

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
NFC ACQUISITION GP INC., NFC ACQUISITION CORP. AND
NFC LAND HOLDINGS CORP.**

**FACTUM OF
NFC ACQUISITION GP INC., NFC ACQUISITION CORP. AND
NFC LAND HOLDINGS CORP.
(Initial Order (January 17, 2012))**

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PART 1 - THE FACTS

The Application

1. This factum is filed in support of the application of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp. (collectively, the "Applicants") for certain relief under the *Companies' Creditors Arrangement Act* (the "CCAA"), including, *inter alia*, the granting of a stay of proceedings by this Honourable Court to facilitate the restructuring of the Applicants, New Food Classics ("NFC" or the "Company") and NFC Acquisition L.P. ("Acquisition LP") (NFC and Acquisition LP being the "Partnerships", and together with the Applicants, the "NFC Entities") and implementation of a sale process with respect to the NFC Entities' property and business.

2. The NFC Entities will also be seeking this Honourable Court's appointment of FTI Consulting Canada Inc. ("FTI") as monitor in the these proceedings.

3. Detailed facts in respect of this application are more fully set out in the Affidavit of Brian Cram, sworn January 16, 2012 (the "Cram Affidavit"), a copy of which is included in the Applicant's Application Record. Capitalized terms used but not defined herein have the meaning ascribed to them in the Cram Affidavit.

PART II - THE LAW

The Applicability of the CCAA to the NFC Entities

The Applicability of the CCAA to the Applicants

4. The CCAA applies to a “debtor company” or affiliated debtor companies where the total of claims against the debtor company and its affiliates exceeds \$5 million. The CCAA defines “company” as, *inter alia*, a company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, including an income trust. Pursuant to Section 2 of the CCAA, a “debtor company” is defined in the CCAA as, *inter alia*, a company that is insolvent.

CCAA, Section 2(1), “debtor company”, “company”

CCAA, Section 3(1)

5. The Applicants are corporations established under the laws of Canada and Ontario, as the case may be. Each Applicant is a company for the purpose of the CCAA.

6. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of “insolvent”, courts have been guided by the definition of “insolvent person” in Section 2(1) of the *Bankruptcy and Insolvency Act* (the “BIA”). An “insolvent person” is defined in the BIA as a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars, and:

- (a) who is for any reason unable to meet his obligations as they generally become due;
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 at paras. 21-22 (Ont. S.C.J.) [*Stelco*], Brief of Authorities of the Applicants, Tab 1

BIA, Section 2(1), “insolvent person”

7. A company is deemed to be insolvent if the requirements of any one of the tests are satisfied and such company would be a “debtor company” entitled to apply for protection under the CCAA.

Stelco, at paras. 26 and 28; Brief of Authorities of the Applicants,
Tab 1

8. In *Stelco*, the Court applied an expanded definition of “insolvent” in the CCAA context to reflect the “rescue” emphasis of the CCAA to include a financially troubled corporation that is “reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”

Stelco, at paras. 25 and 26; Brief of Authorities of the Applicants,
Tab 1

9. The NFC Entities have been unable to meet various financial and other covenants set out in the Term Facility and the Non-Revolver Loan Facility and do not have the liquidity needed to meet their ongoing payment obligations. The NFC Entities cannot meet their liabilities as they come due and do not have sufficient cash to continue to fund their operations. The NFC Entities meet both the BIA and *Stelco* tests for being insolvent.

10. Each of the Applicants is therefore a debtor company for the purpose of the CCAA. The total claims against the NFC Entities (and the Applicants, specifically) are in excess of \$5 million.

The Applicability of the CCAA to the Partnerships

11. The CCAA definition of an eligible applicant does not expressly include partnerships. However, Courts in CCAA proceedings often exercise their statutory jurisdiction to stay proceedings with respect to partnerships and limited partnerships affiliated with one or more applicants where it is just and convenient to do so. Courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.

Re Calpine Canada Energy Ltd. (2006), 19 C.B.R. (5th) 187 at paras. 33 and 34 (Alta. Q.B.), Brief of Authorities of the Applicants, Tab 2

Re Canwest Global Communications Corp. 2009 CarswellOnt 6184 (S.C.J.) [*Canwest Global*], at para. 29, Brief of Authorities of the Applicants, Tab 3

12. An order to such effect was made by the Court in the recent CCAA proceedings in respect of Prizm Income Fund. et al. (Court File No. 11-CL-9159-00CL).

