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 186 (4) of the Act is repealed and the following substituted: (See: 2017, c. 20, Sched. 6, s. 25)

Articles of reorganization

(4) After a reorganization has been made, articles of reorganization and any other required documents and information shall be sent to the Director. 2017, c. 20, Sched. 6, s. 25.

Certificate

(5) Upon receipt of articles of reorganization, the Director shall endorse thereon in accordance with section 273 a certificate which shall constitute the certificate of amendment and the articles are amended accordingly.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 186 (5) of the Act is repealed and the following substituted: (See: 2017, c. 20, Sched. 6, s. 25)

Certificate

(5) Upon receipt of articles of reorganization and any other required documents and information, the Director shall endorse the articles, in accordance with section 273, with a certificate which shall constitute the certificate of amendment, and the articles are amended accordingly. 2017, c. 20, Sched. 6, s. 25.

No dissent

(6) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36 .**

Stays, etc. — other than initial application

Burden of proof on application

11.02 (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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.

Notice to creditors

(2) 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.

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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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 INDEX ENERGY MILLS ROAD CORPORATION

Court File No. CV-17-580840-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Shayne Kukulowicz LSUC# 30729S
Tel: 416.860.6463
Fax: 416.640.3176
skukulowicz@casselsbrock.com

Jane Dietrich LSUC# 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Lance Williams
Tel: 604.691.6112
Fax: 604.691.6120
lwilliams@casselsbrock.com

Lawyers for Index Energy Mills Road Corporation