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August 6, 2021

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Honourable Justice John Bodurtha
Supreme Court of Nova Scotia (Halifax)
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord:

Re: Hfx. No. 507069: Motion of Atlantic Crane & Material Handling Limited, Labrador Cranes 2005 Limited, and LCB Rentals Limited (the "Applicants") for an order approving a Stalking Horse Asset Purchase Agreement and related sales process, and for a Stay Extension pursuant Section 50.4(9) of the Bankruptcy and Insolvency Act (*"BIA"*) extending the time to file a Proposal in this proceeding.

A motion is to be heard by your Lordship on August 19, 2021, at 9.30 a.m. wherein the Applicants seek the following orders:

1. An Order approving the sales process to market for sale the business of the Applicants, and approving, authorizing and directing the Applicants to enter into an asset purchase agreement (the "Stalking Horse APA") with Russell Industries Corp. ("Russell"), or its assignee, *nunc pro tunc*;

2. An order an Order providing that access to Appendix "A" to the Second Report of the Proposal Trustee (the "Confidential Supplement") be restricted to the Chambers Justice (or other such persons as may be designated by the Chambers Justice) for a period of three (3) months from the date of the Order; and

3. An order extending the stay of proceedings from August 19, 2021, up to and including October 1, 2021.

Filed on this motion are:

1. The Affidavit of Jack Miner;
2. The second Report of MNP Limited, Proposal Trustee ("the Trustee" and the Trustee's Report");
3. The Confidential Supplement (sent directly to your Lordship);
4. Three draft orders;
5. This brief.

An affidavit of service will be filed once service has been affected.

The Facts

The Affidavit of Jack Miner and the Trustee's Report reveal:

(a) with the assistance of counsel and the Trustee, the Applicants have actively solicited potential purchasers for the business of the Applicants (the "Business");

(b) in order to allow the business to survive as a going concern, maintain the employees, and to maximize the return to creditors, the Applicants have solicited stalking horse offers to purchase all of the assets and undertakings of the Business;

(c) The Applicants received two stalking horse offers, and upon the advice of the Trustee have accepted that of Russell;

(d) A copy of the accepted stalking horse offer is enclosed as Appendix "B" to the Trustee's Report;

(e) The approximate amount to pay out the Business Development Bank of Canada ("BDC") mortgage on 20 Grandview Avenue, St. John, New Brunswick ("the Property") is $234,000.00;

(f) Based upon the value of accounts receivable and the approximate value of inventory as of August 5, 2021, the Stalking Horse APA will generate cash in the amount of $1,250,000.00 for creditors after payment to BDC;

(g) the Applicants have brought the terms of the Stalking Horse APA to the attention of The Toronto Dominion Bank ("TD"), the senior secured creditor, and the Applicants are awaiting TD's comments.

Stalking Horse and Bidding Procedures Order

The purpose of the Stalking Horse APA is to test the market for the Applicants' assets in advance of an auction of them should there be higher bids. The intent is to maximize the value of the Applicants' assets and to avoid low bids in a going concern sale. Should a bid or bids be made in excess of that of Russell, Russell and those bidders with excess bids will participate in an auction to obtain the best price. Regardless of whether the Stalking Horse APA is the best bid, or whether an auction realizes a greater result, the actual sale will be subject to further approval of the court.

The Stalking Horse APA contains bidding protection in the form of a breakup fee to the stalking horse offeror. The breakup fee is $50,000, being half the minimum overbid fee. Thus, any competing bid will net at least an additional $50,000 after payment of the break fee.

The Stalking Horse APA is subject to the Bidding Procedures appended to the Stalking Horse and Bidding Procedures Order. To summarize:

1. The base bid is the stalking horse bid which is estimated to be $1,250,000.00 after payment of the mortgage in favour of BDC;

2. Other bids must generally conform with that of Russell, exceed the Stalking Horse APA price, and be for substantially all the assets of the Applicants;

3. If there is an excess qualified bid, an auction will be held in which Russell and all excess bidders participate;

4. If there are no bids in excess of that the Stalking Horse APA, that agreement will be brought to the court for approval. If there is an auction, the winning offer will be brought to the court for approval;

5. The Applicants will bring a motion to approve the sale within five (5) business days following the auction;

6. The timelines are as follows:

    - Approval of the process on August 19, 2021
    - Any additional bids from qualified buyers to be received by September 9, 2021
    - The auction, if required, on September 16, 2021
    - Subsequent approval by the Court on or before October 1, 2021

It is respectfully submitted that:

> 20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional

> structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7[1].

The seminal case in Canada dealing with the approval of a stalking horse process is *Re Brainhunter Inc.*[2] In that case Justice Morawetz set out the factors a court should consider when approving a stalking horse sales process, and made it clear that process approval and ultimate sale approval are two different steps:

> 13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (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?
>
> 14 The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

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[1] *Re Danier Leather Inc.*, 2016 ONSC 1044 (Tab 1)

[2] 2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41 (Tab 2)

> 16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

An order substantially in the form presented to the Court on this motion was approved by Justice McDougall in the *Companies' Creditors Arrangement Act* ("*CCAA*") proceedings Hfx. No. 454744: *Application by Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited for relief under the Companies' Creditors Arrangement Act.*[3] That approach was subsequently adapted in *First National Financial GP Corporation* v *3291735 Nova Scotia Limited*[4] wherein Justice Brothers, while noting that a stalking horse process was somewhat of a novelty in this jurisdiction, canvassed the authorities to conclude that the process was appropriate in that case:

> 25 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the "stalking horse" sales process.
>
> 26 A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies' Creditors Arrangement Act proceeding: *Victory Farms Incorporated and Jonathan Mullen Mink Ranch*

[3] Copy attached at Tab 3
[4] 2018 NSSC 235 (Tab 4)

> *Limited*, Hfx. No. 454744.
>
> 27 Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.
>
> 28 D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd.* , at para 7:
> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.
>
> 29 I must consider the following factors as set forth in *CCM Master Qualified Fund, Ltd.* , *supra*:
> 1. The fairness, transparency and integrity of the proposed process;
> 2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
> 3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

Addressing the *First National Financial* factors it is suggested that the following is clear.

(a) Is the process fair and transparent?

This question goes to the integrity of the proposed process.

Clearly the level of the Applicants' debt is such that an asset sale appears to be the best way to maximize recovery. The stalking horse process offers a method whereby a base price is established, so as to enable a competitive process to be undertaken in a fairly speedy and orderly manner.

The process adopted has been previously found by this Court to be appropriate in similar circumstances.

(b) is the proposed process efficacious in light of the specific circumstances facing the Applicants?

The answer to this question is merged in the answer to the previous query. The process offers a relatively quick and fair method of maximizing recovery for the creditors.

(c) Does the sales process optimize the chances of securing the best possible price for the assets up for sale?

Again, the answer is subsumed in those to the previous two questions.

It is also useful also to address the Nortel Criteria.

(a) Will the sale benefit the whole "economic community"?

The sale as a going concern will likely maximize the return for secured creditors, and will certainly benefit the employees and those others who depend economically upon the Business, either directly or indirectly. This would certainly include suppliers and the customers of this somewhat unique Atlantic Canadian enterprise.

(b) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

It is unknown whether any creditor will object. It is difficult to see how a creditor might argue against the sale given that it is designed to obtain the maximum return while ensuring the Business survives.

(c) Is there a better viable alternative?

The Applicants are not aware of any viable alternative which will maximize the return to creditors, preserve employment and ensure that the Business continues.

In conclusion, it is respectfully submitted that for the reasons advanced this is an appropriate case in which to grant the order sought.

Confidentiality Order

Motion is made pursuant to *Civil Procedure Rule* 85.05 for an Order providing that access to the Confidential Supplement be restricted to your Lordship (or other such persons as may be designated by you) for a period of three (3) months from the date of the Order.

The rationale for seeking this order is similar to that in Hfx. 503367: *Canadian Imperial Bank of Commerce* v. *3304051 Nova Scotia Limited,* wherein Justice Wright granted an order under Rule 85.05.[5] The Confidential Supplement to the Trustee's Report contains information with respect to the distressed value of the Applicants' assets. It is thought that access to the Confidential Supplement may colour the approach of any potentially Qualified Bidders. Qualified Bidders will have access to the data room and the same materials as did Russell. Publication of the Confidential Supplement will provide Qualified Bidders with the Trustee's opinions, which were not provided to Russell. To allow access would be therefor be unfair.

