

CANADA  
District of Ontario  
Division No. 05 - London  
Court No. 35-2638322  
Estate No. 35-2638322

## TRUSTEE'S PRELIMINARY REPORT

### IN THE MATTER OF THE BANKRUPTCY OF KMW ENERGY INC. OF THE CITY OF LONDON, IN THE PROVINCE OF ONTARIO

Licensed Insolvency Trustee (“**Trustee**”): MNP Ltd.

*The information contained in this Preliminary Report has been prepared from the available books and records of the Company (as such term is later defined). These books and records have not been reviewed or otherwise audited by the Trustee and, consequently, the Trustee expresses no opinion whatsoever with respect to the validity, the exactness or the reliability of the information taken from those records contained herein.*

#### **SECTION A - BACKGROUND**

KMW Energy Inc. (“**KMW**” or the “**Company**”) is an Ontario corporation that carried on business out of its leased premises in London, Ontario (the “**Premises**”). KMW designed, developed and supplied components of biomass combustion system boilers and heaters.

The Company attributed its financial difficulties primarily to a contract the Company entered into with Georges River Energy, LLC (“**GRE**”) dated December 6, 2016 (the “**GRE Contract**”) for the design and supply of a complete biomass energy system to generate 8.5MW of electric power, including turbine, generation and cooling tower (the “**GRE Project**”). At GRE’s request and in order to reduce the cost of the GRE Project, the Company sourced the turbines from a new supplier to the Company. The turbine, delivered in May 2018, did not function properly. Thereafter, the Company spent an additional US\$1.688MM trying to repair the turbine. To date, the turbine has not functioned to GRE’s satisfaction.

**Proposal Proceedings**

On April 11, 2020 (the “**NOI Filing Date**”), the Company filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to section 50.4 of the *Bankruptcy and Insolvency Act* (the “**BIA**”), wherein MNP Ltd. (“**MNP**”) was named as proposal trustee (the “**Proposal Trustee**”).

The Company received an extension of time from the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) within which to file a Proposal with the Official Receiver, with the extension expiring on June 25, 2020 (the “**NOI Deadline**”).

On May 1, 2020, the Court approved a stalking horse sale process (the “**Sale Process**”) to sell the Company’s assets and business. Offers were due on May 29, 2020 (the “**Bid Deadline**”). On the same date, the Court also approved interim financing up to a maximum of \$500M (the “**DIP Loan Facility**”) from 2751602 Ontario Inc. (“**Stalking Horse Bidder**”) for the purpose of funding KMW’s activities. During the NOI proceedings, KMW borrowed an amount of \$462,340 under the DIP Loan Facility.

Despite diligent efforts by the Proposal Trustee and the Company to find a buyer of its assets and operations on a going-concern basis, no offers were received by the Bid Deadline. Pursuant to the Sale Process, if no Qualified Bid (as defined therein) was received by the Bid Deadline, the Asset Purchase Agreement between the Company and the Stalking Horse Bidder, dated April 24, 2020 (the “**Stalking Horse APA**”) would be the Winning Bid (as defined in the Sale Approval Order). and the Company would seek approval of the Court to complete the transaction contemplated by the Stalking Horse APA (the “**Transaction**”). The Transaction was granted Court approval on June 22, 2020 and was completed on June 25, 2020.

**Bankruptcy**

As a result of the Company's failure to file a proposal by the NOI Deadline, KMW was deemed to have made an assignment in bankruptcy on June 26, 2020 (the "**Bankruptcy Date**"). MNP was appointed the Trustee of the estate, subject to affirmation by creditors.

On July 3, 2020, the Notice to Creditors advising of the bankruptcy and the First Meeting of Creditors ("**FMOC**"), a list of creditors and a proof of claim form, along with a proxy, were sent to all known creditors of the Company. Pursuant to subsection 102(4) of the BIA, the Notice of Bankruptcy was published in the July 7, 2020 edition of the *London Free Press*.

The various public documents related to KMW NOI and bankruptcy proceedings are posted at Trustee's case website at: <https://mnpdebt.ca/en/corporate/engagements/kmw-energy-inc>.

**SECTION B – PRELIMINARY EVALUATION OF ASSETS AND SECURITY INTERESTS**

The Transaction was completed prior to the Bankruptcy Date and involved a sale of substantially all of KMW assets. The Transaction excluded, *inter alia*, seven project contracts and the following claims against Chola Turbo Machinery International Private Limited ("**Chola**"), with respect to certain machinery supplied by Chola to KMW in connection with the GRE Project: :

1. A claim under a Performance Guarantee;
2. A claim under a Corporate Guarantee; and
3. A claim under a Global Commercial Warranty (the "**Warranty Claim**"),

(collectively, referred to as the "**Excluded Assets**").

The Excluded Assets are subject to the Secured Lender's secured claim (as defined below- and see Section E below).

**SECTION C – BOOKS AND RECORDS**

The Trustee has taken possession and control of the Company's available books and records necessary for the administration of these proceedings.

**SECTION D - CONSERVATORY AND PROTECTIVE MEASURES**

As the Company had no physical assets on the Bankruptcy Date, no conservatory or protective measures were necessary.

