

Court File No.: 31-2253654
Estate File No. 31-2253654

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
FORTE EPS SOLUTIONS INC., A CORPORATION WITH A HEAD OFFICE IN THE TOWN
OF MIDLAND IN THE PROVINCE OF ONTARIO**

**FACTUM OF THE PROPOSAL TRUSTEE
(motion returnable JUNE 14, 2017)**

LERNERS LLP
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Domenico Magisano LS#45725E
Tel: 416.601.4121
Fax: 416.601.4123
E-mail: dmagisano@lernalers.ca

Christopher Shorey LS#70135B
Tel: 416.601.2389
Fax: 416.867.2448
E-mail: cshorey@lernalers.ca

Lawyers for the Proposal Trustee

TO THE ATTACHED SERVICE LIST

SERVICE LIST

TO: CHAITONS LLP
500 Yonge Street
Toronto, ON M2N 7E7

Maya Poliak
Tel: 416.218.1161
Fax: 416.218.1844
E-mail: maya@chaitons.com

Lawyers for the Business development Bank of Canada

AND TO: WILLIAM HARVEY JONES
401 Bay Street, Suite 2702
Toronto, ON M5H 2Y4

Tel: 416.596.8876
Fax: 416.596.0907
E-mail: whjones@williamjones.ca

Lawyers for the Debtor

AND TO: FOGLER RUBINOFF LLP
77 King Street West, Suite 3000
Toronto, ON M5K 1G8

W. Ross MacDougall
Tel: 416.864.7604
Fax: 416.941.8852
E-mail: rmacdougall@foglers.com

Lawyers for Pacific High Tech Ltd.

AND TO: MANCINI ASSOCIATES LLP
505-7050 Weston Road
Woodbridge, ON L4L 8G7

Angelo Mancini
Tel: 905.851.7717
Fax: 905.851.7718
E-mail: acm@manciniassociates.com

Lawyers for 2306732 Ontario Inc.

AND TO: PALIARE ROLAND
155 Wellington St. West, 35th Floor
Toronto, ON M5V 3H1

Jeffrey Larry
Tel: 416.646.4330
Fax: 416.646.4301
E-mail: jeff.larry@paliareroland.com

Lawyers for First Source Mortgage Corp.

AND TO: NOVA CHEMICALS (CANADA) LTD.
1086 Modeland Road, Building 1040
Suite 201
Sarnia, ON N7T 8C1

Bruce Davies
Tel: 519.346.3287
E-mail: bruce.davies@novachem.com

AND TO: DEPARTMENT OF JUSTICE
c/o Department of Justice
Ontario Regional Office
the Exchange Tower, Box 36
130 King Street West, Suite 3400
Toronto, ON M5X 1K6

Diane Winters
E-mail: diane.winters@justice.gc.ca

AND TO: MINISTRY OF FINANCE
Legal Services Branch
33 King Street West, 6th Floor
Oshawa, ON L1H 8H5

Kevin J. O'Hara
E-mail: kevin.ohara@fin.gov.on.ca

AND TO: TRAVELERS LEASING LTD.
500-4180 Lougheed Highway
Burnaby, BC V5C 6A7

E-mail: afisher@travelersfinancial.com
bheintz@travelersfinancial.com

AND TO: WESTERN ONTARIO MORTGAGE COMMUNITY FUTURES DEVELOPMENT CORPORATION
330 West Street, Unit 10
Brantford, ON N3R 7V5

E-mail: david@wocfdca.com

AND TO: NORTH SIMCOE COMMUNITY FUTURES DEVELOPMENT CORPORATION
355 Cranston Crescent
Midland, ON L4R 4K6

E-mail: admin@nscfd.on.ca

PART I - INTRODUCTION

1. On May 19, 2017, Forte EPS Solutions Inc. (the “**Debtor**”), filed a Notice of Intention to Make a Proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”), and appointed Albert Gelman Inc. (“**AGI**”) as proposal trustee (the “**Trustee**”).

2. The Debtor has brought a motion seeking, among other things, an extension of the stay afforded to it under the BIA and an order granting an Administrative Charge in favour of the Trustee and its counsel, together with the Debtor’s counsel. The charge shall not exceed \$100,000 and shall be subordinated to the security interest of the Business Development Bank of Canada (“**BDC**”), but in priority to all other claims over the Debtor’s assets.