In *Canadian Financial Wellness Group* v. *Resolve Business Outsourcing*[6] the Court of Appeal considered the public interest in restricting access to competitive information in the context of Rule 85.05:

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[5] A copy of the Oder is attached at Tab 5

[6] 2014 NSCA 98 (Tab 6)

> 26 To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

The Court went on to comment:

> 30 That D+H and Resolve have a specific private interest does not exclude the existence of a concurrent public interest. The two are not mutually exclusive. In *Sierra Club*, Justice Iacobucci said (para 55) "the interest in question cannot *merely* be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality" [emphasis added]. The question is whether D+H/Resolve's clear private interest also can be expressed in terms of a public interest in confidentiality.
>
> 31 The motions judge accepted that "there would be a public interest in fair competition". I agree, for the following reasons.

So too, here there is a public interest in "fair competition", and to disclose to Qualified Bidders the information contained in the Confidential Supplement to the Trustee's Report would compromise such fair competition. Qualified Bidders should have the same access to information as did the stalking horse bidder, an no more.

The Extension of the Stay

The applicants seek a stay extension to allow the sales process to run its course.

The Applicants also apply to the court pursuant to section 50.4(9) of the *BIA*:

> 50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application 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.

Each of the three branches of the test which the Applicants must satisfy are dealt with separately.

Good faith and Due Diligence

The Applicants has clearly acted in good faith and with due diligence.

The filing of the Notice of Intention to Make a Proposal by the Applicants was a prudent step given that BDC Capital Inc. was moving to enforce its security. In the meantime:

(a) The Applicants have retained a trustee;

(b) The Applicants have diligently worked with the trustee on an asset sale process; and

(c) The Business has continued without interruption.

Likelihood of a Viable Proposal

There is the possibility of a viable proposal being made. Much depends upon the ultimate realization from the sale of assets.

Justice Moir had this to say about the likelihood of a viable proposal being made[7]:

> 19 Next is the requirement that a viable proposal is likely to be made.
>
> 20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.
>
> 21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.
>
> 22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.
>
> 23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

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[7] *Re Kocken Energy Systems Inc.*, 2017 NSSC 80 (Tab 7)

> 24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

Here the reasonable level of effort is readily apparent in the Miner affidavit. The companies remain in operation, and there is some indication of the likelihood that a viable proposal will be advanced within the time frame of the extension applied for (45 days) provided the sales process is completed. In addition, a very reasonable level of effort has been made, particularly given the circumstances.

No Creditor Would Be Materially Prejudiced

There is no evidence that any creditor would be materially prejudiced by the stay being sought.

Summary on the Extension

It is respectfully submitted that the Applicants has adduced satisfactory evidence to show:

(a) that the Applicants has acted, and is acting, in good faith and with due diligence;

(*b*) that the Applicants will likely be able to make a viable proposal if the extension being applied for is granted; and

(*c*) that no creditor will be materially prejudiced if the extension is granted.

All of which is respectfully submitted

BOYNECLARKE LLP

Tim Hill, Q.C.

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2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

D Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Motion brought to, inter alia, approve stalking horse agreement and SISP — SISP approved — Certain other relief granted, including that key employee retention plan and charge were approved, and that material about key employee retention plan and stalking horse offer summary would not form part of public record pending completion of proposal proceedings — SISP was warranted at this time — SISP would result in most viable alternative for D Inc. — If SISP was not implemented in immediate future, D Inc.'s revenues would continue to decline, it would incur significant costs and value of business would erode, decreasing recoveries for D Inc.'s stakeholders — Market for D Inc.'s assets as going concern would be significantly reduced if SISP was not implemented at this time because business was seasonal in nature — D Inc. and proposal trustee concurred that SISP and stalking horse agreement would benefit whole of economic community — There had been no expressed creditor concerns with SISP as such — Given indications of value obtained through solicitation process, stalking horse agreement represented

highest and best value to be obtained for D Inc.'s assets at this time, subject to higher offer being identified through SISP — SISP would result in transaction that was at least capable of satisfying s. 65.13 of Act criteria.

Table of Authorities

Cases considered by *Penny J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered

Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

Mustang GP Ltd., Re (2015), 2015 ONSC 6562, 2015 CarswellOnt 16398, 31 C.B.R. (6th) 130 (Ont. S.C.J.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4839, 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 394, 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List]) — followed

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

W.C. Wood Corp., Re (2009), 2009 CarswellOnt 7113, 61 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 441] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137(2) — considered

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

The Motion

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid

deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

Brainhunter Inc., Re, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the

SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, 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.

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable

under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's

engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to

exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp., Re supra.*

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Grant Forest Products Inc., Re, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re, supra.*

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Order accordingly.

End of Document

2

2009 CarswellOnt 8207
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

Heard: December 11, 2009
Judgment: December 11, 2009
Written reasons: December 18, 2009
Docket: 09-8482-00CL

Counsel: Jay Swartz, Jim Bunting for Applicants
G. Moffat for Monitor, Deloitte & Touche Inc.
Joseph Bellissimo for Roynat Capital Inc.
Peter J. Osborne for R.N. Singh, Purchaser
Edmond Lamek for Toronto-Dominion Bank
D. Dowdall for Noteholders
D. Ullmann for Procom Consultants Group Inc.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Applicants were protected under Companies' Creditors Arrangement Act — Applicants brought motion for extension of stay period, approval of bid process and approval of "Stalking Horse APA" — Motion granted — Motion was supported by

special committee, advisors, key creditor groups and monitor — Opposition came from business competitor and party interested in possibly bidding on assets of applicants — Applicants established that sales transaction was warranted and that sale would benefit economic community — No creditor came forward to object sale of business — It was unnecessary for court to substitute its business judgment for that of applicants.

Table of Authorities

Cases considered by *Morawetz J.*:

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

MOTION by applicants for extension of stay and for approval of bid process and agreement.

***Morawetz J.*:**

1 At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

9 Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

10 The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

11 It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

12 Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

> (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?

14 The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

18 In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the

Applicants' process.

19 In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

20 With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

21 For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

22 For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

23 The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

24 Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

25 An order shall issue to give effect to the foregoing.

Motion granted.

3

2016 Hfx. No. 454744

Supreme Court of Nova Scotia

Application by Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited (the "Applicants") for relief under the Companies' Creditors Arrangement Act

JUSTICE GLEN G. MCDOUGALL

Stalking Horse and Bidding Procedures Order

UPON MOTION OF Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited (the "Applicants") for an order approving the Stalking Horse Asset Purchase Agreement and related sales process;

AND UPON READING the affidavit of Jonathan Mullen sworn February 9, 2017, the Sixth Report of Deloitte Restructuring Inc., in its capacity as Monitor (the "Monitor"), dated February 10, 2017 ("the Sixth Report") and the exhibits thereto, filed, and on hearing the submissions of counsel for the Applicants, the Monitor, and those for the secured creditors as appeared:

IT IS ORDERED THAT:

Service

1. The time for service of the Notice of Motion, the Sixth Report and the other materials filed herein is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

Stalking Horse Process

2. The Applicants are hereby authorized and directed, *nunc pro tunc*, to enter into an agreement to sell all or substantially all of their assets, property and undertakings (the "Purchased Assets") to North American Fur Auctions Inc. (the "Stalking Horse Bidder"), substantially in the form of the agreement attached as Appendix "B" to the Sixth Report (the "Stalking Horse Asset Purchase Agreement"), and such agreement, subject to the terms of this Order, is hereby approved and accepted for the purpose of conducting the Stalking Horse Process (defined below) in accordance with the Bidding Procedures (defined below).

3. The bidding procedures described in the Sixth Report and attached hereto as Schedule "A" (the "Bidding Procedures") and the sale process and auction described therein (collectively, the "Stalking Horse Process") be and are hereby approved and the Monitor is hereby authorized and directed to conduct the Stalking Horse Process.

4. In connection with the Stalking Horse Process and pursuant to section 7(3)(c) of the *Personal Information Protection and Documents Act* (Canada), the Applicants and/or the Monitor may disclose personal information of identifiable individuals to prospective bidders for the Purchased Assets and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete a sale of such assets. Each prospective bidder to whom any such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the said assets and related business, and if it does not complete a purchase thereof, shall return all such information to the Applicants and/or the Monitor or in the alternative shall destroy all such information and certify such destruction to the Applicants and/or the Monitor.

5. With respect to paragraph 8.8 of the Sixth Report of the Monitor filed February 10, 2017, the advertisements proposed shall each run once weekly for five consecutive weeks.

6. With respect to paragraph 8.10 of the Sixth Report of the Monitor filed February 10, 2017, the auction of the Purchased Assets shall take place, if necessary, on March 31, 2017, as provided for in paragraph 17 of the Bidding Procedures.

Issued February 16, 2017

Deputy Prothonotary

JESSICA BOUTILIER
Deputy Prothonotary

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document, identified by the seal of the court, is a true copy of the original document on the file herein.