13. The operations of the NFC Entities are substantially intertwined. In particular: (i) the NFC Entities conduct operations through NFC; (ii) NFC is the entity in which the majority of the assets of the NFC Entities reside; (iii) NFC is the party liable for the majority of the operating liabilities of the NFC Entities; (iv) NFC employs the majority of the NFC Entities' employees; and (v) Acquisition LP is the borrower under the Term Facility and the Non-Revolving Loan Facility (with the remaining NFC Entities being guarantors).

14. It is necessary to extend CCAA protection and relief to the Partnerships, as failure to do so would have a detrimental impact on, if not preclude entirely, the NFC Entities' restructuring and value of the NFC Entities property and business.

Approval of Stay of Proceedings

15. Pursuant to Section 11.02(3) of the CCAA, on an initial application in respect of a debtor company the Court may make an order on any terms that it may impose where the applicant satisfies the Court that circumstances exist that make the order appropriate.

CCAA, Section 11.02(3)

16. The CCAA has been described as a statute intended to "facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy" and, as such, is "remedial legislation entitled to a liberal interpretation". The Court has also expressly recognized one of the purposes of the CCAA to be the facilitation of ongoing operations of a business where its assets have a greater value as part of an integrated system than individually.

Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) [*Lehndorff*], at paras. 6 and 7, Brief of Authorities of the Applicants, Tab 4

Re Nortel Networks Corp. (2009), 55 C.B.R. (5th) 229 (Ont.S.C.J.)
[*Nortel*], at para. 47, Brief of Authorities of the Applicants, Tab 5

17. The power to grant a stay of proceedings should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and to enable continuance of the company seeking CCAA protection.

Lehndorff, at para. 10, Brief of Authorities of the Applicants, Tab 4

18. A stay of proceedings will allow the NFC Entities to maintain operations while giving them the necessary time to facilitate the NFC Entities' restructuring and implementation of a sale process with respect to their property and business. The preservation of the business will satisfy NFC's principal customers with respect to the stability of the restructuring process in place and the prospects for continuing the business as a going concern.

Approval of DIP Charge

19. Section 11.2 of the CCAA provides the Court with express jurisdiction to grant a DIP financing charge:

11.2(1) Interim Financing — On application by a debtor company 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 company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2) Priority — Secured Creditors — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, Section 11.2

20. Section 11.2(4) of the CCAA sets out the factors to be considered by the Court in deciding whether to grant a DIP financing charge:

11.2(4) Factors to be considered — In deciding whether to make an order, the court is to consider, among other things:

- (a) the period during which the company is expected to be subject to proceedings under the CCAA;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report.
- CCAA, Section 11.2(4)

21. In the *Canwest Global* case, the Court stressed the importance of meeting the criteria set out in Section 11.2(1), namely:

- (a) whether notice has been given to secured creditors likely to be affected by the security or charge;
- (b) whether the amount to be granted under the DIP facility is appropriate and required having regard to the debtors' cash-flow statement; and
- (c) whether the DIP charge secures an obligation that existed before the Order was made (which it should not).

Canwest Global, at paras. 32-34, Brief of Authorities of the Applicants, Tab 3

22. In order to continue to operate during these proceeding, it is apparent from the Cash Flow (prepared with the assistance of the Monitor) that the NFC Entities require debtor-in-possession financing, as there would otherwise be insufficient monies to pay essential operating expenses and costs associated with these proceedings going forward. Such financing is integral to maximizing the value of the NFC Entities' property and business and will enhance the prospects of a going concern sale, to the benefit of employees, customers and suppliers. The prospective

Monitor will be assisting the NFC Entities during these proceedings is supportive of the DIP Charge.

23. The proposed DIP Charge does not secure obligations that pre-date the proposed Initial Order. In addition, at this time, the NFC Entities are not seeking to have the DIP Charge prime existing PPSA registrants, aside from the existing secured claims of the Bank of Montreal and TD Capital Mezzanine Partners Management Ltd., each of which has been provided with notice of these proceedings. The NFC Entities may, after the commencement of the CCAA Proceedings, seek a further priority for the DIP Charge ahead of other secured claims, liens and encumbrances.

Approval of Administration Charge

24. Section 11.52 of the CCAA provides the Court with the statutory jurisdiction to grant an Administration Charge and provides as follows:

11.52(1) Court may order security or charge to cover certain costs — 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 debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, Section 11.52

25. In addition to the considerations provided for in Section 11.52 of the CCAA, the Court has held that the following factors should also be considered:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.