3. The Trustee supports the relief sought by the Debtor as it appears to the Trustee that the Debtor is acting in good faith and appears to be able to make a viable proposal to its creditors.

PART II - THE FACTS

(A) BACKGROUND

4. The Debtor carries on business manufacturing expanded polystyrene (EPS) products. It employs 15 persons and is headquartered in Midland, Ontario.¹ Its principals are John Cipressi (“**John**”) and Dominic Zita (“**Dominic**”).

5. The Debtor has 4 secured creditors: North Simcoe Community Futures Development Corporation (“**North Simcoe**”), who claims to be owed \$225,500; the Business Development Bank of Canada (“**BDC**”), who claims to be owed \$554,785; Western Ontario Community Futures Development Corporation Inc. (“**SOFFI**”), who claims to be owed \$440,427; and Travelers Leasing Ltd. (“**Travelers**” and together with North Simcoe, BDC and SOFFI are the “**Secured Creditors**”), who claims to be owed \$399,800;² There are also approximately \$3 Million of arm’s length unsecured claims listed by the Debtor.³

¹ Motion Record of the Applicant (“**Applicant’s MR**”), Tab 2, Affidavit of John Cipressi sworn June 5, 2017 (the “**Cipressi Affidavit**”), para 2

² Applicant’s MR, Tab 2, Cipressi Affidavit, para 7

³ First Report of the Proposal Trustee, dated June 9, 2017 (“**First Report**”), Tab 1, p 5, para 21

6. First Source Mortgage Corporation ("**First Source**") claims to be owed \$18,300 and was previously registered as a secured creditor of the Debtor, however, that registration recently expired.⁴

7. Each of the Secured Creditors claimed that the Debtor was in default under their respective security arrangements.⁵ Only BDC issued a Notice of Intention to Enforce on its security, which it did on November 3, 2016. On April 13, 2017, BDC brought an application returnable May 8, 2017, for the appointment of a receiver over the undertakings, properties, and assets of the Debtor (the "**Receivership Motion**").⁶

8. The Receivership Motion was adjourned and, as described above, the Debtor filed the NOI.⁷

9. After filing the NOI, the Debtor, and 16567 Ontario Inc. ("**16567**"), negotiated and executed a forbearance agreement with BDC dated May 23, 2017 (the "**Forbearance Agreement**").

10. The stay of proceedings afforded to the Debtor did not apply to BDC as it had issued demands pursuant to section 244 of the BIA, and said demands had expired, thus invoking section 69.1(2) of the BIA. Nonetheless, the Trustee understands that, with the benefit of the Forbearance Agreement, BDC is prepared to refrain from enforcing on their security for the time being.

11. 16567 is owned by John, and Andrea Zita (Dominic's wife "**Andrea**"). 16567 is also the owner and landlord of the debtor's premises at 16567 Highway 12, Midland, Ontario, L4R 4K3 (the "**Premises**"). Prior to entering into the Forbearance Agreement, 16567 had not guaranteed the Debtor's indebtedness to BDC, nor had it granted security to BDC.

12. The Trustee understands that it was of critical importance to BDC that it receive a guarantee of the Debtor's obligations from 16567 together with a collateral mortgage over the Premises (collectively, the "**16567 Security**"). While 16567 was under no obligation to do so, as part of the Forbearance Agreement (and as a gesture of good faith to the Debtor's stakeholders) John and Andrea caused 16567 to grant the 16567 Security.

⁴ Applicant's MR, Tab 2, Cipressi Affidavit, para 7; please note that First Source's registration expired on May 26, 2017; see Security Review at Tab F of First Report

⁵ Applicant's MR, Tab 2, Cipressi Affidavit, para 8

⁶ Applicant's MR, Tab 2, Cipressi Affidavit, para 8

⁷ Applicant's MR, Tab 2, Cipressi Affidavit, para 4; First Report, Tab 1, p 1, para 2(a)

13. The Debtor believes that without the 16567 Security BDC would have proceeded with the Receivership Motion which likely would have resulted in insufficient recovery for secured creditors and no recovery for unsecured creditors.⁸

14. Further, the Premises has been sold pursuant to an Agreement of Purchase and Sale dated May 5, 2017 (the "**Premises APS**") and scheduled to close on July 25, 2017. The Debtor advises that BDC's debt and security will either be assigned prior to closing of the Premises APS or, failing that, the BDC indebtedness may be satisfied, in part or in full, from the proceeds received as part of the Premises APS.⁹