FEB 16 2017

Deputy Prothonotary

JESSICA BOUTILIER
Deputy Prothonotary

PL# 136351/6218380_3

Schedule A — Bidding Procedures

Bidding Procedures

1. Set forth below are the bidding procedures (the "Bidding Procedures") to be employed with respect to the sale (the "Sale") of the assets, property and undertakings (the "Purchased Assets") of Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited (the "Applicants") by the Applicants.

2. On February 16, 2017, the Court issued an order (the "Bidding Procedures Order") approving and accepting for the purpose of conducting the Stalking Horse Process in accordance with these Bidding Procedures that certain asset purchase agreement dated February 10, 2017 (the "Stalking Horse Asset Purchase Agreement" or "Stalking Horse Bid") between the Applicants and North American Fur Auctions Limited, or its assignee (the "Stalking Horse Bidder"), and approving these Bidding Procedures.

3. All amounts specified herein are in Canadian dollars.

4. Within five (5) business days following the Auction (defined below), the Applicants shall bring a motion (the "Sale Approval Motion") seeking the granting of an order by the Court authorizing and approving the Sale of the Purchased Assets to the Successful Bidder(s) (such order, as approved, the "Approval and Vesting Order").

Assets to Be Sold

5. The Applicants, in consultation with Deloitte Restructuring Inc., (the "Monitor") in its capacity as the Court-appointed Monitor of the Applicants, are offering for sale all of the Applicants' right, title and interest in and to all of the Purchased Assets and encourages bids for all of the Purchased Assets, in whole.

Permitted Encumbrances

6. The mortgages of real property made by the Applicants in favour of Nova Scotia Farm Loan Board and Farm Credit Canada shall be Permitted Encumbrances, and the sale herein contemplated shall be subject to said mortgages of real property.

The Bidding Process

7. The Applicants, in consultation with the Monitor, shall (i) determine whether any person is a Qualified Bidder, (ii) coordinate the efforts of Qualified Bidders in conducting their due diligence investigations, (iii) receive offers from Qualified Bidders, and (iv) negotiate any offers made to purchase the Purchased Assets (collectively, the "Bidding Process"). The Monitor, in consultation with the Applicants and the secured creditors, shall have the right to adopt such other rules for the Bidding Process (including rules that may depart from those set forth herein) that will better promote the goals of the Bidding Process, provided, however, that such other rules are not inconsistent with any of (i) the provisions of the Stalking Horse Asset Purchase Agreement (including the deadlines therein), (ii) the Bid Deposit Requirement (as defined below), and (iii) the bid protections granted to the Stalking Horse Bidder herein.

Participation Requirements

8. A "Qualified Bidder" is a potential bidder that the Monitor, in consultation with the Applicants and the secured creditors, determines is likely (based on financial information submitted by the bidder, the availability of financing, experience and other considerations deemed relevant by the Monitor) to be able to consummate a sale if selected as the Successful Bidder (as defined below). Notwithstanding the foregoing, the Stalking Horse Bidder shall be deemed a Qualified Bidder.

Due Diligence

9. Any Person that wishes to participate in the Bidding Process must (i) execute a confidentiality agreement in form and substance acceptable to the Monitor and (ii) be a Qualified Bidder. The Monitor shall not be obligated to furnish information of any kind whatsoever to any Person that the Monitor determines not to be a Qualified Bidder. The Monitor will afford any Qualified Bidder the time and opportunity to conduct reasonable due diligence subject to the time frames contemplated by these Bidding Procedures. The Monitor will designate a representative to coordinate all reasonable requests for additional information and due diligence access from such Qualified Bidders.

Bid Deadline

10. A Qualified Bidder that desires to make a bid shall deliver written copies of its bid and the Required Bid Materials (defined below) to each of (i) the Monitor, Deloitte Restructuring Inc. Inc., 1969 Upper Water Street, Suite 1500, Halifax, NS, Canada B3J 3R7, Attention: James Foran; and (ii) counsel to the Monitor, McInnes Cooper, 1969 Upper Water Street, Suite 1300, Purdy's Wharf Tower II Halifax, NS, B3J 2V1, Attention: Ben R. Durnford, not later than 12:00 p.m. (Nova Scotia time) on March 24, 2017 (the "Bid Deadline"). In the event that a bid is determined to be a Qualified Bid, the Monitor shall deliver a written copy of any such Qualified Bid and the Required Bid Materials to the Stalking Horse Bidder's counsel, Burchell MacDougall LLP, 710 Prince St, PO Box 1128, Truro NS, B2N 5H1, Attention: Brian W. Stilwell, and to the Applicants' counsel, BoyneClarke LLP, 99 Wyse Road, Suite 600, Dartmouth, NS, B2Y 3Z5, Attention: Tim Hill, Q.C.

Bid Requirements

11. All bids must include (unless such requirement is waived by the Monitor, with the concurrence of the Applicants and the secured creditors) (the "Required Bid Materials"):

    (i) A cash purchase price equal to or greater than $4,000,000, (the "Minimum Bid Amount");

    (ii) An acknowledgement that the sale is subject to the Permitted Encumbrances;

    (iii) A letter stating that the bidder's offer is irrevocable until the first business day after the Purchased Assets have been sold pursuant to the closing of the sale or sales thereof approved by the Court;

    (iv) An executed copy of a proposed purchase agreement and a blackline of the Qualified Bidder's proposed purchase agreement reflecting variations from the Stalking Horse Asset Purchase Agreement (the "Marked Agreement"). All Qualified Bids must provide: (a) a commitment to close within five (5) business days after satisfaction of all conditions and a covenant to use commercial best efforts to satisfy all conditions; and (b) the identity of and contact information for the bidder and full disclosure of any affiliates and any debt or equity financing sources involved in such bid;

(v) A cash deposit in the amount of $400,000 in the form of a wire transfer, certified cheque or such other form acceptable to the Monitor (the "Bid Deposit"), which shall be placed in an escrow account (the "Escrow Account"). The Escrow Account shall not be subject to any Liens whatsoever of the Applicants' creditors or otherwise, and funds shall be disbursed from the Escrow Account only as follows: (i) if the Qualified Bidder is the Successful Bidder at the Auction, its Bid Deposit will be applied to the purchase price payable by it under its bid on the closing thereof, and (ii) if the Qualified Bidder is not the Successful Bidder at the Auction, then its Bid Deposit shall be returned to it (subject to the other provisions of these Bidding Procedures and the terms of its asset purchase agreement with the Monitor);

(vi) A representation of the bidder and written evidence that the bidder has a commitment for financing or other evidence of the proposed purchaser's ability to consummate the proposed transaction, including executed copies of any financing agreements, commitments, guarantees of the payment obligations of the proposed purchaser, and which the Monitor, in consultation with the Applicants and the secured creditors, believes to be sufficient to satisfy the bidder's obligations under its proposed bid, including to consummate the transaction contemplated by the proposed agreement submitted by it as provided above;

(vii) A representation of the bidder and written evidence that the bidder has entered into an agreement with Nova Scotia Farm Loan Board and Farm Credit Canada to assume the debt secured by the mortgages of real property which form part of the Permitted Encumbrances, should the bidder be the successful bidder;

(viii) The bid shall identify with particularity those executory contracts and unexpired leases of the Applicants with respect to which the bidder seeks to receive an assignment;

(ix) The bid shall not request or entitle the bidder to any transaction or break up fee, expense reimbursement, termination or similar type of fee or payment and shall include an acknowledgement and representation of the bidder that it has had an opportunity to conduct any and all due diligence regarding the Purchased Assets prior to making its offer, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Purchased Assets in making its bid, and that it did not rely upon any written or oral statements, representations, warranties, or guarantees, express, implied, statutory or otherwise,

regarding the Purchased Assets, title to same, the financial performance of the Purchased Assets, the fitness for use of or the physical condition of the Purchased Assets, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in these Bidding Procedures or the Stalking Horse Asset Purchase Agreement;

(x) The bid shall not contain any due diligence, financing or regulatory contingencies of any kind other than those contained in the Stalking Horse Asset Purchase Agreement, though the bid may be subject to the satisfaction of other specific conditions in all material respects at the Closing Date (defined below);

(xi) The bid shall fully disclose the identity of each entity that will be bidding for the Purchased Assets or otherwise participating in connection with such bid, and the complete terms of any such participation;

(xii) The bid shall state that the offering party consents to the jurisdiction of the Court;

(xiii) The bid shall include evidence of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the submitted purchase agreement of the bidder;

(xiv) The bid shall state that the offering party has not acted and will not act in collusion with any other undisclosed party or entity in connection with its bid; and

(xv) The bid shall identify with particularity any liabilities being assumed.

