

In the Supreme Court of British Columbia

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, C. B-3, AS AMENDED

AND

IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF DRAKE TOWING (2018) LTD.

NOTICE OF APPLICATION

Name(s) of Applicant(s): Drake Towing (2018) Ltd. (the "Company")

To: Service List

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia on September 2, 2022 at 9:45 a.m. for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order abridging the time for service of this Notice of Application and dispensing with further service of this Notice of Application such that this Notice of Application is properly returnable on the date that it is heard;
2. An Order extending the stay of proceedings and the time for the filing of a proposal by the Applicants by forty-five (45) days to October 27, 2022;
3. An Order approving the proposed sale and investment solicitation process attached hereto as Schedule "A" for the sale or restructuring of the assets or business of the Company;
4. Such further and other relief as counsel may advise and this Honourable Court may deem just.

Part 2: FACTUAL BASIS

1. The Company requires an extension of time to file a proposal for a period of 45 days from September 12, 2022 to and including October 27, 2022 (the "Extension Period"), which

will allow sufficient time for a sale process to be commenced and for the Company and the Proposal Trustee to assess the level of market interest in the business of the Company and/or its principal assets (the "Sale Process").

2. Since the commencement of these proceedings, the Company has worked diligently to stabilize financial recording and financial performance. The Company has determined that it requires additional funds to continue operating and fund a proposal to creditors. The Company has not been able to source further lending, and the best alternative for the Company is to solicit investment from others or a sale of the assets of the Company.
3. The Company has been acting in good faith and with due diligence in attempting to formulate a proposal.
4. The Company is likely to present a valuable proposal to its respective creditors if it is granted the Extension Period within which to formulate same.
5. The Proposal Trustee supports the application for the Extension Period and the Sale Process.
6. No creditor will be materially prejudiced if the requested Extension Period is granted and the Company's Sale Process approved.
7. The Company is not aware of any person that opposes the relief sought.
8. Sections 50.4(7)(b)(iii) and 50.4(9) of the *BIA*.
9. Such further grounds as counsel may advise and this Honourable Court permits.

Part 3: LEGAL BASIS

Extension of Stay of Proceedings and time to file a proposal

1. Pursuant to Section 50.4(9) of the *BIA*, a debtor in a proposal proceeding may, before the expiry of the time to file a proposal, apply to the court for an order extending the time to file a proposal, by a maximum of 45 days, and the court may extend the time 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.

Sales Process

2. Pursuant to Section 65.13 of the BIA, an insolvent person under an NOI proceeding may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by the court. 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.

3. A superior court retains its inherent jurisdiction in the context of proceedings under the BIA:

Re Eagle River International Ltd, 2001 SCC 92 at para 20; and *Re Residential Warranty Co of Canada Inc*, 2006 ABCA 293 [*Residential Warranty*] at para 21.

4. In order for a Court to exercise its inherent jurisdiction in the context of proceedings under the BIA, two preconditions must be met:

- (a) the BIA must be silent on a point or not have dealt with a matter exhaustively; and
- (b) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it.

Residential Warranty (ibid).

5. There is no specific provision within the BIA governing the establishment of a sales process, nor are there any provisions prohibiting the Court from exercising its authority to approve a bidding process. Courts therefore rely on their broad authority under the BIA and their inherent jurisdiction when granting sales process orders.

6. Such orders are not uncommon in either proposal proceedings or CCAA proceedings.

7. Any proposed sale resulting from the sale process will remain subject to further order of the court. The proposed sales process provides a framework which will be taken into account

when the court is asked to approve a proposed sale in these NOI Proceedings pursuant to section 65.13 of the BIA.

8. It provides interested parties with a fair and transparent process by which offers will be received, which will allow the Proposal Trustee to obtain the best price for the benefit of stakeholders.

9. In *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) the court set out the following non-exhaustive list of guiding factors: whether a sale is warranted at this time, whether the sale is to benefit the whole “economic community”, whether any of the debtors’ creditors have a bona fide reason to object to the sale of the business, and whether there is a better viable alternative.