(B) CURRENT STATUS

15. On June 12, 2017, the Trustee served and filed its first report (the "**First Report**").¹⁰

16. As detailed in the Security Review attached as Appendix "F" to the First Report, a personal property security registration ("**PPSR**") database search conducted on June 5, 2017, revealed four financing statements registered against the Debtor:

- (a) a financing statement made May 10, 2012, by North Simcoe;
- (b) a financing statement made January 29, 2013, by BDC;
- (c) a financing statement made February 1, 2013, by SOFFI; and
- (d) a financing statement made July 29, 2014, by Travelers.¹¹

17. North Simcoe provided the Trustee with a copy of a priorities agreement between itself and BDC dated January 30, 2013 in which North Simcoe purports to subordinate its security interest in the Debtor's assets to the interests of BDC.¹²

18. Since the NOI was filed, the Debtor has been engaged in the following activities, it:

- (a) entered into the Forbearance Agreement;

⁸ Applicants MR, Tab 2, Cipressi Affidavit, para 9

⁹ Applicants MR, Tab 2, Cipressi Affidavit, para 4 and Exhibit "E"

¹⁰ First Report, Tab 1

¹¹ First Report at Appendix "F", the security review from counsel for the Trustee dated June 9, 2017 (the "**Security Review**")

¹² First Report, Tab 1, p 5, para 19

- (b) advised various stakeholders, including management, relevant employees and important suppliers of the restructuring proceedings;
- (c) enhanced its marketing efforts to prospective customers;
- (d) held preliminary discussions with one party who had approached the Debtor and was interested in purchasing the Debtor's assets;
- (e) had informal discussions with various secured and unsecured creditors in respect of the restructuring proceedings;
- (f) attended meetings with the Trustee and its legal counsel to discuss its objectives and opinions in respect of these restructuring proceedings;
- (g) prepared its Cash Flow Forecast (as defined in the First Report) with the assistance of the Trustee;
- (h) provided the Trustee, on an ongoing basis, with financial and other information in order to allow the Trustee to monitor its cash receipts and disbursements; and
- (i) started to consider options for recapitalizing and/or marketing the Debtor and its business.¹³

19. The Debtor is seeking the Stay Extension pursuant to subsection 50.4(9) of the BIA. If the Stay Extension is granted, the Debtor expects to either: (a) make a proposal to its creditors; or (b) return to this Court seeking approval of a proposed sale and investment solicitation process ("**SISP**").¹⁴

20. Also of note is that the Premises APS is scheduled to close during the Stay Extension period. As BDC and SOFFI both have registered collateral mortgages on the Premises, the closing of the Premises APS will provide the Debtor with clarity on the identity and quantum of their outstanding obligations to secured creditors.

21. The Debtor is also seeking the Administrative Charge which shall stand as security for unpaid fees and disbursements of the Trustee, the Trustee's counsel and Debtor's counsel. The Administrative Charge is security for payment of fees and is not intended to be in lieu of the Debtor's obligation to pay fees. As such, the Administrative Charge is capped at a maximum of

¹³ First Report, Tab 1, p 6, para 23

¹⁴ Applicant's MR, Tab 2, Cipressi Affidavit, para 12

\$100,000 and is subordinate to BDC's security (however will be in priority to all other claims and security interests in the Debtor's assets).¹⁵

22. Of note, during the course of preparing for this motion, the Trustee discovered that Travelers' leases were the result of a sale and lease back transaction with the Debtor.¹⁶ Accordingly, while Travelers has provided the Trustee with a copy of a "delivery certificate" evidencing delivery of the equipment in question, the definition of Purchase Money Security Interest ("PMSI") in the *Personal Property Security Act* (Ontario) excludes "a transaction of sale by and lease back to the seller".¹⁷ It is still unclear if Travelers received written subordination agreements from the other Secured Creditors with respect to the equipment subject to its security.