12. A bid received from a Qualified Bidder that includes all of the Required Bid Materials and is received by the Bid Deadline is a "Qualified Bid." The Monitor, in consultation with the Applicants and the secured creditors, reserves the right to determine the value of any Qualified Bid, and which Qualified Bid constitutes the best offer (the "Lead Bid"). Forthwith after the Bid Deadline, the Monitor, in consultation with the Applicants and the secured creditors, shall determine which Qualified Bid shall be the Lead Bid for the purposes of the Auction. A copy of the Lead Bid will be provided to all Qualified Bidders prior to the Auction Date.

13. Notwithstanding the bid requirements detailed above, the Stalking Horse Bid shall be deemed a Qualified Bid.

Credit Bidding

14. None of the bidders shall be permitted to credit bid any indebtedness owed to them by the Applicants in connection with the making of a Qualified Bid or in the conduct of the Auction. If any of the secured creditors or any affiliate thereof (other than the Stalking Horse Bidder) wishes to participate in the Auction, they must qualify as a Qualified Bidder in accordance with these Bidding Procedures and will forfeit any right of consultation with the Monitor provided for herein.

"As Is, Where Is, with All Faults"

15. The sale of the Purchased Assets shall be on an "as is", "where is" and "with all faults" basis and without representations, warranties, or guarantees, express, implied or statutory, written or oral, of any kind, nature, or description by the Monitor or the Applicants or their respective agents, representatives or estates, or any of the other parties participating in the sales process pursuant to these Bid Procedures, except as may otherwise be provided in a definitive purchase agreement with the Applicants. By submitting a bid, each Qualified Bidder shall be deemed to acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Purchased Assets prior to making its bid, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Purchased Assets in making its bid, and that it did not rely upon any written or oral statements, representations, warranties, or guarantees, express, implied, statutory or otherwise, regarding the Purchased Assets, title to the Purchased Assets, the financial performance of the Purchased Assets or the physical condition or location of the Purchased Assets or their fitness for use, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in these Bidding Procedures or as set forth in a definitive purchase agreement with the Applicants.

Free of Any and All Lieus

16. Except as otherwise provided in the Stalking Horse Asset Purchase Agreement or another Successful Bidder's purchase agreement, and subject to mortgages of real property in favour of Nova Scotia Farm Loan Board and Farm Credit Canada and any other security, charges or other restrictions (Permitted Encumbrances")which may be defined in the Approval and Vesting Order, all of the Applicants' right, title and interest in and to the

Purchased Assets subject thereto shall, pursuant to the provisions of section 36 of the Companies' Creditors Arrangement Act, be sold free and clear of any and all security, charge or other restriction, other than Permitted Encumbrances as provided for in the Approval and Vesting Order.

The Auction and Auction Procedures

17. If a Qualified Bid (other than that submitted by the Stalking Horse Bidder) or Qualified Bids which, in either case, in the aggregate provide for cash consideration of not less than the Minimum Bid Amount, have been received by the Monitor on or before the Bid Deadline, the Monitor shall conduct an auction (the "Auction") with respect to all of the Purchased Assets, with the Lead Bid as the starting bid for the Auction. The Auction shall be conducted at the offices of Deloitte Restructuring Inc. Inc., 1969 Upper Water Street, Suite 1500, Halifax, NS, Canada B3J 3R7 (the "Auction Site") at 11:00 a.m. (Nova Scotia time) on March 31, 2017 (the "Auction Date"), or such other place and time as the Monitor shall notify all Qualified Bidders who have submitted Qualified Bids and expressed their intent to participate in the Auction as set forth above. Prior to moving the Auction Date, the Monitor shall consult with the Stalking Horse Bidder and the Applicants and the secured creditors.

18. Except as otherwise provided herein, based upon the terms of the Qualified Bids received, the number of Qualified Bidders participating in the Auction, and such other information as the Monitor determines is relevant, the Monitor, in consultation with the Applicants and the secured creditors, may conduct the Auction in any manner that it determines will achieve the maximum value for the Purchased Assets, provided that all Qualified Bidders that have timely submitted a Qualified Bid shall be entitled to be present during each round of bidding, the identity of each such Qualified Bidder shall be disclosed to all other Qualified Bidders, and all material terms of each Qualified Bid and each subsequent bid made by each such Qualified Bidder shall be disclosed to all other Qualified Bidders. The Monitor, in consultation with the Applicants and the secured creditors also may set opening bid amounts in each round of bidding as the Monitor determines to be appropriate.

19. If Qualified Bidders submit Qualified Bids, then the Monitor, in consultation with the Applicants and the secured creditors, shall (i) promptly following the Bid Deadline, review each Qualified Bid on the basis of the financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the sale as contemplated in the Stalking Horse and Bidding Procedures

Order and the Bidding Procedures, and (ii) as soon as practicable after the conclusion of the Auction, identify the best offer for the Purchased Assets (to the extent any such bid is acceptable to the Monitor, in consultation with the Applicants and the secured creditors, a "Successful Bid" and the bidder or bidders making such bid, the "Successful Bidder"). At the hearing on the Sale Approval Motion, the Monitor will present the Successful Bid to the Court for approval. The Monitor reserves all rights not to submit any bid which is not acceptable to the Monitor for approval by the Court. The Monitor acknowledges that the Stalking Horse Bid is a Qualified Bid and shall be submitted to the Court for approval in the event that there is no other Successful Bid. Except as otherwise provided herein or as restricted by the Stalking Horse Asset Purchase Agreement, the Monitor upon consultation with the Applicants, may adopt rules for bidding at the Auction that, in its business judgment, will better promote the goals of the bidding process or any order of the Court entered in connection herewith.

20. If no Qualified Bid is submitted by the Bid Deadline or all Qualified Bids that have been submitted have been withdrawn prior to the Bid Deadline or the Auction Date, then the Monitor shall cancel the Auction (in which case, the Successful Bid shall be the Stalking Horse Bid, and the Successful Bidder shall be the Stalking Horse Bidder).

Overbid Amount; Minimum Bid Increment

21. There shall be an overbid amount that a Qualified Bidder must bid to exceed the Stalking Horse Bid ("Overbid Amount"), and that amount shall be at least $100,000 for all bids made by Qualified Bidders. At the Auction, all subsequent bids shall not be less than $50,000 in excess of the preceding bid, unless modified by the Monitor.

Acceptance of Qualified Bids

22. The sale of the Purchased Assets to any Successful Bidder by the Applicants is expressly conditional upon the approval of the Successful Bid by the Court at the hearing of the Sale Approval Motion. The Applicants' presentation of any Qualified Bid to the Court for approval does not obligate the Applicants to close the transaction contemplated by such Qualified Bid until the Court approves the bid. The Applicants will be deemed to have accepted a bid only when the bid has been approved by the Court at the hearing on the Sale Approval Motion.

Sale Approval Motion Hearing

23. The Sale Approval Motion shall be made on or before April 14, 2017. The Applicants, in consultation with the Monitor, in the exercise of its business judgment, in consultation with the Applicants and the secured creditors, reserves their rights to the extent consistent with the Stalking Horse Asset Purchase Agreement, to change the date of the hearing of the Sale Approval Motion in order to achieve the maximum value for the Assets.

24. At the hearing of the Sale Approval Motion, the Applicants shall seek approval from the Court to consummate the Successful Bid, and at the Monitor's election, to consummate the next best Qualified Bid (the "Back-Up Bid", and the party submitting the Back-Up Bid, the "Back-Up Bidder") should the Successful Bid not be closed in accordance with its terms for any reason.

25. If the Successful Bidder fails to consummate an approved Sale within five (5) business days after satisfaction of all conditions thereof ("the Closing Date"), the Applicants, in consultation with the Monitor, may, but shall not be required, to consummate the Back-Up Bid without the requirement of any further approval thereof by the Court. The Back-Up Bid shall remain open until the first business day following the consummation of the sale of the Purchased Assets to the Successful Bidder.

Modifications

26. The Monitor, after consultation with the Applicants and the secured creditors, may (a) determine which Qualified Bid, if any, is the best offer; and (b) reject at any time before the issuance and entry of an Approval and Vesting Order approving a Qualified Bid, any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bidding Procedures, or the terms and conditions of sale, or (iii) contrary to the best interests of the Monitor, the Applicants' estate or their creditors. Notwithstanding the foregoing, the provisions of this paragraph shall not operate or be construed to permit the Monitor to - accept any Qualified Bid that (i) does not require a bid deposit of at least $400,000 be placed in a protected, segregated account, which shall serve as protection and security for the Stalking Horse Bidder as outlined herein, (ii) does not equal or exceed the Overbid Amount, or (iii) impose any terms and conditions upon the Stalking Horse Bidder that are contradictory to or in breach of the terms of the Stalking Horse Asset Purchase Agreement

other than any such terms and conditions set forth in these Bidding Procedures or the Bidding Procedures Order.

