Case Name:

8440522 Canada Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, 1985, c.C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of 8440522 Canada Inc., Data & Audio-visual Enterprises Wireless Inc., and Data & Audio-visual Enterprises Holdings Incorporation

[2013] O.J. No. 4574

2013 ONSC 6167

8 C.B.R. (6th) 86

2013 CarswellOnt 13921

233 A.C.W.S. (3d) 286

Court File No. 13-CV-16274-OOCL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: September 30, 2013.
Judgment: October 4, 2013.

(50 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Companies and arrangements -- Applications -- Initial applications -- Monitors -- Reports -- Application by debtor groups of companies for protection under CCAA allowed -- Applicant provided low-cost cellular services and had raised over $400 million in debt financing -- Wireless telecom start-up costs were high and applicant became insolvent before it was able to achieve profitability -- It was clear shutdown would occur without CCAA protection so initial order granted, permitting director and administrative charges and continued engagement of financial

advisors and Chief Restructuring Officer -- DIP facility approved by board and Monitor authorized as necessary to maintain stability while applicant tried to finalize acquisition -- Extension of stay reasonable and customary.

Application by the debtor group of companies for protection under the Companies' Creditors Arrangement Act. The applicant carried on business as a wireless telecommunications carrier. The applicant provided low-cost cellular service and had 194,000 subscribers on pay-in-advance plans. The applicant had raised over $400 million in debt financing since 2008 for capital expenditures and operations. Wireless telecom start-up costs were capital intensive and it could take years for companies to become profitable. The applicants submitted they ran out of financial runway before profitability was achieved and now faced an imminent liquidity crisis. The applicant had obtained a bridge notes facility and was pursuing acquirers. A proposed transaction for sale was currently being considered by Industry Canada. One of the secured creditors objected to certain terms proposed for the initial order.

HELD: Application allowed. It was clear the applicant was insolvent and shutdown would be inevitable without CCAA protection. The initial order was granted with directors and administrative charges permitted and continued engagement of financial advisors. The approval of the DIP facility would provide stability and had been approved by the board and recommended by the Monitor. The DIP facility selected was appropriate and would not prejudice the creditors. An extension of the stay was granted as reasonable and customary and applied to the oppression application. The ad hoc committee had been of assistance in the process and the charge was appropriate and necessary and did not affect the security position of the creditor objecting. The Chief Restructuring Officer was knowledgeable and central to the restructuring process and his engagement was to continue. The Monitor had reviewed and approved the engagement letter.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.2(1)

Counsel:

Robert Frank, Virginie Gauthier and Evan Cobb, for applicants.

David C. Moore, for The Catalyst Capital Group Inc.

John Porter and Leanne M. Williams, for Ernst & Young Inc, the proposed Monitor.

Robert J. Chadwick and Brendan O'Neill, for the proposed DIP lender and the ad hoc Committee of Noteholders.

Kevin P. McElcheran and James D. Gage, for Quadrangle, a shareholder and for subordinated note holders.

Janice Wright, for Equity Financial Trust Company, as Trustee and Collateral Agent under the First Lien Notes, Trustee under the Unsecured Senior Notes, and Collateral Agent under the Bridge Notes.

[Editor's note: An amended judgment was released by the Court October 24, 2013. The changes were not indicated. This document contains the amended text.]

1 **F.J.C. NEWBOULD J.**:-- On September 30, the applicants ("Mobilicity Group") applied for protection under the CCAA. At the conclusion of the hearing I ordered that the application should be granted for reasons to follow, and an Initial Order was signed. These are my reasons.

Background facts

2 The Mobilicity Group consists of Data & Audio-Visual Enterprises Wireless Inc., the operating company ("Wireless" or "Mobilicity"), its holding company Data & Audio-Visual Enterprises Holdings Inc. ("Holdings") and 8440522 Canada Inc., wholly owned by Wireless and which has no material assets or liabilities.

3 Mobilicity carries on business as a Canadian wireless telecommunications carrier. It provides cellular service to Canadians in five urban markets: Ottawa, Toronto, Calgary, Edmonton and Vancouver and has roaming agreements with third party service providers to provide continuity of service outside of these markets. Mobilicity also offers hardware (handsets and accessories) to its customers.

4 Mobilicity was founded on the concept of offering low cost cellular services to value-conscious consumers seeking less expensive cellular services than those offered by the established players in the market, being Bell Canada Inc., TELUS Corporation and Rogers Communications Inc.