23. If Travelers does not have a valid and enforceable PMSI or written subordination agreements, its security may be subordinate to that of BDC, North Simcoe and SOFFI. However, given when this issue was discovered, the Trustee and the Debtor have not been able to discuss this matter in detail with Travelers. Accordingly, the Administrative Charge sought provides Travelers with 30 days from the date of the Court's granting of the Administrative Charge to return to Court and: (a) seek a court determination on the priority of their security interest in the relevant assets; and (b) if the Court determines that Travelers has a valid and enforceable PMSI, make any submissions it may have with respect to the Administrative Charge.¹⁸

PART III - ISSUES AND THE LAW

24. The issues for this Court to determine are:

- (a) is the Stay Extension reasonable in the circumstance; and
- (b) is the Administrative Charge, granting a charge in favour of the Trustee, counsel for the Trustee, and counsel for the Debtor for the aggregate amount of \$100,000, subordinate only to BDC's security, but without prejudice to Travelers to bring a motion within 30 days for a declaration that it has a valid PMSI and, if it is determined that Travelers has a valid PMSI, re-visit the Administration Charge as it pertains to the assets subject to Travelers' security, appropriate in the circumstances.

¹⁵ First Report, Tab 1, p 8, para 29

¹⁶ First Report, Tab 1, pp 9-10, para 34

¹⁷ RSO 1990, c. P10, s 1(1) ("PPSA")

¹⁸ First Report, Tab 1, pp 9 & 10, paras 31 & 37

(A) THE STAY EXTENSION

25. Pursuant to section 69(1) of the BIA, the Debtor is subject to a stay of proceedings (the “Stay”) upon filing a NOI. Section 69(2)(b) of the BIA precludes the Stay from applying to a secured creditor who has given notice of its intention to enforce prior to the filing of the NOI and as such BDC is not subject to the Stay.

26. Pursuant to section 50.4(8) of the BIA, the Debtor has 30 days, until June 19, 2017, from filing an NOI to make a proposal. Section 50.4(9) of the BIA allows the Court to grant a 45 day extension, until August 3, 2017, if it is satisfied that:

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

27. An objective standard should be applied to the above test, *i.e.*, “what would a reasonable person or creditor do in the circumstances”. The intent of these sections of the BIA is rehabilitation and “matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.”¹⁹

28. First, the Trustee is of the opinion that the Debtor has acted in good faith and with due diligence.²⁰ It is a debtor’s conduct post-filing of a notice of intention that should be considered under this first branch of the test.²¹ The Debtor has engaged in the activities outlined at paragraph 18 above, and, specifically, it has negotiated a Forbearance Agreement with BDC and has been searching for potential financiers and purchasers. Moreover, the principals of the Debtor have personally financed the post-filing business of the Debtor and its related company, 16567 has provided additional security to BDC, all with a view to negotiating a successful restructuring of the Debtor.²²

¹⁹ *Cantrail Coach Lines Ltd, Re*, 2005 BCSC 351, at para 11

²⁰ First Report, Tab 1, p 11, para 40

²¹ *Enirgi Group Corp v Andover Mining Corp*. 2013 BCSC 1833, at para 64

²² Applicant’s MR, Tab 2, Cipressi Affidavit, para 16

29. Second, the Trustee is of the opinion that the Debtor will be able to make a viable proposal if the Stay Extension is granted.²³ The Debtor has provided affidavit evidence that it will use the time provided by the Stay Extension to obtain offers to purchase or finance the Debtor and to establish a SISP or to make a proposal.²⁴ The Debtor believes that several offers to purchase or finance are forthcoming and that the Stay Extension is necessary to secure interim financing to meet cash-flow requirements pending the contemplated SISP and proposal.²⁵

30. Third, the Trustee is of the opinion that no creditor will be materially prejudiced by the granting of the Stay Extension. In fact, the principals of the Debtor have been investing their own money to maintain the operations of the Debtor.²⁶ Moreover, 16567 has provided additional security to BDC in exchange for their continued support of the Debtor's attempts to restructure.²⁷ Further, the Premises APS is expected to close on July 25, 2017, and John and Dominic have advised the Trustee that some (and perhaps all) of the excess funds from the Premises may be used to fund a proposal to creditors.²⁸

31. Furthermore, while there is some debate on the priority of Travelers' security, the Debtor expects to meet its post-NOI payments, including equipment lease payments to Travelers.²⁹ As a result, the investment of new funds into the business plus the Debtor's commitment to meet its post-NOI payments suggests that creditors will not be materially prejudiced by the Stay Extension.³⁰ Conversely, a deemed assignment into bankruptcy and forced liquidation of assets may result in a shortfall to secured creditors and no recovery for unsecured creditors.