Miscellaneous

27. The Auction and these Bidding Procedures are for the benefit of the Applicants and nothing contained in the Bidding Procedures Order or these Bidding Procedures shall create any rights in any other person or bidder (including without limitation rights as third party beneficiaries or otherwise) other than the rights expressly granted to a Successful Bidder under the Bidding Procedures Order. The bid protections incorporated in these Bidding Procedures are for the benefit of the Stalking Horse Bidder.

28. The Monitor shall not have any liability whatsoever to any person or party, including without limitation the Applicants, the Stalking Horse Bidder, any other bidder or any creditor or other stakeholder, for any act or omission related to the process contemplated by these Bidding Procedures.

29. Except as provided in the Bidding Procedures Order and Bidding Procedures, the Court shall retain jurisdiction to hear and determine all matters arising from or relating to the implementation of the Bidding Procedures Order.

4

2018 NSSC 235
Nova Scotia Supreme Court

First National Financial GP Corporation v. 3291735 Nova Scotia Limited

2018 CarswellNS 714, 2018 NSSC 235, 297 A.C.W.S. (3d) 94, 64 C.B.R. (6th) 289

First National Financial GP Corporation and First National Financial LP (Applicants) v. 3291735 Nova Scotia Limited (Respondent)

Christa M. Brothers J.

Heard: May 11, 2018
Judgment: May 11, 2018
Written reasons: September 27, 2018
Docket: Hfx 474742

Counsel: D. Bruce Clarke, Q.C., for Applicants
Gavin D.F. MacDonald, for KSV Kofman Inc. (Proposed Receiver, for the Respondent, 3291735 Nova Scotia Limited)
Brian W. Stilwell — Watching Brief

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Applicant creditor made demand on respondent debtor for $2,870,520.62 plus daily interest and provided notice of intention to enforce security — Deadlines passed without payment and debtor informed creditor it could not make further payments — Receiver proposed by creditor was registered and had adequate professional liability insurance — Creditor brought application for receivership order and sales process order — Application granted — Service had been properly effected and all conditions precedent were satisfied — Security, demand and default were proven and it was appropriate for court to exercise powers under Bankruptcy and Insolvency Act and Judicature Act — Appointment of receiver would allow debtor's property to be preserved and protected pending liquidation, and receiver would provide transparency and reassurance to creditors that liquidation was being handled expeditiously and in commercially reasonable manner — Administrative charges and borrowing power were appropriate — Stalking horse agreement was supported by largest creditor and was commercially reasonable way to protect downside risk given property had been listed for two years without satisfactory results.

Table of Authorities

Cases considered by *Christa M. Brothers J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 2011 ONSC 1007, 2011 CarswellOnt 896, 74 C.B.R. (5th) 300 (Ont. S.C.J.) — considered

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen.

Div. [Commercial List]) — considered

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243 — considered

s. 243(1) — considered

s. 244(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

Judicature Act, R.S.N.S. 1989, c. 240
Generally — referred to

s. 43(9) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
R. 6(1) — considered

APPLICATION by creditor for receivership order and sales process order.

***Christa M. Brothers J.* (orally):**

Overview

1 This is an application for a Receivership Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. P-3 (BIA) and s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as a Sales Process Order. The Applicants, First National Financial GP Corporation and First National Financial LP (collectively "First National") seek appointment of KSV Kofman Inc. as Receiver of all the property, assets, and undertakings of the Respondent, 3291735 Nova Scotia Limited (the "Company"). Additionally, if the Receivership Order is granted, the Receiver seeks approval of its proposed process for sale of the Respondent's properties, characterized as a stalking horse bid process.

2 The Company was served and its President attended the Motion, taking no position and making no submissions. Notice of this Motion was given to all affected parties and no one appeared to oppose the orders sought.

The Application for a Receivership Order

3 The Court received written and oral submissions. The evidence submitted included affidavits from Chris Sebben (Manager of Commercial Default Management for First National), a solicitor's affidavit of Stephen Kingston, and the affidavit of Sharon MacLeod, Legal Assistant with Burchells L.L.P. The materials confirm that the Company is indebted to First National pursuant to a Letter of Offer dated October 19, 2015, as amended by letters dated January 5, 2016, and April 29, 2016. The security for the Company's obligations to First National is in various forms, more particularly described and

evidenced in the court file.

4 The applicants say the Company has defaulted on its obligations and the Company's principal has advised that the Company could not make further payments. As of February 26, 2018, the company owed First National a total of $2,870,520.62 with interest accruing at a daily rate of $486.51. On that date, First National issued a demand for payment to the Company for its indebtedness, as well as a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (hereinafter referred to as "BIA"). The deadline for payment and the time limitation in the Notice of Intention to Enforce Security have both expired without payment being made. Reasonable time was given to raise the funds to satisfy the demand and the Company, through its Principal, confirmed payment could not and would not be made.

5 The Receiver, KSV Kofman Inc., is a registered member of the Canadian Association of Insolvency and Restructuring Professionals, carrying adequate professional liability insurance.

6 I have reviewed all the materials with regard to the proposed Receivership Order.

7 I am satisfied that service was effected. The affidavit of Sharon MacLeod, sworn and filed on May 11, 2018, confirms that service was properly effected as per s. 6(1) of the Bankruptcy and Insolvency General Rules, CRC, c. 368. All conditions precedent for the order have been satisfied.

8 I am satisfied that the security has been proved, that demand and default has been proved, and that this is an appropriate matter for the Court to exercise its powers as contained in the BIA and the *Judicature Act*.

9 Section 243(1) of the BIA provides:

> Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be, 'just or convenient to do so'.
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> >
> > (c) take any other action that the court considers advisable.

10 In addition, a Receiver can be appointed pursuant to provincial law, as provided for in s. 43(9) of the *Judicature Act*:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either conditionally or upon such terms and conditions as the Supreme Court thinks just [...].
>
> [emphasis added]

11 The test that I must apply is whether it is just and convenient in the circumstances to appoint a Receiver.

12 In making this decision, I must consider all the circumstances, the particular nature of the property, and the rights and interests of all of the parties. Taking into account all the materials filed with the Court and having heard counsel, I find that it is just and convenient in the circumstances to approve and issue the Receivership Order. In reaching this decision, I have considered the following:

1. First National holds first priority security over the Company's real and personal property;

2. The Company is in default of its obligations to First National;

3. First National has made demand for payment upon the Company and issued a Notice of Intention to Enforce Security pursuant to the BIA;

4. Both the Demand Letter and the Notice have expired, without payment being made;

5. First National is in a position to enforce its security as against the Company should it choose to do so;

6. The appointment of a Receiver would allow for the Company's property to be preserved and protected pending liquidation; and

7. A Receiver, as an officer of the court, would provide transparency and reassurance to the Company's creditors that the liquidation of the property is handled expeditiously and in a commercially reasonable manner.

13 I have reviewed the case law and, in particular, *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.) . In that case, the Court noted that under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a Court may appoint a Receiver if it is "just and convenient" to do so. The Court said:

23. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

14 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private Receiver or an application to court to have a court-appointed Receiver. The legal principles involved were summarized as follows:

10 The Court has the power to appoint a receiver or receiver and manager where it is 'just or convenient' to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

15 *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.) , spoke of the remedy of appointing a receiver and the use of such remedy where there is a secured creditor.

25. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

16 I also have heard from counsel with regard to the administration charges and the borrowing power set out in the proposed Order. I am satisfied, in all the circumstances having regard to the materials filed with the Court, that this is an appropriate quantum. This is a multi-million dollar asset and this possible charge is not out of line in the circumstances.

17 Also, in terms of the borrowing power, there is a need for funding of the Receivership and this is a reasonable proposal in the circumstances, having regard to the materials filed by the proposed Receiver.

Sale Process Order

18 Having granted the Receivership Order, I heard submissions from counsel for KSV Kofman Inc. concerning the approval of the proposed sale process.

19 The principal asset owned by the Company is the real property described as 1017-1021 Beaufort Avenue in Halifax (six condominium lots).

20 First National is a mortgagee of the Company. There are subsequent mortgages held by Canadian Western Trust Company and Nick Bryson. Both have been served with the application materials and took no position on the application. The purpose of this receivership is to conduct a sale process for the real property.

21 KSV recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders.

22 KSV also recommended Keller Williams be retained as listing agent due to its experience dealing with residential developers.

23 On April 13, 2018, Keller Williams presented KSV with an offer from 3308949 Nova Scotia Limited (3308 NS Ltd.) to purchase the real property. In order to maximize the value for creditors and to minimize the risk of losing this offer, KSV asks that the offer be a "stalking horse" in a court supervised sale process.