10. These factors have been used in NOI proceedings as well. A notable precedent is *Mustang GP Ltd. (Re)*, 2015 ONSC 6562.. There the court referenced CCM19 (a receivership) and the principles from *Soundair Corporation (Re)*, [1991] OJ No 1137 (ONCA) to propose the following additional factors: the fairness, transparency and integrity of the proposed process, the commercial efficacy of the proposed process in light of the specific circumstances of the case, and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

11. The Company has acted in good faith and with due diligence as set out above to navigate to a position to make this application with an intention of further improving its positions to the point where a viable proposal can be made to its creditors.

12. The Company intends to continue to stabilize accounting methods, continue operations, look for efficiency gains in operation, and develop a plan for a proposal to its creditors or a sales process in the extended time requested.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Harvey Sauer sworn June 13, 2022;
2. Affidavit #2 of Harvey Sauer sworn August 30, 2022
3. Proposal Trustee's First Report to the Court.
4. Proposal Trustee's Second Report to the Court.
5. Proposal Trustee's Third Report to the Court.
6. Such further and other material as counsel may advise and this Honourable Court permits.

The applicant(s) estimate(s) that the application will take 20 minutes.

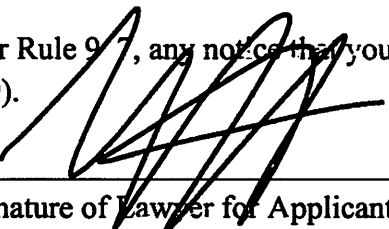
[] This matter is within the jurisdiction of a master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing or this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: ~~September~~ ^{August} 30, 2022



Signature of Lawyer for Applicant
Martin C. Sennott

This NOTICE OF APPLICATION is delivered by Martin C. Sennott of Martin C. Sennott Law Corporation on behalf of Boughton Law Corporation, whose place of business and address for delivery is PO Box 49290, 700 - 595 Burrard Street, Vancouver, BC V7X 1S8, 604-687-6789. (File No. 95212.1)

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

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.

SALES AND INVESTMENT SOLICITATION PROCESS

Pursuant to a Notice of Intention to File a Proposal, Crowe MacKay & Company Ltd. was appointed as trustee under the proposal (in such capacity, the "Proposal Trustee") of the assets, undertakings and property of Drake Towing (2018) Ltd. (the "Company") pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA").

On September 2, 2022, the Supreme Court of British Columbia (the "Court") issued an Order (the "SISP Order") which, *inter alia*, approved this sales and investment solicitation process (the "SISP") for the purchase, sale, investment or restructuring of the business and/or the properties, assets and undertakings of the Company (the "Assets"). This SISP describes the manner in which parties may gain access to or continue to have access to due diligence materials concerning the Company and the Assets, how bids involving the Company or the Assets will be submitted to and dealt with and how the Court approval will be sought in respect of a transaction involving the Assets or the Company.

All references to currency in the SISP are references to Canadian Dollars. In the SISP, "Business Day" means any day other than a Saturday, Sunday or statutory holiday in the Province of British Columbia.

1. "As Is, Where Is" Basis

- a. Any transaction involving the Assets or the Company will be subject only to such representations, warranties, covenants, or indemnities as are expressly included in the Final Purchase Agreement (as defined herein), but will otherwise be on an "as is, where is" basis, without representations or warranties of any kind by the Company or any of their respective agents or estates.

2. Publication of Notice and Solicitation of Interest

- a. On or before that day (the "Publication Date") which is three (3) days after the granting of SISP Order, the Proposal Trustee will cause notices of the SISP to be published in the Vancouver Sun and to be delivered to such other parties as the Proposal Trustee may reasonably believe are or would be interested in participating in the SISP.
- b. The Proposal Trustee may contact any persons to solicit non-binding indications of interest in the Assets or the Company.
- c. As soon as reasonably practicable after the granting of the SISP Order, the Proposal Trustee, in consultation with the Company, will prepare a list of potential bidders (the "Known Potential Bidders") who may have interest in a transaction involving the Assets or the Company. Such list will include parties who, in the Proposal Trustee's reasonable judgment, may be interested in acquiring an interest in the Assets whether pursuant to an asset purchase transaction (an "Asset Bid") or some other restructuring, recapitalization or other form of reorganization of the business, property or affairs of the Company, including but not limited to the debt, share, or capital structure of the Company (a "Restructuring Bid").
- d. The Proposal Trustee may prepare an initial marketing or offering summary (a "Teaser Letter") notifying Known Potential Bidders of the SISP and inviting the Known Potential Bidders to express their interest in making an Asset Bid or a Restructuring Bid.

