

Court File No. BK-22-02822607-0031
Estate File No. 31-2822607

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

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
RSC 1985, c. B-3, AS AMENDED

IN THE MATTER OF THE PROPOSAL OF KUK-ILL JOHN KIM

AND IN THE MATTER OF THE PROPOSAL OF MYOUNG-JA MARY KIM

FACTUM OF THE DEBTORS
(Motion returnable April 28, 2023)

April 24, 2023

WEIRFOULDS LLP
Barristers & Solicitors
66 Wellington Street West, Suite 4100
Toronto-Dominion Centre
P.O. Box 35
Toronto, ON M5K 1B7

Philip Cho (LSO #45615U)
pcho@weirfoulds.com

Tel: 416-365-1110

**Lawyers for the Debtors, Kuk-Ill John Kim
and Myoung-Ja Mary Kim**

TO: ATTACHED SERVICE LIST

SERVICE LIST

To: FIJ LAW LLP
50 West Pearce St #10
Richmond Hill, ON L4B 1C5

Raffaele Sparano
rsparano@fijlaw.com

Lawyers for Bosung Investments Inc., Byoung Han and Jae Yol Han

AND TO: CITY OF TORONTO
c/o GEORGE CHAROCOPOS
North York Civic Centre
5100 Yonge Street, lower level
North York, ON M2N 5V7

George.charocopos@toronto.ca

AND TO: HYON-CHEONG SALLY WESTERGREN
6 Old Church Street
London, UK
SW3 5DQ

sally.hckim@gmail.com

AND TO: BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto, ON M5H 4E3

Rick Coburn
(LSO # 306040)
rcoburn@blg.com

Brendan Wong
(LSO # 51464A)
bwong@blg.com

Lawyers for Lee-Mar Developments Limited

AND TO: WILMS & SHIER ENVIRONMENTAL LAWYERS LLP
1 Toronto Street, Suite 900
Toronto, ON M5C 2V6

Marc McAree
(LSO # 36807C)
mmcaree@willmsshier.com

Jacquelyn E. Stevens
(LSO # 49234E)
jstevens@willmsshier.com

AND TO: ALBERT GELMAN INC.
100 Simcoe Street, Suite 125
Toronto, ON M5H 3G2

Tom McElroy
tmcelroy@albertgelman.com

Trustee

AND TO: CHAPNICK & ASSOCIATES
228 Carlton Street
Toronto, ON M5H 2L1

Paul Dineen
(LSO #21996S)
paul.dineen@chapnick.ca

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PART 1 - OVERVIEW

1. Kuk-Ill John Kim and Myoung-Ja Mary Kim (collectively, the “**Debtors**”), bring this motion for an order:
 - (a) approving the transaction contemplated in the Sale and Purchase Agreement between the Debtors, as vendor, and Joseph Messina in trust for a company to be incorporated, as purchaser (in such capacity, the “**Purchaser**”) dated February 18, 2023 (the “**Sale Agreement**”) to purchase the real property located at 385 Spadina Road, Toronto, Ontario (the “**Property**”) of the Debtors (the “**Purchased Asset**”) and authorizing the Proposal Trustee (as defined herein) to complete the transaction contemplated therein (the “**Transaction**”);
 - (b) vesting in the Purchaser, or as the Purchaser may direct, the Debtors’ right, title and interest in the Purchased Asset, as defined in the Sale Agreement, free and clear of any claims and encumbrances, other than permitted encumbrances;

- (c) increasing the Administration Charge by amending the Order of Justice Conway, dated April 28, 2022 (the “**Administration Order**”);
- (d) approving the fifth report (the “**Fifth Report**”) of Albert Gelman Inc. (“**AGI**”) in its capacity as proposal trustee (the “**Proposal Trustee**”), to be filed;
- (e) sealing the Confidential Information (as defined herein) until the earlier of (i) the filing of the Proposal Trustee’s Certificate following the completion of the transaction to be approved by the Court in this proceeding; and (ii) further order of this Court;
- (f) approving the interim fees and disbursements of counsel to the Debtors and of the Proposal Trustee; and
- (g) such other relief as counsel may advise and this Honourable Court may permit.

PART 2 - THE FACTS

2. The relevant facts are set out in the Affidavit of Stephen Silver Kim sworn April 10, 2023 (the “**Silver Affidavit**”) and the Fifth Report of the Proposal Trustee.¹

PART 3 - ISSUES AND THE LAW

3. The Debtors state the following are the issues to be decided on this motion:
- (i) Should the Sale Agreement be approved, and title to the Purchased Asset be vested in the Purchaser?

¹ Motion Record, April 10, 2023, Tab 2, paras 4 – 31; Fifth Report of AGI in its capacity as Proposal Trustee, April 11, 2023, paras 22 – 42.

