



NO. B-160890
ESTATE NO.: 11-2177611
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF
WEST COAST LOGISTICS LTD.**

NOTICE OF APPLICATION

Name of Applicant: West Coast Logistics Ltd.
(the "**Applicant**", or "**West Coast**")

To: Office of Superintendent of Bankruptcy

And To: All Proven Creditors

TAKE NOTICE that an application will be made by the Applicant to the presiding Registrar at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on **Tuesday, January 9, 2018 at 9:45 a.m.** for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The Amended Proposal dated for reference November 23, 2017 and filed December 7, 2017, be and is hereby approved.

Part 2: FACTUAL BASIS

Background

2. West Coast Logistics Ltd. ("**West Coast**") provides loading and reloading services at a leased location in New Westminster, BC. The leased facility has barge, rail, and truck access servicing primarily the lumber, pulp and paper and steel industries.
3. West Coast's financial difficulties arose as a result of decreased sales during the Spring and Summer of 2016. In addition, the premises that West Coast leases required significant repairs and maintenance to be performed by the landlord which limited West Coast's ability to store high grade steel, pulp, and lumber all of which has contributed to the decreased sales, loss of customers and losses of the Company in 2016, and a dispute with the landlord, and the landlord's neighbouring tenant, Harvest Fraser Richmond Organics Ltd. ("**Harvest**").
4. As at November 11, 2016, West Coast's secured liability was \$260,000 plus unsecured liabilities estimated at \$550,000.

5. On October 17, 2016, West Coast caused a notice of intention to make a proposal ("**NOI**") to be filed with the Office of the Superintendent of Bankruptcy, with the Bowra Group Inc. being appointed as the proposal trustee (the "**Proposal Trustee**").
6. Subsequently, West Coast was granted extensions of time to file its Proposal as it continued to address its issues with the landlord, and Harvest in respect of separate litigation between Harvest and the landlord, which culminated in an application being sought by Harvest to obtain an injunction against the landlord and, although not a party to those proceedings, West Coast, to prevent West Coast's use of the rail lines running through the neighboring lands, those being an integral aspect of West Coast's business operations.
7. The Injunction was dismissed by Order pronounced March 31, 2017, with costs being awarded to West Coast by Harvest.
8. As a result of those issues, extensions were granted by Orders pronounced November 16, 2016, December 23, 2016, February and March 31, 2017, with the time ultimately set to expire on April 16, 2017.
9. Throughout this time, West Coast acted in good faith by organizing its affairs and investigating various options with a view to formulating and presenting a proposal to its creditors. In particular, West Coast, reduced operating costs, continued in its efforts to increase sales, undertook discussions with Harvest with respect to the injunction application to attempt a resolution; and continued to negotiate with its Landlord to resolve the issues so that it can increase its customer base and profitability by, and/or that the rent payable more properly reflects the state of the Property until such time as those issues are resolved.
10. In addition, throughout this period, the Proposal Trustee continued to monitor West Coast's business and be satisfied that it was and continued to act in good faith and with due diligence in formulating a viable Proposal to its creditors.

Filing of the Proposal and Trustee Report

11. West Coast filed a Proposal to its creditors on April 13, 2017 (the "**Proposal**").
12. Under the terms of the Proposal, the unsecured creditors will be paid a percentage of "Free Cash Flow" generated by West Coast for a 2 year period, that being 35%, up to a total of \$500,000, then 50% for the amounts earned above \$500,000 per year (with creditors owed under \$1,000 being paid 100 cents on the dollar). The secured creditors, owed approximately \$380,000, are not participating.
13. In considering the terms of the Proposal, the Proposal Trustee was of the opinion that the estimated fair realization value of the assets of the Company in a liquidation was \$361,571, with secured liabilities of \$380,000, meaning a shortfall to secured creditors, and therefore an estimated nil realization in a bankruptcy to unsecured creditors.
14. In contrast, under the terms of the Proposal, based upon the estimate of future operations, the amount to be realized will be between \$154,000 to \$318,000, meaning a recovery to unsecured creditors of between 40% and 83%.