5 In addition to four corporately-owned stores, the Mobilicity dealer network consists of approximately 314 points of distribution which include approximately 94 "platinum-level" stores that exclusively sell Mobilicity-branded services and only offer wireless-related products at their stores, and approximately 150 "gold" and "silver" level stores that sell Mobilicity-branded services, but also sell non-wireless related products. With the exception of the four corporately owned stores, these points of distribution are operated independently from the Mobilicity Group and are compensated for sales on a commission basis 45 days after the end of the month in which a subscriber is signed on, subject to certain customer retention requirements. These dealers often operate with very low liquidity and any disruption to the stream of revenue derived from commissions would cause many of them to cease operations due to a lack of funding

6 Mobilicity operates on a "pay in advance" billing system which provides set monthly plans for its subscribers. Mobilicity has approximately 194,000 subscribers who together generate gross revenues of approximately $6.3 million per month.

7 Mobilicity's business model provides for outsourcing of certain business functions: network building and maintenance, real-time billing and rating, provisioning systems, handset logistics and distribution and call centre operations. Suppliers of such business functions include: Ericsson Canada Inc., Amdocs Canadian Managed Services Inc. and Ingram Micro Inc.

8 The single most significant capital expenditure made by Mobilicity was the acquisition of its 10 spectrum licenses from the Government of Canada effective in 2009. Mobilicity acquired the spectrum licenses for $243 million using funds contributed by Holdings.

9 After purchasing the spectrum licences, Mobilicity incurred significant costs by establishing an office, hiring a management team to develop the wireless carrier business, and contracting with Ericsson Canada Inc. to build a network system.

Outstanding indebtedness

10 In aggregate, the Mobilicity Group has raised in excess of $400 million in debt financing to fund capital expenditures and operations since 2008. A description of that indebtedness is below:

a. Wireless is the borrower under certain first lien notes issued in a principal amount of $195,000,000 due April 29, 2018. Holdings is a guarantor of the first lien notes and each of Wireless and Holdings has entered into a general security agreement in connection with the first lien notes. The Catalyst Capital Group Inc. ("Catalyst") holds approximately 32% of the first lien notes.

b. Wireless is the borrower of $43.25 million in second lien notes (the "Bridge Notes") due September 30, 2013. These Bridge Notes are also guaranteed by Holdings and the obligations thereunder are secured by the assets of Wireless and Holdings. The Bridge Notes rank behind the first lien notes in right of payment and the security on the Bridge Notes is subordinate to the first lien notes security.

c. Holdings has issued 15% Senior Unsecured Debentures in the total principal amount of $95 million due September 25, 2018. As of July 31, 2013, the amount outstanding on the Unsecured Senior Notes (including payment in kind interest) was approximately $154.4 million.

d. Holdings has also issued 12% Convertible Unsecured Notes due September 25, 2018. Initially, convertible notes in the principal amount of $59,741,000 were issued (the "Unsecured Pari Passu Notes"). Subsequently, additional convertible notes in the principal amount of $35,000,000 were issued (the "Unsecured Subordinated Notes"). The Unsecured Subordinated Notes rank subordinate in right of payment to the Unsecured Pari Passu Notes and the Unsecured Senior Notes and the Unsecured Pari Passu Notes rank pari passu in right of payment with the Unsecured Senior Notes. As of July 31, 2013, the amount outstanding on

the Unsecured Pari Passu Notes and the Unsecured Subordinated Notes (including payment in kind interest) respectively, was approximately $88.4 million and approximately $38.6 million.

11 The cash interest payment under the above described indebtedness is a payment of over $9 million on the first lien notes which became due on September 30, 2013, the date of the Initial Order.

Mobilicity Group's financial difficulties

12 Wireless telecom start-ups are highly capital-intensive. As indicated by the substantial indebtedness incurred by the Mobilicity Group to date, significant fixed costs must be incurred before revenue can be generated. During the period where a wireless carrier is building its customer base, revenue is typically insufficient to cover previously incurred investments and ongoing operating costs. It can take several years for a customer base to be adequately built to provide profitability. The applicants submit that Mobilicity ran out of "financial runway" before profitability was achieved and it now faces an imminent liquidity crisis.

13 For the seven months ended July 31, 2013, the Mobilicity Group recognized revenue of $46,864,490. During that period, the Mobilicity Group recorded a net loss of $71,958,543. As of July 31, 2013, the Mobilicity Group had on a consolidated basis accumulated a net deficit of $431,807,958.

14 In July 2012, the Mobilicity Group engaged National Bank and Canaccord Genuity (together, the "financial advisors") as their financial advisors in an effort to raise additional financing.

15 With the assistance of the financial advisors, the Mobilicity Group solicited more than 30 potential investors in an attempt to raise financing. In this regard, an investor roadshow was completed in August and September of 2012 without success.