24 The Stalking Horse Agreement was provided to the Court and the key terms and conditions are as follows:

- **Purchaser:** 3308
- **Purchased Assets:**

  (i) The Real Property

  (ii) prepaid expenses and all deposits with any Person, public utility or Governmental Authority relating to the Real Property

  (iii) plans

  (iv) contracts

  (v) permits in connection with the Real Property, to the extent transferable

  (vi) all intellectual property, if any, owned by the Company with respect to the project

- **Purchase Price:** $3,708,750, including HST

- **Deposit:** $322,500 being 10% of the purchase price (before HST)

- **Excluded Assets:** Receiver's and Company's right, title and interest in any assets of the Company, other than the Purchased Assets, and includes: (i) books and records that do not exclusively or primarily relate to the Purchased Assets; and (ii) tax refunds

- **Representations and Warranties:** consistent with the standard terms of an insolvency transaction, i.e. on an 'as is, where is' basis, with limited representations and warranties.

- **Closing:** first business day which is five business days after receipt of Sale Approval Order
- **Material Conditions:**

(i) There shall be no order issued by a Governmental Authority against either the Company or 3308 or involving the Purchased Assets that prevents the completion of the Transaction;

(ii) there shall be no new work orders or similar orders and no new Encumbrances registered on title to the Real Property or affecting title to the Real Property or affecting title to the Real Property arising or registered after the Acceptance Date which cannot be foreclosed pursuant to the Sale Approval Order;

(iii) there shall be no new environmental issue that causes a material adverse change to the condition or operation of the Real Property; and

(iv) the Court shall have issued the Bidding Procedures Order and the Sale Approval Order and those orders shall not have been amended or dismissed at the time of Closing.

- **Termination:**

(i) The Stalking Horse Agreement can be terminated:

- upon mutual written agreement of the Receiver and 3308;
- if any of the conditions in favour of 3308 or the Receiver are not waived or satisfied; or
- if prior to closing: (a) the Purchased Assets are substantially damaged or destroyed; or b) all or material part of the Real Property is expropriated by a Governmental Authority.

(ii) The Stalking Horse Agreement will be terminated in the event it is not the Successful Bid.

25 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the "stalking horse" sales process.

26 A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies' Creditors Arrangement Act proceeding: *Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited*, Hfx. No. 454744.

27 Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.

28 D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd.* , at para 7:

> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.

29 I must consider the following factors as set forth in *CCM Master Qualified Fund, Ltd.* , *supra*:

1. The fairness, transparency and integrity of the proposed process;

2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

30 In all the circumstances, the "stalking horse" process is commercially reasonable. While uncommon in Nova Scotia, "stalking horse" sale processes are commonly used to maximize recovery elsewhere in Canada. The bidding procedures in this matter allow a market test for the benefit of all stakeholders and provide an opportunity to realize greater value than the Stalking Horse Agreement.

31 The Stalking Horse Agreement protects the downside risk in this matter given the property has been listed since 2016 with no satisfactory results.

32 First National, as the principal stakeholder in these proceedings, has consented to the relief sought.

33 I have considered the deviations in this matter and I find that they are appropriate in the circumstances. There is a break fee and expense reimbursement proposed in this case. I have heard from counsel as to why this is appropriate, and considered this amount in the context of break fees across Canada. I accept both as reasonable.

34 In considering the particular circumstances of this case, I find this sales process provides the most reasonable, robust and transparent process in the circumstances and will likely provide the best value to the stakeholders.

35 I also note that no formal auction is being proposed, but I am satisfied that this is a more practical and efficient way to proceed with the Sale Process Order and will likely reduce the costs.

36 I understand that the bidding procedures do not allow for credit bids and am satisfied that this is reasonable in the circumstances.

Application granted.

End of Document

5

2021

Hfx No. 503367

Supreme Court of Nova Scotia

Between:

Canadian Imperial Bank of Commerce, a chartered bank

Plaintiff

- and -

3304051 Nova Scotia Limited, a body corporate

Defendant

Order for Confidentiality

Sgd. RWW, J

BEFORE THE HONOURABLE Justice Robert W. Wright in chambers:

UPON MOTION of Deloitte Restructuring Inc. (the "Receiver"), in its capacity as Court-appointed receiver of all of the assets, undertakings and properties of 3304051 Nova Scotia Limited (the "Company"), for Sale Approval and Vesting Orders and an Order of Confidentiality with respect to the proposed sale of the Company's property by the Receiver;

AND UPON the Receiver having prepared a Confidential Supplement to the Second Report of the Receiver dated April 15, 2021 (the "Confidential Supplement") to assist the Court in considering its motion for the Sale Approval and Vesting Orders which contains confidential bidding and financial information;

AND UPON this Court having received a letter dated April 26, 2021 from Colin Bryson that contains an offer to purchase the Company's assets (the "Bryson Letter");

AND UPON the Receiver having applied for an Interim Order for Confidentiality pursuant to *Nova Scotia Civil Procedure Rule 85.05* with respect to the Confidential Supplement, extending up to the conclusion of its motion for the Sale Approval and Vesting Orders;

AND UPON HEARING Marc Dunning on behalf of the Receiver and reading the affidavit of Marc Dunning, the Second Report of the Receiver, the Confidential Supplement, the Bryson Letter and other material on file herein;

[Remainder of page left intentionally blank]

IT IS HEREBY ORDERED THAT access to the Confidential Supplement and the Bryson Letter be and shall be restricted to the Chambers Justice (or such other person(s) as designated by the Chambers Justice) for a period of six (6) months, from the date of issue of this Order.

DATED at Halifax, Province of Nova Scotia, this 27th day of April, 2021.

~~Prothonotary~~

LORRAINE LUNN
Deputy Prothonotary

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document, identified by the seal of the court, is a true copy of the original document on the file herein.

APR 27 2021

Deputy Prothonotary

LORRAINE LUNN
Deputy Prothonotary

6

Most Negative Treatment: Check subsequent history and related treatments.

2014 NSCA 98
Nova Scotia Court of Appeal

Canadian Financial Wellness Group v. Resolve Business Outsourcing

2014 CarswellNS 800, 2014 NSCA 98, 1112 A.P.R. 257, 246 A.C.W.S. (3d) 544, 352 N.S.R. (2d) 257, 378 D.L.R. (4th) 612, 62 C.P.C. (7th) 223

Resolve Business Outsourcing Income Fund, Resolve Corporation and D+H Limited, Appellants v. The Canadian Financial Wellness Group Limited, Respondent

Saunders, Fichaud, Bryson JJ.A.

Heard: September 16, 2014
Judgment: October 28, 2014
Docket: C.A. 423907

Proceedings: reversing *Canadian Financial Wellness Group v. Resolve Business Outsourcing* (2013), 337 N.S.R. (2d) 396, 1067 A.P.R. 396, 297 C.R.R. (2d) 19, 2013 NSSC 394, 2013 CarswellNS 930, N.M. Scaravelli J. (N.S. S.C.)

Counsel: Scott R. Campbell, Christopher W. Madill, for Appellants
Peter Coulthard, Q.C., Alexander C. Grant, for Respondent

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.iii Private and confidential communications

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Private and confidential communications
In 2006, Government of Canada initiated public and competitive tendering process for administering student loan program, and it awarded contract to defendant R — Defendant D subsequently acquired R and contract — In 2011, plaintiff sued defendants claiming that defendants became privy to their confidential information, wrongly used information for profit and were liable based on quantum meruit — In 2012, Government of Canada began re-procurement process for next contract to service student loans — Defendants viewed systems documents as containing proprietary or confidential and commercially sensitive information that would benefit other bidders in competitive bidding process for new contract — Defendants moved for confidentiality order claiming public disclosure would make information available to competitors to use in impending bidding process for renewed Government of Canada contract and disclosure would undermine public interest in fair and competitive bid process — Motions judge found that defendants had not established pubic interest in confidentiality beyond own commercial interest and dismissed motion — Defendants appealed — Appeal allowed — Motions judge's reasoning erroneously restricted meaning of public interest in confidentiality — Fact defendants had specific private interest did not exclude existence of concurrent public interest — There was public interest in fair competition — If defendants' confidential

material was available to competitors they could tailor tenders to that material while defendants would not have competitors' confidential information, which would be contrary to principles of fairness and equity that should govern tender process — There was real and substantial risk to important commercial interest that could be expressed in terms of public interest in confidentiality and there was no reasonable alternative, short of confidentiality order, that would preserve interest — Salutary effects of confidentiality order outweighed deleterious effects, including right to freedom of expression and public interest in open access to courts.