- (ii) Should the Administration Charge be increased?
- (iii) Should the Fifth Report and the activities described therein be approved?
- (iv) Should a sealing order be granted in respect of the Confidential Appendix?
- (v) Should the interim fees and disbursements of the Proposal Trustee and counsel to the Debtors be approved?

I. Approval and Vesting Order

4. The Debtors are “insolvent persons” who have made a proposal to their creditors under Division I, Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the “**BIA**”).²

5. An insolvent person in respect of whom a proposal is filed may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by the Court, and in the case of an individual, that the authorization may only be given in respect of assets acquired for, or used, in relation to the business.³

6. The BIA sets out the factors a court will consider when deciding whether to grant authorization to an insolvent person to dispose of assets outside of the normal course of business:

Factors to be considered

65.13 (4) 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 trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee 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;

² *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 50.

³ *Ibid*, s 65.13(1).

(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.⁴

7. Section 65.13(7) authorizes this Honourable Court to approve the Transaction and grant the requested approval and vesting order.⁵

8. Section 100 of the *Courts of Justice Act* also confers the jurisdiction on this Court to grant the relief sought:

Vesting orders

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.⁶

9. Further, while these proceedings do not involve a sale by a court-appointed receiver, the Debtors submit that the factors set out in *Royal Bank of Canada v Soundair Corp.* (“*Soundair*”)⁷ have also been met. In *Soundair*, the Court set out the following factors:

- (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (ii) the interests of all parties;
- (iii) the efficacy and integrity of the process by which offers are obtained;
- (iv) whether there has been unfairness in the working out of the process.

10. In the case at bar, the process leading to the proposed sale was reasonable:

- (i) The Debtors proceeded to sell the Property on an “as is-where is” basis, as contemplated in their respective filed proposals;

⁴ BIA, *supra*, s 65.13(4).

⁵ BIA, *supra*, s 65.13(7).

⁶ *Courts of Justice Act*, RSO 1990, c C43, as amended, s 100.

⁷ [7 CBR \(3d\) 1; 46 OAC 321; 83 DLR \(4th\) 76; 4 OR \(3d\) 1 \(CanLII\)](#).

- (ii) The Debtors selected an appropriate licensed real estate broker, Re/Max Ultimate Julie Seo Realty & Re/Max Ultimate Realty Inc. (the “**Realtor**”), to market and list the Property on the multiple listing service (“**MLS**”).
- (iii) Following the Realtor’s recommendation, the Debtors listed the Property for a nominal value with a bid date to solicit interest and as many bids as possible (the “**Initial Listing**”);
- (iv) The Debtors prepared and populated a virtual data room for potential buyers to access information related to the Property;
- (v) When the Initial Listing had become “stale” and did not attract any bids for the Property, the Debtors re-listed the Property at \$649,000 (the “**Second Listing**”), which ultimately resulted in an offer to purchase the Property by the Purchaser; and,
- (vi) The Property was listed on the MLS for a period of more than three months, receiving over 50 inquiries, resulting in approximately 20 people accessing the virtual data room.

11. Throughout the process, the Debtors kept the Proposal Trustee apprised of the matters at they developed and sought input from the Proposal Trustee as appropriate.⁸

12. In its Fifth Report, the Proposal Trustee recommends that the Court approve the Transaction.

13. The creditors were consulted throughout the sale process and approved the strategies regarding the Initial Listing of the Property and the subsequent Second Listing, with the creditors indicating a preference to market the Property at a lower price point when presented with two price points.

14. Although the Transaction will not generate meaningful recoveries for the creditors, and in fact, may result in a bankruptcy, the Debtors have no source of income to continue their ownership of the Property and to defend the litigation related to the Property. As such, the proposed Transaction is in the best interest of all stakeholders to bring about finality and certainty to the Property and the claims of creditors. In particular, the Transaction will result in a purchaser

⁸ Motion Record, April 10, 2023, Tab 2, para 31.

acquiring title to the Property with notice of the environmental concerns and appears to be willing and able to take steps to address the concerns.

15. Given the environmental issues affecting the Property, and the extensive period of time that the Property was exposed on the MLS with only one offer being received, the consideration given for the Property is reasonable and fair in the circumstances.

16. As such, the process to market and sell the Property represented a sufficient effort to get the best price and the Debtors did not act improvidently.

17. Therefore, in all the circumstances, the Debtors submit that the Transaction should be approved. Further, the Debtors submit that the Court ought to exercise its jurisdiction and discretion to vest the Purchased Asset in the Purchaser, free and clear of any prior claims, save for any permitted encumbrances and provided that nothing in the order shall be taken to affect any duties or obligations imposed on any person pursuant to any environmental protection laws or regulation, including, without limitation, the *Environmental Protection Act*, RSO 1990, c E19, as amended.