- e. The Proposal Trustee may distribute to the Known Potential Bidders and any other interested persons any Teaser Letter, or other marketing material, as well as a form of confidentiality agreement (the “**Confidentiality Agreement**”).
- f. Any person who (a) executes a Confidentiality Agreement, in form and substance satisfactory to the Proposal Trustee, and (b) in the opinion of the Proposal Trustee, has the financial capabilities and technical expertise to make an Asset Bid or Restructuring Bid, shall be deemed to be a potential bidder (each such person so deemed, a “**Potential Bidder**”).

3. SISP and Timelines

- g. All offers must be submitted in accordance with the terms of the SISP and in compliance with the deadlines set out in the SISP which will be strictly enforced other than as provided in the SISP.
- h. As described in greater detail below the SISP will consist of the following deadlines:

PHASES	TIME PERIOD	TARGET DATE
Publication Date	Three (3) days following the granting of the SISP Order	September 5, 2022
Notification to Known Potential Bidders	Three (3) days following the granting of the SISP Order	September 5, 2022
Bid Deadline	Twenty-one (21) days following the Publication Date	September 26, 2022
Final Purchase Agreement Deadline	Ten (10) days following the Bid Deadline	October 6, 2022
Court Hearing	Within ten (10) Days following the Final Purchase Agreement Deadline	October 14, 2022
Outside Closing Date	Fourteen (14) dates after Court Hearing	October 28, 2022

- i. All deadlines contained herein expire at 5:00 p.m. (Pacific Time) on the date of the due date. Any deliverables contained in a deadline must be delivered to the Company and the Proposal Trustee in accordance with the delivery provisions below by no later than 5:00 p.m. (Pacific Time) on each deadline to be compliant with the SISP.
- j. Notwithstanding the foregoing, the Proposal Trustee, in consultation with the Company, may extend any one or more of the dates and deadlines referenced herein to a later date if, in their reasonable business judgment, they determine it is appropriate to do so.

4. Due Diligence

- a. The Proposal Trustee may prepare such marketing or other materials as the Proposal Trustee deems appropriate describing the opportunity to make an Asset Bid or a Restructuring Bid for distribution to Potential Bidders in accordance with the SISP.
- b. The Proposal Trustee shall provide Potential Bidders with information, including access to an electronic data room about the Assets and the Company's business. Additional information and due diligence opportunities (including, without limitation, on-site inspections) may be made available to Potential Bidders upon request and if the Proposal Trustee and the Company determine it to be appropriate for Potential Bidders to evaluate a transaction involving an Asset Bid or a Restructuring Bid.
- c. The Proposal Trustee, the Company and any of their agents, estates, advisors and professionals are not responsible for, and will have no liability with respect to, any information provided to or obtained by any Potential Bidder in connection with the Company or the Assets.

5. Bid Process

- a. Any Potential Bidder may submit an executed Asset Bid or a Restructuring Bid (each, a "Bid") to the Proposal Trustee on or before 5:00pm (Pacific Time) on September 26, 2022 (the "Bid Deadline"). The Proposal Trustee will provide to each of the Potential Bidders a template Asset Bid or Restructuring Bid (the "Purchase Agreement").
- b. A Bid shall be a "Qualified Bid" in the event that:
 - i. it is actually received by the Proposal Trustee by no later than 5:00pm (Pacific Time) on the Bid Deadline, subject to any extension as contemplated herein;
 - ii. it includes an executed offer (the "Offer") by the Potential Bidder on substantially the same terms and conditions as set forth in the Purchase Agreement;
 - iii. it includes:
 - A. a copy of the Purchase Agreement marked to show the differences between it and the executed Offer;
 - B. a deposit equal to 10% of the cash consideration to be paid pursuant to the Bid (the "Deposit"), which shall be paid by certified cheque or by wire transfer within three Business Days of the Proposal Trustee contacting the Potential Bidder that it is the Winning Bid (as defined herein);
 - C. evidence of the Potential Bidder's financial ability to complete the transaction described in the Bid as may be acceptable to the Proposal Trustee in its reasonable business judgment (notwithstanding the foregoing, this requirement of written evidence may be waived by the Proposal Trustee in its reasonable business judgment); and
 - D. evidence in form and substance satisfactory to the Proposal Trustee that the Bid and the Purchase Agreement have received all necessary authorization and approval from the Potential Bidder's board of directors or any other parties to comply with the Potential Bidder's corporate governance procedures