16 The Bridge Notes facility was entered into on February 6, 2013 to allow Mobilicity to continue operations while it pursued strategic alternatives. The Bridge note lenders are the first lien note holders other than Catalyst, and certain existing holders of Unsecured Senior Notes. Catalyst has started oppression proceedings attacking the Bridge Notes facility.

17 Mr. William Aziz was retained in late April of 2013 through BlueTree Advisors II Inc. as Chief Restructuring Officer to provide assistance in dealing with restructuring matters. Mr. Aziz has extensive experience in the area of corporate restructuring.

18 The Mobilicity Group proposed alternative plans of arrangement earlier this year. During the course of those proceedings, a transaction was agreed to sell the Mobilicity Group to TELUS Corporation for $380 million pursuant to a plan of arrangement under the *Canada Business Corporations Act*. The plan of arrangement was approved on May 28, 2013. However, On June 4,

2013, the Minister of Industry announced that TELUS Corporation's application to transfer the spectrum licenses would not be approved at that time. Accordingly, the TELUS transaction was not completed.

19 The Mobilicity Group has continued to engage with potential acquirers. As part of those efforts, the Mobilicity Group solicited and received an expression of interest and engaged in detailed discussions with a significant U.S.-based wireless service provider. However, after significant due diligence these discussions did not ultimately result in a binding offer due to uncertainty surrounding the Government's upcoming spectrum auction.

20 In the two weeks preceding this application the Mobilicity Group developed a transaction structure for a proposed transaction with a prospective purchaser, which is currently being considered by Industry Canada. The government's assent to the proposed transaction was not obtained prior to this application being made.

Analysis

21 It is clear from the affidavit of Mr. Aziz that the Mobilicity Group is insolvent and that without the protection of the CCAA, a shutdown of operations would be inevitable as the Mobilicity Group will cease to be able to pay its trade creditors in the ordinary course and will cease to be able to make interest payments on its outstanding debt securities. Thus the applicants are entitled to relief under the CCAA.

22 The Initial Order contained provisions permitting a charge for directors and an administration charge. These were not opposed except as to part of the administrative charge discussed below. The applicants also sought authorization to continue the engagement of the financial advisors who had initially been retained in 2012, which was not opposed, and approval of KERP agreements for a small number of employees, also not opposed. The Monitor supported these provisions and they appeared to be reasonable, and were approved.

23 I will deal with issues that were raised by Catalyst, not in opposition to the Initial Order, but in opposition to certain parts of it.

DIP financing

24 The Mobilicity Group has obtained a $30 million DIP facility available in five tranches, to be used only in accordance with the cash flow forecasts of the applicants. They seek approval of this facility and a charge to secure the facility. The facility was obtained after a solicitation process undertaken by the Mobilicity Group and its financial advisors, described in some particularity in Mr. Aziz's affidavit. The lenders are the holders of the second lien notes under the Bridge Loan and other unsecured lenders of the Mobilicity Group.

25 The DIP financing ranks pari passu with the Bridge Notes, and subordinate to the first lien

notes, with the exception of cash interest payments under the DIP Financing. Since the DIP financing ranks subordinate to the first lien notes, the holders of the first lien notes, including Catalyst, will not be adversely affected by the DIP Financing.

26 In the solicitation process, the Mobilicity Group received DIP financing proposals from not less than four parties, including existing creditors as well as third parties with no prior financial involvement with the Mobilicity Group. One such proposal was provided by the holders of the Bridge Notes and another was provided by Catalyst. The Mobilicity Group engaged its financial advisors and legal counsel to assist in the evaluation of the DIP Financing options that were presented.

27 Upon review, the Mobilicity Group determined, with advice from its advisors, that the proposals provided by the non-creditor third parties likely could not be implemented. Therefore, the financial advisors held discussions with the holders of the Bridge Notes and Catalyst to obtain what the Mobilicity Group believed to be the best available offer from each party either in the form of a final definitive term sheet or definitive agreements. These discussions occurred over the course of several weeks.

28 The financial advisors and counsel to the Mobilicity Group evaluated these DIP financing options, including the Catalyst DIP term sheet, based upon, among other things, quantum, conditions, price, ranking and execution risk and provided their expert views to the board of directors of the Mobilicity Group. After consideration of the DIP financing options, and after considering the advice of its legal and financial advisors, the board of directors of the Mobilicity Group concluded that the DIP financing option presented by the holders of the Bridge Notes was the best available option.