Creditors' Meeting to Consider the Proposal, and Disallowance of Claim for Voting Purposes

15. The Proposal Trustee called the creditors' meeting to consider the Proposal in accordance with the provisions of the BIA (the "**Creditors' Meeting**"), with the meeting being initially scheduled for May 3, 2017.

16. In its report to the Creditors, the Proposal Trustee set out its estimate for recovery as outlined above, and noted that in a bankruptcy the realization would be zero given that the assets were valued at \$361,571, which was insufficient to pay the secured creditors (who were not sharing in the Proposal) and required priority claims, such as those owing under the *Wage Earner's Protection Program Act*, those amounts being an estimated \$390,000.
17. At the Creditors' Meeting, one of Harvest's creditors, Prudential indicated that it wished to meet with the Company to discuss the Proposal terms further. Accordingly, on May 3, 2017, the meeting was adjourned for further investigation, to May 17, 2017.
18. After the originally scheduled meeting date of May 3, 2017, West Coast received emails from Prudential calling into question the *bona fides* of their participation in the Proposal and, specifically, the manner in which they would cast their vote. In particular, by email of May 4, 2017, Prudential emailed the principals of West Coast stating that they (*i.e.*, Prudential) "have had a lengthy discussion ... [and] have concluded" the following:
1. We [Prudential] need a personal guarantee from either one of you, preferably through property of equal debt value, until the debt is paid in full.
 2. Prudential gets all the container trucking and will bill the client directly for the next five years.
- And that "if these terms are agreeable to you [*i.e.*, West Coast], we will vote yes. If not unfortunately we will be voting against the proposal on May 17th 2017."
19. As such treatment would clearly constitute a fraudulent preference to Prudential by treating them in a significantly better and preferential manner over West Coast's other creditors, and would be contrary to the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164, West Coast did not even consider that proposal.
20. By email of May 12, 2017, Prudential emailed to say that they had "withdrawn" the offer, but would still be voting against the Proposal, and then raised an issue as to the value of the assets of West Coast. The issue as to value appears to be based upon a dated 2015 appraisal of West Coast's assets.
21. By email of May 16, 2017 to counsel for Prudential, the Proposal Trustee confirmed that he had done an analysis on the numbers based on the 3 different scenarios from the 2015 appraisal, and had also had the original appraiser provide further comments given that his updated 2017 opinion had changed considerably. In this email correspondence:
- (a) The original appraiser noted that the forced liquidation value of the assets had gone from \$542,000 in 2015 to \$354,500 in 2017, and that some of that was because the overall condition of the fleet had deteriorated, given the passage of 2 years, and that some of the units were not running any longer.
 - (b) The Proposal Trustee provided the estimate of recovery, even assuming the 2015 values remained valid, from nil (on a forced liquidation value), \$0.11 per dollar (on an orderly liquidation value) and \$0.64 per dollar (on a fair market value basis).
22. As noted above, based on the 2017 appraised value, a recovery in a bankruptcy would be nil.
23. When the Creditors Meeting was reconvened on May 17, 2017, the Proposal Trustee asked Prudential if they had asked to meet with the company to discuss the Proposal, and Prudential said they had not. The Proposal Trustee then tabled the May 4 and May 12, 2017 emails and again opened the discussion as to the appraised value of West Coast's assets, namely the difference in values in 2015 and 2017, making it clear that there was no basis for a recovery

under the 2017 values, and a likely recovery of 0 to 11% on a forced or orderly liquidation value (which would be the realization in a bankruptcy scenario), even using the 2015 values.

24. Despite withdrawing the email of May 4, 2017, Prudential made it clear that they would never vote in favour of the Proposal, absent some deal that resulted in them being paid in full. West Coast's counsel took the position that Prudential was not acting in good faith and requested that the Trustee disallow the claim for voting purposes
25. Prudential then agreed to a further adjournment of the Creditors' Meeting for a short period so that those issues could be discussed. When reconvened a short while later, a further adjournment was agreed upon.
26. Given the conduct of Prudential, by application heard August 25, 2017, West Coast sought, and obtained, an Order that the Proposal Trustee could proceed to conduct the vote on the Proposal as filed, without considering the vote of Prudential. Prudential filed an appeal of that Order, which by Order of Mr. Justice Milman pronounced October 20, 2017, was dismissed.