(B) THE ADMINISTRATIVE CHARGE

32. The BIA provides that the Court may grant a charge for an appropriate amount, and in priority to secured creditors, in favour of certain entities involved in the restructuring process:

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

²³ First Report, Tab 1, p 11, para 40

²⁴ Applicant's MR, Tab 2, Cipressi Affidavit, para 12

²⁵ Applicant's MR, Tab 2, Cipressi Affidavit, para 15

²⁶ Applicant's MR, Tab 2, Cipressi Affidavit, para 16

²⁷ Applicant's MR, Tab 2, Cipressi Affidavit, para 9 & 10

²⁸ Applicant's MR, Tab 2, Cipressi Affidavit, para 11

²⁹ First Report, Tab 1, p 8, para 27

³⁰ First Report, Tab 1, p 11, para 41

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

...

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

33. In this case, the contemplated Administrative Charge would be in favour of the Trustee and counsel for the Trustee, in accordance with subsection (1)(a), and counsel for the Debtor, in accordance with subsection (1)(b).

34. The Trustee is of the opinion that the order sought is appropriate. Administrative Charges are common in proceedings such as this and are necessary to secure the fees and disbursements of the professionals that are involved in enabling a company to successfully complete its restructuring process.³¹

35. The professional services are essential for both conducting a future SISP and a successful proposal. The quantum sought, \$100,000, is proportionate to the complexity and size of the business. The proposed charge will be subordinate to the secured interests of BDC, the senior secured creditor and the only creditor that is not subject to the stay of proceedings.

36. As previously discussed, Travelers may not enjoy a PMSI in the equipment it purported to finance, however, Travelers has not had sufficient opportunity to respond to the Trustee's concerns³². Accordingly, the Administrative Charge should not rank behind Travelers security, although the Administrative Charge, if granted, should afford Travelers with 30 days to address the Trustee's concerns regarding their security and, if necessary, permit Travelers to return to this Court for direction.

37. Lastly, the creditors have been given notice of this motion and, to date, none of them have notified the Trustee that they are opposed to the relief sought.

³¹ First Report, Tab 1, p 9, para 30; See e.g. *Colossus Minerals Inc., Re*, 2014 ONSC 514 at paras 11-15

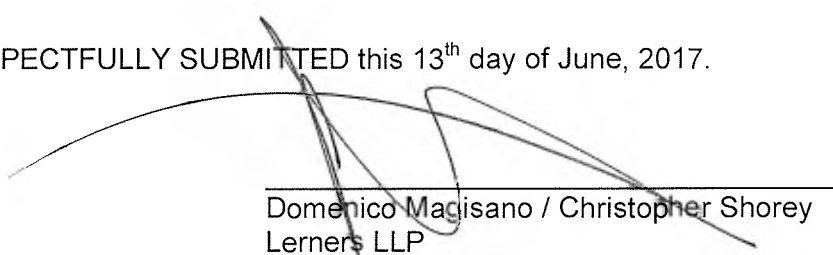
³² First Report Tab 1, pp 9-10, paras 33 & 34

PART IV - ORDER REQUESTED

38. The Trustee supports the relief sought by the Debtor, namely an Order:

- (a) approving an extension of time for the Debtor to file a proposal until August 2, 2017; and
- (b) granting an Administrative Charge in favour of the Trustee, its counsel, Lerner's LLP, and counsel for the Debtor, William Harvey Jones, in the aggregate maximum amount of \$100,000.00, in priority to all other creditors except BDC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June, 2017.



Domenico Macisano / Christopher Shorey
Lerner's LLP

Lawyer for the Proposal Trustee

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Cantrail Coach Lines Ltd, Re*, 2005 BCSC 351
2. *Colossus Minerals Inc., Re*, 2014 ONSC 514
3. *Enirgi Group Corp v Andover Mining Corp*, 2013 BCSC 1833

SCHEDULE "B"
RELEVANT STATUTES

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

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

...

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- (c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

...

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.

...

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

...

Limitation

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action;

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ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

Proceeding commenced at **TORONTO**

FACTUM OF THE PROPOSAL TRUSTEE
(Motion returnable June 14, 2017)

LERNERS LLP
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Domenico Magisano LS#45725E
Tel: 416.601.4121
Fax: 416.601.4123
E-mail: dmagisano@lernalers.ca

Christopher Shorey
Tel: 416.601.2389
Fax: 416.867.2448
E-mail: cshorey@lernalers.ca

Lawyers for the Proposal Trustee