(notwithstanding the foregoing, this requirement may be waived by the Proposal Trustee in its reasonable business judgment);

- iv. it is irrevocable until the earlier of (i) the approval by the Court, and (ii) thirty (30) days following the days following the Bid Deadline; provided, however, that if such Bid is selected as the Winning Bid, it shall remain irrevocable until the closing of the Winning Bid, as the case may be;
- v. it is not conditioned on the outcome of any unperformed due diligence and includes an acknowledgement and representation that the Potential Bidder has had an opportunity to conduct any and all required due diligence prior to making its Bid, that it has relied solely on its own independent review, investigation and/or inspection of any documents and/or the Assets and the Company in making the Bid, and that it did not rely on any written or oral statements, representations, promises, warranties, conditions or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets and the Company or the accuracy or completeness of any information provided in connection therewith;
- vi. it is not conditioned on any break-up fee, termination fee, expense reimbursement or other Bid protection provision;
- vii. it fully discloses the identity of each entity that will sponsor or participate in the Bid and the complete terms of any such sponsorship or participation, including all of the Potential Bidder's principal advisors, subject, however, to the Potential Bidder's right to assign the Purchase Agreement (further and notwithstanding the foregoing, this requirement may be waived by the Proposal Trustee in its reasonable business judgment);
- viii. it provides for closing of the proposed transaction by no later than fourteen (14) days after the Approval Order (as defined herein) is granted by the Court (the "**Outside Closing Date**");
- ix. it contains any other information that may be reasonably requested by the Proposal Trustee in advance of that day which is no later than the Bid Deadline, subject to any extension as contemplated herein.

6. Selection of Winning Bid

- a. In reviewing the Qualified Bids and before determining the Winning Bid (as defined herein), the Company and the Proposal Trustee shall retain full discretion and authority to discuss the bids received, and their terms, with the applicable Potential Bidder.
- b. The Company shall, in consultation with the Proposal Trustee, exercise its judgment and have the discretion to negotiate the terms of the Qualified Bids with the Potential Bidders and select the best Qualified Bid (the "**Winning Bid**"). The person(s) who made the Winning Bid shall be the "**Winning Bidder**".
- c. In negotiating, selecting and concluding a Winning Bid, the Company may consider such criteria as it deems appropriate, including but not limited to items such as:
 - i. the purchase price;
 - ii. the counterparties to the transaction;

- iii. the terms of the proposed Purchase Agreement and other transaction documents;
 - iv. other factors affecting the speed, certainty and value of the transaction, including conditions required to close the transaction; and
- d. the likelihood and timing of consummating the transaction.
- e. The Proposal Trustee shall notify the Winning Bidder, if any, and any other bidders of their respective status as soon as reasonably practicable in the circumstances.
- f. The Company may, in consultation with the Proposal Trustee, negotiate the terms of and enter into the Offer with the Winning Bidder (the "**Final Purchase Agreement**"). Any Final Purchase Agreement entered into with the Winning Bidder shall be executed on or before ten (10) days following the Bid Deadline October 6, 2022 (the "**Final Agreement Deadline**").
- g. The Company has the right not to accept any Qualified Bid.

7. Termination of the SISP

- h. In the event that:
- i. there are no Qualified Bids, as determined by the Proposal Trustee in accordance with the SISP, within two (2) days after the Bid Deadline, or no Qualified Bids are deemed commercially reasonable by the Proposal Trustee; or
 - ii. there is no Winning Bid, as determined by the Proposal Trustee in accordance with the SISP, within five (5) business days after the Bid Deadline; or
 - iii. a Final Purchase Agreement is not executed by the Final Agreement Deadline; or
 - iv. a transaction contemplated by the Final Purchase Agreement does not close by the Outside Closing Date,
- then the SISP shall terminate.