Table of Authorities

Cases considered by *Fichaud J.A.*:

Dagenais v. Canadian Broadcasting Corp. (1994), 1994 CarswellOnt 1168, 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 20 O.R. (3d) 816 (S.C.C.) — followed

Double N Earthmovers Ltd. v. Edmonton (City) (2005), 6 M.P.L.R. (4th) 25, 41 Alta. L.R. (4th) 205, 2005 ABCA 104, 2005 CarswellAlta 276, 363 A.R. 201, 343 W.A.C. 201, [2005] 10 W.W.R. 1 (Alta. C.A.) — considered

Double N Earthmovers Ltd. v. Edmonton (City) (2007), 2007 CarswellAlta 36, 2007 CarswellAlta 37, 2007 SCC 3, 391 W.A.C. 329, 401 A.R. 329, 275 D.L.R. (4th) 577, 28 B.L.R. (4th) 169, [2007] 1 S.C.R. 116, 29 M.P.L.R. (4th) 1, 68 Alta. L.R. (4th) 1, 58 C.L.R. (3d) 4, [2007] 3 W.W.R. 1, 356 N.R. 211 (S.C.C.) — referred to

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. (2008), 2008 SCC 8, 75 B.C.L.R. (4th) 1, 290 D.L.R. (4th) 193, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 372 N.R. 95, (sub nom. *Juman v. Doucette)* [2008] 1 S.C.R. 157, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 252 B.C.A.C. 1, 422 W.A.C. 1, [2008] 4 W.W.R. 1, 50 C.P.C. (6th) 207, 2008 CarswellBC 411, 2008 CarswellBC 412 (S.C.C.) — referred to

Foster-Jacques v. Jacques (2012), 353 D.L.R. (4th) 1, 26 R.F.L. (7th) 259, 2012 NSCA 83, 2012 CarswellNS 591, (sub nom. *Coltsfoot Publishing Ltd. v. Foster-Jacques)* 266 C.R.R. (2d) 1, 1014 A.P.R. 166, 320 N.S.R. (2d) 166 (N.S. C.A.) — referred to

Innocente v. Canada (Attorney General) (2012), 2012 NSCA 36, 2012 CarswellNS 233, 998 A.P.R. 273, 315 N.S.R. (2d) 273 (N.S. C.A.) — referred to

Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc. (2001), 2001 SCC 51, 2001 CarswellQue 1864, 2001 CarswellQue 1865, (sub nom. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.)* 204 D.L.R. (4th) 331, (sub nom. *Lac d'Amiante du Québec ltée v. 2858-0702 Québec inc.)* 274 N.R. 201, [2001] 2 S.C.R. 743, 14 C.P.C. (5th) 189, 2001 CSC 51 (S.C.C.) — referred to

Martel Building Ltd. v. R. (2000), 2000 SCC 60, (sub nom. *Martel Building Ltd. v. Canada)* [2000] 2 S.C.R. 860, 36 R.P.R. (3d) 175, (sub nom. *Martel Building Ltd. v. Canada)* 193 D.L.R. (4th) 1, 2000 CarswellNat 2678, 2000 CarswellNat 2679, 2000 CSC 60, 3 C.C.L.T. (3d) 1, 5 C.L.R. (3d) 161, (sub nom. *Martel Building Ltd. v. Canada)* 262 N.R. 285, 186 F.T.R. 231 (note) (S.C.C.) — considered

R. v. Mentuck (2001), 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 163 Man. R. (2d) 1, 269 W.A.C. 1, 2001 CarswellMan 535, 2001 CarswellMan 536, 2001 SCC 76, 47 C.R. (5th) 63, [2002] 2 W.W.R. 409, 277 N.R. 160, [2001] 3 S.C.R. 442 (S.C.C.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Rules considered:

Federal Courts Rules, SOR/98-106
R. 151 — considered

Nova Scotia Civil Procedure Rules, N.S. Civ. Pro. Rules 2009
R. 14.03(1) — considered

R. 85.04 — considered

R. 85.04(1) — considered

R. 85.04(2)(a) — considered

R. 85.05(1) — considered

R. 85.05(2) — considered

Words and phrases considered:

public interest in confidentiality

The defendants sought a confidentiality order. The proposed order would prevent the public disclosure of documents to be produced by the defendants to the plaintiff in the discovery stage of the lawsuit. The defendants were concerned that the documents might become exhibits to an affidavit for a chambers motion. The motions judge denied the order. He held that the defendants had not established a public interest in confidentiality, beyond their own commercial interest, and had not satisfied the first branch of the *Sierra Club* test.

. . . . .

The judge's discretion under Rule 85.04(1) [*Nova Scotia Civil Procedure Rules*, SOR/98-106] is to be exercised in accordance with the open courts principle that was discussed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442 and was summarized in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

. . . . .

In my respectful view, the judge's reasoning erroneously restricted the meaning of "public interest in confidentiality" under *Sierra Club*.

That [the appellants] have a specific private interest does not exclude the existence of a concurrent public interest. The two are not mutually exclusive.

The motions judge accepted that "there would be a public interest in fair

competition". I agree[.]

APPEAL by defendants from judgment reported at *Canadian Financial Wellness Group v. Resolve Business Outsourcing* (2013), 2013 NSSC 394, 2013 CarswellNS 930, 1067 A.P.R. 396, 337 N.S.R. (2d) 396, 297 C.R.R. (2d) 19 (N.S. S.C.), dismissing motion for confidentiality order with respect to documents.

Fichaud J.A.:

1 The defendants sought a confidentiality order. The proposed order would prevent the public disclosure of documents to be produced by the defendants to the plaintiff in the discovery stage of the lawsuit. The defendants were concerned that the documents might become exhibits to an affidavit for a chambers motion. The motions judge denied the order. He held that

the defendants had not established a public interest in confidentiality, beyond their own commercial interest, and had not satisfied the first branch of the *Sierra Club* test.

2 The defendants appeal. They say that the documents disclose intellectual property that is integral to servicing a government-sponsored project for which a competitive bidding call is imminent. Disclosure of the documents in court, assert the defendants, would open its information to other bidders and undermine the public interest in a fair and competitive bidding process.

Background

3 The Appellant D+H Limited Partnership (D+H) administers $20 billion in student loans. Its portfolio includes student loans provided by the Government of Canada's Student Loan Program (CSLP) and those provided by most provincial governments. D+H provides loan-related services to 1.7 million students in Canada.

4 D+H manages the CSLP loans further to a contract with the Government of Canada (Government). The contract had an operational start date of March 17, 2008 (CSLP Contract). The Government awarded the CSLP Contract to the Appellant Resolve Corporation (Resolve) after a public and competitive tendering process initiated by the Government in the spring of 2006. In 2010, D+H acquired Resolve and, with it, the CSLP Contract.

5 The Government's 2006 request for proposals for the CSLP Contract asked for "end to end" servicing of the student loans, from the initial disbursement of funds to the post-study repayment of loans. The Affidavit of Mr. Bob Zebeski, D+H's Director of Operations, summarizes the bidding process:

> 6. Resolve's bid for the CSLP Contract in response to the RFP in the spring of 2006 included lengthy and detailed technical submissions on the process proposed by Resolve to manage and administer the CSLP loan portfolio on an end-to-end basis. These bid submissions required a significant amount of work and included confidential process-related information that was (and is) highly commercially and competitively valuable and sensitive to Resolve (now D+H).
>
> 7. In addition to Resolve's detailed technical submissions on the proposed processes for providing end-to-end servicing of CSLP loans, the RFP for the CSLP Contract required bidders to submit a separate financial proposal outlining the costs to the Government of Canada associated with providing those services. Bids for the CSLP Contract were evaluated using a "price per point" model developed by the Government of Canada, whereby the technical process and service-related (among other) elements of the bids were assigned points. The total points awarded to the bid were divided by the total cost of the bidder's proposal, to arrive at a "price per point" score. Resolve was awarded the CSLP Contract on the basis of having the best (lowest) price-per-point score.
>
> 8. Although certain aspects of the tender and bidding process run by the Government of Canada for the CSLP Contract are in the public domain, such as the RFP and the identity of the bidders, Resolve's technical bid documents were submitted on a confidential basis.

6 The CSLP Contract had a five-year term, with an additional two-year option followed by three one-year options, all exercisable by the Government. The Government exercised the two-year option, which runs until March 2015.

7 The CSLP Contract is financially significant to the Government and the operator. The revenue from the initial five-year term approximated $380 million.

8 In 2012, the Government began the re-procurement process for the next contract to service the CSLP. On November 28, 2012, the Government held an "Industry Day" meeting to provide potential bidders with an overview of the bidding timetable and objectives for the next CSLP contract. The document distributed by the Government on Industry Day itemized the consultative steps leading to the draft RFP. According to Mr. Zebeski's Affidavit, dated September 23, 2013, the steps scheduled by the Government included "issuance of the RFP in late 2013", "evaluation of bids in response to the RFP in spring of 2014" and "awarding contract for CSLP in fall of 2014".