Re Canwest Publishing Inc. 2010 ONSC 222 (CanLII) (S.C.J.), at para. 54, Brief of Authorities of the Applicants, Tab 6

26. The size and complex nature of the NFC Entities' business requires the specialized legal and financial skill sets of the proposed beneficiaries of the Administration Charge, each of which will play a critical role in the CCAA proceedings in respect of the NFC Entities. It is unlikely that these beneficiaries will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. There is no unwarranted duplication of roles among these beneficiaries in these proceedings.

27. The NFC Entities worked with FTI to estimate the proposed quantum of the Administration Charge and believe it to be reasonable and appropriate in view of the complexities of the NFC Entities' CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge. The beneficiaries of the Administration Charge intend to bill weekly in order to facilitate proceeding with a smaller Administration Charge; the Cashflows reflect these intentions.

28. The considerations set out in paragraph 23 above apply to the Administration Charge with respect to the priming of certain secured interests.

Approval of Directors' and Officers' Charge

29. The CCAA has codified the granting of directors' and officers' charges on a priority basis in section 11.51 which provides as follows:

11.51(1) Security or charge relating to director's indemnification
— On application by a debtor company and 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 the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, Section 11.51.

30. In the *Canwest Global* case, the Court applied Section 11.51 at the debtor company's request for a directors' and officers' charge, noting that the Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings. In approving the request, the Court held that:

[t]he purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approve the request.

Canwest Global, at para. 48, Brief of Authorities of the Applicants,
Tab 3

31. To ensure the ongoing stability of the NFC Entities' business during the CCAA period, the NFC Entities require the continued participation of their directors and officers.

32. There is an existing claims-made insurance policy with respect to directors' and officer's liability. However, as of the date hereof, the insurer has not admitted coverage with respect to liabilities of the NFC Entities for which the directors may be personally liable and there is potential ambiguity in respect of the extent of coverage for certain liabilities. In the present circumstances, it is not possible to obtain at reasonable cost further coverage that is satisfactory.

33. The quantum of the proposed Directors' and Officers' Charge has been considered by FTI and negotiated by the NFC Entities and The Bank of Montreal. It is reflective of certain prospective obligations for which the directors and officers of the NFC Entities could potentially be held personally liable.

34. The considerations set out in paragraph 24 above apply to the Directors' and Officers' Charge with respect to the priming of certain secured interests.

Approval of Sale Process

35. The remedial nature of the CCAA confers broad powers on the Court in order to facilitate the restructuring of insolvent companies. This jurisdiction stems, *inter alia*, from Section 11 of the CCAA, which provides that a Court may, "subject to the restrictions set out in [the CCAA] ... make any order it considers appropriate in the circumstances" and from the inherent jurisdiction of Courts to fill in the gaps of the CCAA in order to give effect to its purposes.

CCAA, Section 11

Nortel, at para. 30, Brief of Authorities of the Applicants, Tab 5

Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 at para. 45 (Ont. Gen. Div.), Brief of Authorities of the Applicants, Tab 7

36. In the *Nortel* case, the Court articulated certain factors that should be considered when determining whether to authorize a sales process in a CCAA proceeding:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole "economic community"?

- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?

Nortel, at paras. 48 and 49, Brief of Authorities of the Applicants,
Tab 5

37. Prior to these proceedings, in exploring their strategic options, the NFC Entities were engaged in extensive efforts to raise additional capital and negotiate strategic combinations, which proved unsuccessful. The NFC Entities have now been advised by the DIP Lender that they must expeditiously conduct the Sales Process in order to receive the benefit of the proposed DIP Facility.

38. The Sale Process will benefit the whole economic community, as it will provide the NFC Entities with an opportunity to preserve their business and continue as a going concern, resulting in continued employment for their employees, uninterrupted service to customers, and continued business for suppliers.

39. The NFC Entities' creditors are not prejudiced by the Sales Process and retain their rights to raise any concerns over or objections to a proposed sale at a future motion to approve an asset sale. The Bank of Montreal is supportive of the Sale Process and it is to be conducted with the assistance of the Monitor, acting as sales agent.

PART III - ORDER REQUESTED

40. The Applicant, therefore, requests an order substantially in the form of the draft order included in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



David Bish



Adam M. Slavens

Lawyers for NFC Acquisition GP Inc.,
NFC Acquisition Corp.,
NFC Land Holdings Corp.,
New Food Classics and
NFC Acquisition L.P.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.)
2. *Re Calpine Canada Energy Ltd.* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.)
3. *Re Canwest Global Communications Corp.* 2009 CarswellOnt 6184 (S.C.J.)
4. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.)
5. *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont.S.C.J.)
6. *Re Canwest Publishing Inc.* 2010 ONSC 222 (CanLII) (S.C.J.)
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