Creditor Approval of Proposal

27. The meeting to consider the Proposal was duly constituted and held on Monday, December 4, 2017, and presided over by Mario Mainella in accordance with the provisions of the BIA. At the meeting an amended proposal (the "**Amended Proposal**") was tabled which amended it to provide that:
 - (a) Semi-annual payment would be made, rather than annual; and
 - (b) Cash flow statements would be available on a quarterly basis if requested from the Trustee.
28. In accordance with the August 25, 2017 Order of Registrar Nielsen, as upheld on appeal, Prudential's vote was not tabulated in considering the Amended Proposal.
29. Accordingly, the voting creditors voted unanimously in support of the Amended Proposal. Specifically there were 9 votes in the amount of \$230,887.34 which all voted in favour of the Amended Proposal, with none against.

Part 3 LEGAL BASIS

Approval of the Proposal

30. Section 58 of the Bankruptcy & Insolvency Act ("**BIA**"), provides that upon acceptance of a proposal by the creditors, the Trustee shall apply to the court for approval of the order, on at least 15 days' notice to the proven creditors.
31. S. 59 of the BIA sets out the basis for the Courts' consideration of the Proposal:

Court to hear report of trustee, etc.

59 (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

32. The Trustee has filed a report confirming unanimous acceptance of the Proposal by those creditors eligible to vote, that there are no facts arising from s. 173, that the Proposal is advantageous for the creditors, that all priority and crown claims have been provided for in accordance with S. 60(1) to 60(1.7) and distribution provided for consistent and in the manner required under ss. 60(2) to (4) of the BIA.
33. Under s. 60(5) of the BIA, the Court may approve or refuse to approve the Proposal. The Company submits that there are no facts on which approval ought to be refused, particularly given the eligible creditors' views and overwhelming approval of the Proposal, which is more advantageous than a bankruptcy.
34. The Company submits that it is appropriate to grant the orders sought in Part 1 above, on the basis set out herein, and will rely upon ss. 58, 59 and 60 of the BIA.

Part 4: MATERIAL TO BE RELIED ON

35. Affidavit #1 of Cindy Curran, sworn November 14, 2016;
36. Affidavit #1 of Michael Smallwood, sworn December 19, 2016;
37. The First Report to the Court of the Proposal Trustee, dated December 19, 2016;
38. Affidavit #1 of Michael Smallwood, sworn February 9, 2017;
39. The Second Report to the Court of the Proposal Trustee, dated February 9, 2017;
40. Affidavit #3 of Michael Smallwood, sworn June 16, 2017;
41. Affidavit #1 of Grover Dimmock, sworn July 4, 2017;
42. Affidavit #1 of Rex D'souza, sworn July 20, 2017;
43. Affidavit #2 of Grover Dimmock, sworn August 1, 2017;
44. Affidavit #4 of Michael Smallwood, sworn August 1, 2017;
45. Order pronounced August 25, 2017;

- 46. Order pronounced October 20, 2017;
- 47. Report to the Court of the Proposal Trustee on the Proposal, dated December 7, 2017; and
- 48. Such other materials as counsel may advise.

The Applicant estimates that the application will take 20 minutes.

This matter is within the jurisdiction of a Master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must

- (a) file an Application Response in Form 33 within 5 days after the date of service of this Notice of Application or, if the application is brought under Rule 9-7 of the *Supreme Court Civil Rules*, within 11 days after the date of service of this Notice of Application; and
- (b) at least 2 days before the date set for the hearing of the application, serve on the applicant 2 copies, and on every other party one copy, of a filed copy of the Application Response and the other documents referred to in rule 9-7(12) of the *Supreme Court Civil Rules*.

Dated at the City of Vancouver, in the Province of British Columbia, this 7th day of December, 2017.



 Lawson Lundell LLP
 Solicitors for the Applicant

This Notice of Application is filed by the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this Notice of Application

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

The following information is provided for data collection purposes only and is of no legal effect.

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- Other – Approval of BIA Proposal

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