8. Approval Hearing

- a. In the event that the Company enters into a Final Purchase Agreement with respect of a Winning Bid, or any other bid, the Company shall apply for an order (the "**Approval Order**") from the Court approving the transaction contemplated by that bid and any necessary or appropriately related relief required to consummate the transaction contemplated by that bid (the "**Court Hearing**").

9. Return of Deposits

- a. The Deposit provided in connection with the Winning Bid will be retained by the Proposal Trustee until a transaction is completed pursuant to the Winning Bid.
- b. Notwithstanding anything contained in the SISP, the Company may in their sole discretion declare that any one or more Potential Bidder or Qualified Bidder is not entitled to participate any further in the SISP and in such case the applicable Deposit will be returned by the Proposal Trustee.

10. Notice

- a. All documents and correspondence to be delivered to a party in connection with the SISF shall be delivered by courier, fax or email to the Company and the Proposal Trustee as follows:

(i) to the Company:

by email to the following addresses:

accounts@draketowing.com
hsauer@alquipediesel.com

in writing to the following address:

1553 Powell Street
Vancouver, BC V5L 5C3

Attn: Colleen Sauer and Harvey Sauer

with a copy to the Company's counsel:

by email to the following address:

msennott@boughtonlaw.com

in writing to the following address:

700 – 595 Burrard Street
Vancouver, BC V7X 1S8

Attn: Martin Sennott

(ii) to the Proposal Trustee:

by email to the following addresses:

Derek.Lai@crowemackay.ca
Nelson.Allan@crowemackay.ca

in writing to the following address:

Crowe MacKay & Company Ltd.
1100 - 1177 West Hastings Street
Vancouver BC V6E 4T5

Attention: Derek Lai and Nelson Allan

with a copy to the Proposal Trustee's legal counsel:

by email to the following address:

KMak@cwilson.com

in writing to the following address:

Clark Wilson LLP
900 – 885 West Georgia Street
Vancouver BC V6C 3H1

Attention: Katie Mak

11. Modifications

- a. The Company, in consultation with the Proposal Trustee, may:
 - i. determine, in their reasonable business judgment, which Qualified Bid, if any, is the highest or otherwise best offer,
 - ii. reject, at any time any Bid that is
 - A. inadequate or insufficient;
 - B. not in conformity with the requirements of the SISP; or
 - C. contrary to the best interests of the Company.
- b. The Company, in consultation with the Proposal Trustee, may make any changes, modifications, substitutions, or extensions to any term, provisions or conditions in the SISP, including extending any timelines or waving any conditions, that the Company determine, in their reasonable business judgment, are appropriate.
- c. The Company, in consultation with the Proposal Trustee, may terminate the SISP at any time if the Company determine it is appropriate to do so, in their reasonable business judgment.

12. Other

- a. In the event that the Company and any party disagree as to the interpretation or application of the SISP, the Court will have jurisdiction to hear and resolve such dispute.
- b. At any time during the SISP, the Company or the Proposal Trustee may apply to the Court for advice and directions with respect to the discharge of their power and duties hereunder.
- c. This SISP does not and will not be interpreted to create any contractual or other legal relationship between the Proposal Trustee or the Company and any other participant in the SISP, except as specifically set forth in a definitive agreement that may be signed with the Company.
- d. Without limiting the provisions of the first paragraph of this section entitled "Other", in the event any Potential Bidder or Qualified Bidder objects or takes issue with any act or decision of the Company or the Proposal Trustee under or pursuant to the SISP taken at a time when such person was either a Potential Bidder or a Qualified Bidder then:
 - i. such person may deliver to the Proposal Trustee and the Company, within three Business Days following such act or decision, a written notice detailing the objection or issue (the "Objection Notice"); and
 - ii. the Proposal Trustee shall then promptly apply to the Court for directions in respect of:

- A. whether such person has the standing to have given the Objection Notice;
and
 - B. the merits of the objection set out in the Objection Notice
- and the Court may grant such directions or relief, if any, that it determines to be appropriate in the circumstances.

For further certainty, in the event such an application occurs, the time limits and deadlines set out in these Bidding Procedures shall be extended as may be ordered by this Court upon request of the Company or the Proposal Trustee.