29 Catalyst contends that the DIP lending should not be approved at this time. It points to the cash flow forecast of the applicants that indicates that no DIP borrowing will be required until the week ending November 8, 2013 and says that there is time to give consideration to other DIP facilities that might be available. Mr. Moore said that he expects to obtain instructions from Catalyst to propose DIP financing that will rank equally as the DIP lending proposed by the applicants but provide more money and on better terms than that provided for in the proposal before the court.

30 Mr. Moore relies on the statement of Blair. J. (as he then was) in *Re Royal Oak Mines Inc*. (1999), 6 C.B.R. (4th) 314 that extraordinary relief such as DIP financing with super priority status should be kept in the Initial Order to what is reasonably necessary to meet the debtor's urgent needs during the sorting out period. Each case, of course, depends on its particular facts. Unlike *Royal Oak*, the proposed DIP financing does not give the DIP lender super priority of the kind in *Royal Oak*. It will rank behind the first lien notes held by Mr. Moore's client. The issue is whether approval of DIP financing is necessary at this time.

31 As to that question, I accept the position of Mobilicity that it is important that now that the CCAA proceedings have commenced, approving a DIP facility will provide some assurance of

stability to the market place, including the customers of Mobilicity and its suppliers and dealers. If no DIP financing were approved, there is a serious risk that customers of Mobilicity, who do not have long term contracts, will go elsewhere. That would negatively affect the cash flow of Mobilicity and the assumption that advances under the DIP loan would not be required until November.

32 Should this DIP facility be approved with its proposed security? In my view it should. On the record before me, the facility was approved by the board of directors of the Mobilicity Group with the benefit of expert advice after a process undertaken to obtain bids for the loan. I recognize that board approval is a factor that may be taken into account but it is not determinative. See *Re Crystallex* (2012), 91 C.B.R. (5th) 207 (C.A.) at para. 85.

33 The factors in s. 11.2 (4) of the CCAA must be considered. I will deal with each of them.

(a) The period during which the company is expected to be subject to the CCAA proceedings.

34 Mobilicity hopes to be able to enter into a transaction with a proposed purchaser within a relatively short period of time. The applicants submit that it is reasonable to estimate that the proceedings could last to February, 2014 and that subject to its conditions, the DIP facility can provide funding until that time.

(b) How the company's business and financial affairs are to be managed during the proceedings.

35 The Mobilicity Group retained Mr. Aziz in April, 2013 as its CRO, and he will continue in that capacity. He is a person of known ability. The business will continue to be run on a day to day basis by management who are looking for stability to enable it to keep its customer base.

(c) Whether the company's management has the confidence of its major creditors.

36 Catalyst, as the holder of approximately 34% of the first lien notes, says it has no confidence in Mr. Aziz or the way that it alleges the Mobilicity Group has ignored the different interests of Mobilicity and its holding company. That is the subject of its claim for oppression. However, the balance of first lien note holders, all of the Bridge Note holders, approximately 92% of the unsecured debenture holders and all of the holders of the pari passu notes support the company's management and the approval of the DIP facility. That is, holders of $444 million of the Mobilicity Group's debt, or 88% of that debt, support management and the DIP facility.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement.

37 The Mobilicity Group's preferred course is to achieve a going concern transaction that will be of benefit to all stakeholders, including the first lien note holders. The DIP facility permits some stability and breathing room to enable this to happen.

(e) The nature and value of the company's property.

38 The earlier TELUS deal was for $380 plus assumption of obligations of the company. If the value of the Mobilicity Group is anywhere near that size, the $30 million DIP facility appears reasonable, particularly as it is to be drawn down in tranches when needed.

(f) Whether any creditor would be materially prejudiced as a result of the security.

39 No creditors will be materially prejudiced as a result of the DIP facility charge. The secured creditors likely to be affected by the charge have consented to it. The charge is junior to the security granted to the holders of first lien notes and is subordinate to any encumbrances that may have priority over the first lien notes either by contract or by operation of law.

(g) The position of the Monitor as set out in its report.

40 In its pre-filing report, E & Y, the proposed Monitor, has reviewed the process leading to the DIP facility and its terms. It states that it is of the view that the DIP facility charge is required and is reasonable in the circumstances in view of the applicants' liquidity needs.

41 In all of the circumstances, I approved the DIP facility and its charge. There is a come-back clause in the Initial Order, which Catalyst may or may not wish to utilize. I would observe that if Catalyst seeks to have a DIP facility proposed by it to replace the approved DIP facility, some consideration of the *Soundair*, [1991] O.J. No. 1137, and *Crown Trust Co. v. Rosenberg*, (1986) 60 O.R. (2d) 87, principles may be appropriate.