II. Administration Charge

18. Section 64.2 of the BIA provides this Honourable Court with authority to grant parties – including the debtor’s legal counsel and the Proposal Trustee – a priority charge over the assets of a debtor that has commenced proposal proceedings.⁹

19. On this motion, the Debtors seek an increase to the Administration Charge granted by the Honourable Justice Conway on April 28, 2022.

20. This Court in *Canwest Publishing Inc.*¹⁰ set out the following non-exhaustive list of factors to be considered in approving an administration charge.

- (i) the size and complexity of the businesses being restructured;
- (ii) the proposed role of the beneficiaries of the charge;

⁹ BIA, *supra*, ss 64.2(1)-(2).

¹⁰ [*Canwest Publishing Inc.*](#), 2010 ONSC 222 at para 54.

- (iii) whether there is an unwarranted duplication of roles;
- (iv) whether the quantum of the proposed charge appears to be fair and reasonable;
- (v) the position of the secured creditors likely to be affected by the charge; and
- (vi) the position of the Monitor.

21. While *Canwest* was decided in the context of a *CCAA* proceeding, given the similarity in purposes between a *CCAA* proceeding and a Division 1 proposal under the BIA, these factors ought to be considered by the Court in granting an increase in the administration charge in the case at bar.

22. As a result, the Debtors submit that the *Canwest* factors are met in this case in that:

- (i) While the size of the business is not significant, there was additional complexities involved in these proceedings given the failure to secure interim financing, the need to market the Property, and the alleged active contamination and litigation of the Property;
- (ii) The proposed role of the beneficiaries remains crucial to the success of the proceedings. The Debtors are elderly, retired individuals and have required appropriate legal advice, together with supervision and assistance by the Proposal Trustee during the sale process;
- (iii) At this time, the Proposal Trustee has not sought the appointment of its own counsel and as such, there is no unwarranted duplication of roles;
- (iv) The increase in quantum of the administration charge sought is from \$125,000 to an aggregate amount of \$300,000, which is fair and reasonable given this Court had already approved a DIP Charge in the amount of \$250,000, which did not proceed;
- (v) There are no secured creditors affected by the charge; and
- (vi) The Proposal Trustee supports the requested increase in the administration charge.

III. Sealing Order

23. The Fifth Report contains one confidential appendix being the unredacted Sale Agreement that discloses the purchase price (the “**Confidential Appendix**”). The Debtors seek a sealing order in respect of the Confidential Appendix.

24. Section 137(2) of the *Courts of Justice Act* provides:

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.¹¹

25. In *Sherman Estate v Donovan*, the Supreme Court modified the prior test set out in *Sierra Club of Canada v Canada (Minister of Finance)* and restated the test to determine whether a sealing order should be granted. A person seeking a sealing order should establish the following:

- (i) court openness poses a serious risk to an important public interest;
- (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.¹²

26. The Confidential Appendix contains sensitive commercial information which if publicly disclosed, will pose a serious risk to the ability of the Debtors to later market and sell the Purchased Asset if the Transaction does not close. There remains some risk that the Transaction does not close. If the information as to the prior accepted purchase price is made public, then in the event the Debtors must re-market the property for sale, it is unlikely to achieve a price better than what was already accepted by the Debtors.

¹¹ *Courts of Justice Act*, RSO 1990, c C43, as amended, s. 137(2).

¹² *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII), at para 38.

27. There is a public interest worth protecting that is at serious risk if the Confidential Appendix is not sealed pending the completion of the Transaction, namely, the integrity of a sale process in an insolvency proceeding. The order sought is necessary to prevent this serious risk to the public interest and other reasonably alternative measures would not prevent this risk.

28. Moreover, the order sought is proportional as it requests a sealing order for only as long as is necessary, or subject to further order of this Court. The public right to the evidence on which the Court has approved the Sale Agreement is only minimally impaired as the *Soundair* principles are centred on the integrity of the process, not the actual price. As such, the benefits of the sealing order outweigh any negative effect of the sealing order.

IV. Approval of Fifth Report and Activities of the Proposal Trustee

29. The activities of the Proposal Trustee are set out in the Fifth Report and include the following steps:

- (i) assisted the Debtor in preparing their respective proposals to creditors and filing same with the Official Receiver;
- (ii) attended and chaired the Creditor Meeting and Reconvened Creditor Meeting;
- (iii) continued to communicate with the Debtors' legal counsel and the Debtors' realtor, Stuart Hyman, regarding the process for marketing and selling the Real Property;
- (iv) attended informal meetings with the Debtors' legal counsel, legal counsel for certain creditors and the realtor to discuss, among other things, the sales process and Purchase Agreement; and,
- (v) maintained a Case Webpage with electronic copies of the Court materials related to these restructuring proceedings, located at www.albertgelman.com/corporate-solutions/other-engagements.