**SECTION E - PROVABLE CLAIMS**

The claims of creditors as per the Company's Statement of Affairs ("SOA") and the claims filed as at 2:00 pm on July 16, 2020 are summarized below:

	<u>SOA</u>	<u>Claims as Filed</u>
Secured/Deemed Trust	\$ 9.00 <sup>1</sup>	Nil
Preferred	Nil	Nil
Unsecured	\$7,542,830.58	\$4,402,944.58
Contingent	\$5,071,156.00	Nil
	\$12,613,995.58	\$4,402,944.58

462673 Ontario Inc. operating as Nor-Arc Steel Fabricators ("Nor-Arc") was, until April 17, 2020<sup>2</sup>, KMW's only secured creditor registered under the Ontario *Personal Property Security Act* ("PPSA"). Pursuant to an assignment agreement dated April 20, 2020, the Stalking Horse Bidder, who is a party related to Nor-Arc, took an assignment of all of the debt and security owed by KMW to Nor-Arc, (the Stalking Horse Bidder, now referred to as the "**Secured Lender**") and the claim

<sup>1</sup> The SOA reflects KMW's indebtedness to the DIP Lender as approximately \$2,740,426; the Excluded Assets are reflected as having a value of \$9 on the statement of affairs. The balance of the DIP Lender's claim is considered an unsecured claim. At the time of writing the report, the DIP Lender has not filed a proof of claim.

<sup>2</sup> On April 17, 2020, Liberty Mutual registered a security interest under the PPSA. Liberty Mutual is a secured creditor as it issued a performance bond in respect of the GRE Project.

being the “**Secured Claim**”). During the NOI Proceedings, Weisz Fell Kour LLP (“**WFK**”), the Proposal Trustee’s independent legal counsel, provided the Proposal Trustee with an opinion confirming that, subject to certain standard assumptions and qualifications, Nor-Arc has valid and enforceable security over the Property, with such security agreement having now been assigned to the Secured Lender.

The Trustee has not determined the admissibility of the above-noted claims for dividend purposes.

**SECTION F - LEGAL PROCEEDINGS, TRANSFERS AT UNDER-VALUE AND PREFERENCE PAYMENTS**

*Legal Proceedings*

The Secured Lender advised the Trustee that Loopstra Nixon LLP, its counsel, has analysed the Warranty Claim and believed that commencement of the Warranty Claim needed to be done on or prior to July 10, 2020, in order to come within certain Warranty deadlines and limitation periods. The filing of the Warranty Claim was necessary in order to preserve the Warranty Claim as an asset of the estate. Accordingly, the Trustee authorized Loopstra Nixon LLP to issue and serve a Notice of Action on behalf of the estate in respect of the Warranty Claim by July 10, 2020, naming, among others, Chola as defendants therein, for the purpose of preserving the Warranty Claim. After seeking advice from WFK, the Trustee entered into an agreement with the Secured Lender, authorizing the issuance of the Notice of Action on behalf of the estate. In consideration for the Trustee commencing the Action, the Secured Lender agreed to, *inter alia*:

- (a) waive its secured claim such that the Secured Lender shall have an unsecured claim in the estate. The waiver of the Secured Lender’s secured claim allows unsecured creditors to see potential recovery from the pursuit of the Warranty Claim and any other Excluded Asset;
  - (b) bear all costs of issuing and serving the Notice of Action and any claim preservation steps;
- and

(c) together with Nor Arc, indemnify the trustee for any costs or liabilities arising out of these claims.

*Transfers at Under-Value and Preference Payments*

The Trustee is still in the process of completing its review of the Company's books and records in order to identify any potential transfers at undervalue or preference payments. The scope of the review will be limited to a review of certain disbursements made in the 12 months preceding the NOI Filing Date and inquiries with management.

Based on the information provided by the Company, the Company maintained its bank accounts at BMO Bank of Montreal. The Trustee has conducted a preliminary review of the Company's bank statements in respect of the following bank accounts for the periods referenced below. The Company has further confirmed that no credit cards were set up and all payments were made through the Company's bank accounts only:

- CAD Chequing Account: 12-month period preceding the NOI Filing Date
- USD Chequing Account: 12-month period preceding the NOI Filing Date

The Trustee will discuss any matters which require attention of the creditors and any findings with the Inspector(s), if appointed at the FMOC.

**SECTION G - ANTICIPATED REALIZATIONS AND PROJECTED DISTRIBUTION**

Given the foregoing and the SOA, the Trustee does not anticipate any realizations in the estate, and therefore no distributions to Company's creditors in this proceeding.

**SECTION H - OTHER MATTERS**

*Indemnity Agreement*

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Prior to the filing of the NOI, MNP received a retainer of \$17,500 from KMW, which has been held in trust to be applied against the professional fees and costs associated with the bankruptcy and the NOI.

*Other*

The Purchase Price included payment of any and all amounts and claims which rank in priority to the DIP Lender's Secured Claim, if any, including, without limitation, on account of unremitted source deductions. Prior to closing of the Transaction, KMW had confirmed payment of wages, vacation pay and related source deductions through June 25, 2020. To date, Canada Revenue Agency has not conducted an audit.

*WEPP*

The Trustee understands that the Stalking Horse Bidder extended offer of employment to all of KMW's employees on substantially the same terms. Accordingly, the Trustee does not anticipate having to administer the Wage Earner Protection Program in respect of KMW's former employees.

Dated at Toronto, Ontario this 17<sup>th</sup> day of July 2020.

***MNP LTD.***

***Trustee of the Estate of  
KMW Energy Inc., a Bankrupt***

Per:



Sheldon Title  
License Insolvency Trustee