Stay of oppression action

42 The Initial Order sought by the applicants contained a usual stay order preventing the commencement or continuance of proceedings against or in respect of the applicants and the Monitor. Included in the protection were the DIP lenders, the holders of Bridge Notes and the Collateral Agent under the Bridge notes. The applicants submitted, and I agree with them, that this expanded group was appropriate in the circumstances as the holders of Bridge Notes and the Trustee have each been named in the oppression application brought by Catalyst. The holders of the Bridge Notes and the Trustee are parties to the oppression application by Catalyst solely due to their lending arrangements with the applicants and, as a result, the applicants are central parties to that litigation and would need to participate actively in any steps taken in that litigation. Further, any continuation of the oppression application against the holders of the Bridge Notes and the Trustee would distract from the goals of these proceedings and also result in unwarranted expenditure of

resources by the holders of the Bridge Notes and the Trustee, each of which are indemnified in a customary manner by the applicants for these types of expenditures. As the DIP lenders are also Bridge Note holders and as such parties are stepping into a similar financial position as the Bridge Note holders, the extension of the stay to those parties is appropriate and reasonable. See *Sino-Forest Corp. (Re)*, (May 8, 2012), Toronto CV-12-9667-00CL (Ont. S.C.J.); *Timminco Ltd. Re*., 2012 ONSC 2515 at paras. 23 and 24.

43 Catalyst contended, however, that the stay provisions should exclude its oppression application. Why this is so is not clear. Mr. Moore said there had been no steps taken in the application since the August cross-examination of Mr. Aziz, and that Catalyst would undertake not to take further steps until the come-back date. I see no reason why the oppression application should be excluded from the stay contained in the Initial Order. It may be that Catalyst will be paid out in the near future if the transaction now on the table can be concluded. In any event, it is open to any party to apply to lift a stay on proper grounds. Catalyst is no different.

Ad hoc committee charge

44 The Initial Order contains an administration charge to cover fees and disbursements to be paid out to the Monitor and its counsel, counsel to the applicants, counsel to the DIP lenders and counsel to the ad hoc committee of Noteholders. Catalyst contends that there is no basis for counsel for the ad hoc committee of Noteholders to be included in this charge or to be paid by the applicant.

45 In this case, counsel to the DIP lenders is also counsel to the ad hoc committee of noteholders. That committee includes the balance of the first lien noteholders other than Catalyst who are the Bridge Note holders. It was the Bridge Notes that permitted the Mobilicity Group to continue since February of this year. Those noteholders making up the ad hoc committee have been working in a supportive capacity in an attempt to have the Mobilicity Group re-organized in a constructive way. I am satisfied that the ad hoc committee has been of assistance to the process and that the charge is appropriate and necessary. I would also note that the administrative charge is junior to the first lien notes and thus the security position of Catalyst is not affected by the charge. As well the administrative charge is supported by the proposed Monitor.

Appointment of chief restructuring officer

46 The Initial Order authorizes the applicants to continue the engagement of William Aziz as the chief restructuring officer of the Mobilicity Group on the terms set out in the CRO engagement letter. This letter has been sealed as confidential. Catalyst said it should see the letter and until then no order should be made. On the day before this application was heard, counsel for the Mobilicity Group offered to send the complete record to counsel for Catalyst if an undertaking was given that the material would be kept confidential prior to the hearing. Mr. Moore objected to such a pre-condition and was served shortly before the hearing with the application record without the confidential documents.

47 Catalyst contends that no order should be made until it has had a chance to see the terms of the engagement letter. I do not think this wise. To proceed with the CCAA process without the continuation of Mr. Aziz as the chief restructuring officer would send the entirely wrong signal to all stakeholders, let alone the Government of Canada with whom Mr. Aziz has been dealing regarding a proposed transaction.

48 Mr. Aziz has a thorough knowledge of the affairs of the Mobilicity Group, having been its chief restructuring officer since April of this year. He has been central to the efforts of the applicants to restructure. He is very knowledgeable and experienced. In is appropriate that his engagement now be continued. The proposed Monitor has reviewed the engagement letter and is of the view that the fee arrangement is reasonable and consistent with the fee arrangements in other engagements of similar size, scope and complexity.

49 Counsel for the applicants and Catalyst were agreeable to working out an appropriate confidentiality arrangement. Once Catalyst has seen the engagement letter for Mr. Aziz, it will be entitled if so advised to bring whatever come-back motion it thinks appropriate.

50 The Initial Order as signed contains provisions as discussed in this endorsement.

F.J.C. NEWBOULD J.

---- End of Request ----
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