30. As such, the Debtors respectfully requests that the Fifth Report and the activities of the Proposal Trustee set out therein be approved by this Court.

V. Approval of Fees

31. Counsel to the Debtors, WeirFoulds LLP, and the Proposal Trustee seek the approval of their respective fees and expenses. The fees and disbursements of WeirFoulds LLP are set out in the Affidavit of Wojtek Jaskiewicz affirmed on April 11, 2023 (the “**Jaskiewicz Affidavit**”, and together with the McElroy Affidavits, the “**Fee Affidavits**”).¹³ The Proposal Trustee’s fees are set out in the Affidavits of Tom McElroy sworn on April 11, 2023 (the “**McElroy Affidavits**”).¹⁴

32. The Jaskiewicz Affidavit sets out the fees and disbursements of counsel to the Debtors for the period June 1, 2022 to February 28, 2023 as aggregating \$79,746.44. The McElroy Affidavits set out the fees and disbursements of the Proposal Trustee for the period September 26, 2022 to April 10, 2023 as aggregating \$28,344.74.

33. The Fee Affidavits show that the fees incurred are fair and reasonable, based on the (i) nature and extent of the proceeding, (ii) the complications and difficulties encountered, (iii) the time spent by the court officer, (iv) the professionals’ knowledge, experience and skill, (v) the results achieved, and (vi) the costs of comparable services.¹⁵

PART 4 - RELIEF SOUGHT

34. The Debtors respectfully submit that an order should issue, substantially in the form of the draft orders included at Tabs 3 and 5 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: April 24, 2023



WeirFoulds LLP
Per: Philip Cho, of counsel for the Debtors

¹³ Fifth Report of AGI in its capacity as Proposal Trustee, April 11, 2023, Appendices “M”, “N”, and “O”.

¹⁴ Fifth Report of AGI in its capacity as Proposal Trustee, April 11, 2023, Appendices “M” and “N”.

¹⁵ [*Confectionately Yours Inc. \(Re\)*](#), 2002 CanLII 45059 (ONCA) at paras. 42-54.

**Schedule “A”
List of Authorities**

Canwest Publishing Inc., 2010 ONSC 222

Confectionately Yours Inc. (Re), 2002 CanLII 45059 (ONCA)

Royal Bank of Canada v Soundair Corp., 7 CBR (3d) 1; 46 OAC 321; 83 DLR (4th) 76; 4 OR (3d) 1 (CanLII)

Sherman Estate v Donovan, 2021 SCC 25

**Schedule “B”
Statutory Authorities**

Bankruptcy and Insolvency Act, RSC, 1985, c B-3.

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

- (a) an insolvent person;
- (b) a receiver, within the meaning of [subsection 243\(2\)](#), but only in relation to an insolvent person;
- (c) a liquidator of an insolvent person’s property;
- (d) a bankrupt; and
- (e) a trustee of the estate of a bankrupt.

Where proposal may not be made

(1.1) A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

To whom proposal made

(1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

Idem

(1.3) Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

Classes of secured claims

(1.4) Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

- (a) the nature of the debts giving rise to the claims;
- (b) the nature and rank of the security in respect of the claims;

(c) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;

(d) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and

(e) such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

Court may determine classes

(1.5) The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

Creditors' response

(1.6) Subject to [section 50.1](#) as regards included secured creditors, any creditor may respond to the proposal as made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

(a) [sections 124](#) to [126](#), in the case of unsecured creditors; or

(b) [sections 124](#) to [134](#), in the case of secured creditors.

Effect of filing proof of claim

(1.7) Hereinafter in this Division, a reference to an unsecured creditor shall be deemed to include a secured creditor who has filed a proof of claim under subsection (1.6), and a reference to an unsecured claim shall be deemed to include that secured creditor's claim.

Voting

(1.8) All questions relating to a proposal, except the question of accepting or refusing the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal was made.

Documents to be filed

(2) Subject to [section 50.4](#), proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and

(b) the prescribed statement of affairs.

Filing of documents with the official receiver

(2.1) Copies of the documents referred to in subsection (2) must, at the time the proposal is filed under [subsection 62\(1\)](#), also be filed by the trustee with the official receiver in the locality of the debtor.

Approval of inspectors

(3) A proposal made in respect of a bankrupt shall be approved by the inspectors before any further action is taken thereon.

Proposal, etc., not to be withdrawn

(4) No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

Assignment not prevented

(4.1) Subsection (4) shall not be construed as preventing an insolvent person in respect of whom a proposal has been made from subsequently making an assignment

Security or charge relating to director's indemnification

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.

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.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall 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

(4) 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 trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), 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 insolvent person; 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

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

(a) a director or officer of the insolvent person;

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

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

Assets may be disposed of free and clear

(7) 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 insolvent person 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

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use —

during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Courts of Justice Act, RSO 1990, c C43.

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.