9 To jump ahead briefly - at the hearing in the Court of Appeal on September 16, 2014, counsel informed the Court that the Government had issued the RFP the previous week. Of course, that fact was not before the motions judge whose decision was dated December 4, 2013.

10 In late 2012, the Government issued "Rules of Engagement" for the Re-procurement process. The Rules of Engagement included:

> An overriding principle of the industry consultation is that it be conducted with the utmost of fairness and equity between all parties. No one person or organization shall receive nor be perceived to have received any unusual or unfair advantage over the others.
>
> These Rules of Engagement will apply beginning with the signing of this document and concluding with the release of the Final Request for Proposal (RFP) on MERX.
>
> . . . . .
>
> Canada will not disclose proprietary or commercially-sensitive information concerning a Participant to other Participants or third parties, except and only to the extent required by law.
> **TERMS AND CONDITIONS:**
>
> . . . . .
>
> 2. Participants will NOT reveal or discuss any information to the MEDIA/NEWSPAPER regarding the CSLP Re-procurement during this consultative process. ...

11 D+H views its systems documents as containing proprietary or confidential and commercially sensitive information that would benefit other bidders in the competitive bidding process for the new CSLP contract. Mr. Zebeski's Affidavit explains:

> 23. ... D+H's competitive advantage in this area of borrower communications will be lost if the confidential documents which are the subject of this motion become publicly available to competitive bidders as a result of this litigation.
>
> . . . . .
>
> 29. In addition, D+H maintains an internal Knowledge Base system, which stores and organizes documents for a variety of users within D+H, including CSRs [customer service representatives]. These Knowledge Base documents are strictly confidential and only for use within D+H. Within D+H, access to the Knowledge Base documents is restricted to employees with a "need-to-know" based on user access profiles which are created and monitored by D+H's system access group, which is independent of any D+H business or operational group. Furthermore, all D+H employees, including the CSRs, are bound by confidentiality agreements with D+H which they entered into as a condition of their employment with D+H. These employee confidentiality agreements prohibit the dissemination of Knowledge Base documents outside of D+H.
>
> . . . . .
>
> 33. D+H's Knowledge Base documents reflect and represent a significant expenditure of time and resources dedicated by D+H to its student loan servicing business, are central to D+H's performance of that business, and constitute highly confidential and commercially sensitive work product of D+H.

12 In August 2011, the Respondent The Canadian Financial Wellness Group Incorporated (CFW) sued D+H, Resolve Corporation and the Resolve Business Outsourcing Income Fund. CFW's Statement of Claim says that, before 2008, CFW had developed a program of confidential and proprietary material that was designed to address the relationship between student loan borrowers and service providers. CFW alleges that Resolve and D+H became privy to CFW's information, wrongly used that information for profit, and are liable to CFW for *quantum meruit.* By a Defence filed in October 2011, D+H and Resolve denied liability.

13 The parties exchanged notices of documentary disclosure. CFW provided its list and documents in late September 2012. D+H and Resolve provided their list on December 10, 2012. The D+H/Resolve notice listed almost 600 documents. D+H/Resolve's list included training and systems manuals for their customer service representatives and scripts for use by

their representatives in communications with student borrowers.

14 D+H and Resolve agree that these documents pertain to the litigious issues, and should be disclosed to CFW for the purposes of the lawsuit. But D+H and Resolve wish to avoid the public disclosure of their training and systems manuals and scripts (which D+H terms "Confidential Documents"). D+H's factum says these "have been developed and refined over time, with the knowledge and experience gained through interaction, research and analysis. In the public domain, the Confidential Documents would provide a competitor with the Appellants' 'recipe for success'...."

15 D+H and Resolve state that public disclosure would make the information available to their competitors for use in the impending bidding process for the renewed CSLP Contract. D+H and Resolve are concerned that CFW may attach the information to affidavits for an upcoming chambers motion, meaning the information would be on the public court record and accessible to its competitors.

16 On June 26, 2013, D+H/Resolve moved in the Supreme Court of Nova Scotia for a confidentiality order under Civil Procedure Rule 85.04 to seal the documents that they considered to be confidential — approximately 35% of the their productions. Justice Scaravelli heard the motion on November 7, 2013, and issued a ruling on December 4, 2013 (2013 NSSC 394 (N.S. S.C.)), dismissing the motion. Later I will discuss his reasons. The Order was issued on January 28, 2014.

17 On February 3, 2014, D+H and Resolve applied for leave to appeal to the Court of Appeal.

Issues

18 The issues are whether leave should be granted and, if so, whether the motions judge committed an appealable error, under the standard of review, by denying the confidentiality order.

Standard of Review

19 Rules 85.04(1) and (2)(a) say:

> **85.04 Order for confidentiality**
>
> (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding; ...

20 The judge "may" issue the order. A discretionary order is reviewed by this Court for error of legal principle or patent injustice. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36 (N.S. C.A.), paras 26-29. The question here is whether the motions judge erred in legal principle in the application of the open courts principle.

Analysis

21 D+H/Resolve agree that CFW is entitled to production of the documents for the purpose of the lawsuit. The pre-trial disclosure of documents carries an implied undertaking of confidentiality, acknowledged by Rule 14.03(1). As the private disclosure process does not involve the court, it does not engage the open courts principle: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, [2008] 1 S.C.R. 157 (S.C.C.), para 22, per Binnie, J. for the Court; *Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc.*, [2001] 2 S.C.R. 743 (S.C.C.), paras 59-72; *Foster-Jacques v. Jacques*, 2012 NSCA 83

(N.S. C.A.) [hereinafter *Coltsfoot*], para 83.

22 D+H/Resolve do not seek to limit the disclosure of documents to CFW. Their concern is that CFW may attach the documents to an affidavit for a chambers motion. In that event, the documents would be publicly accessible. D+H/Resolve indicate that a summary judgment motion may be in the offing. Hence, their request for a sealing order.

23 Rules 85.05(1) and (2) require that the applicant for a confidentiality order give "reasonable notice to representatives of media". This may be done through posting on the Courts of Nova Scotia website. D+H/Resolve gave such notice before the motion in the Supreme Court. The Courts of Nova Scotia website displays a Protocol, approved by the judges of the Court of Appeal, for notice to the media respecting proceedings in the Court of Appeal. Before the appeal hearing, D+H/Resolve gave that notice to the media under the Protocol. In neither court did any representative of the media appear or contest the confidentiality order. CFW is the only party to object.

24 The judge's discretion under Rule 85.04(1) is to be exercised in accordance with the open courts principle that was discussed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) and *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.) and was summarized in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.). See also *Coltsfoot*, paras 22-24, 27.

25 In *Sierra Club*, Justice Iacobucci for the Court formulated the *Dagenais/Mentuck* test in the context of *Federal Court Rule* 151, that stated:

> **151.** (1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

Federal Court Rule 151 does not differ materially from Nova Scotia's Rule 85.04(1). In *Sierra Club*, Justice Iacobucci said:

> **(3) Adapting the Dagenais Test to the Rights and Interests of the Parties**
>
> 53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> 54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.
>
> 55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be

> characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" [Justice Iacobucci's underlining].
>
> 56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.
>
> 57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

26 To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

27 In this case, the motions judge's decision framed the issue:

> [12] The plaintiff does not dispute the information sought to be protected is confidential and proprietary. Moreover, both parties agree there is no reasonable alternative to the request for a sealing order including redaction. The plaintiff submits Resolve's motion does not meet either [the] "necessity" branch or the "proportionality" branch of the "Sierra Test".

28 With that background, I will turn to the motions judge's reasons. The judge determined that there was no public interest in confidentiality under the first branch of *Sierra Club*'s test. He said:

> [15] The evidentiary basis set out in the present case by way of affidavit evidence relates specifically to Resolve's upcoming participation in a RFP with other competitors it believes will participate in the process. They submit public disclosure of the confidential material would undermine Resolve's competitive advantage. Although there would be a public interest in fair competition, the interest in this case is clearly specific to Resolve in that it seeks to protect its own commercial interests. However, as stated in *Sierra Club* there must be a broader public interest at stake in order to defeat the fundamental principle of the open court process. Moreover, Resolve has the burden of establishing the risk to its commercial interest is real and grounded in evidence. However, the RFP for the contract has yet to be issued and the competitive bidding process has yet to occur. No trial dates have been set for these proceedings. There is no evidence of any pending or intended motions requiring disclosure of the confidential information. It is anticipated that the RFP will be issued in late 2013 with the valuation of the confidential bids set for the spring of 2014.

The judge concluded:

> [16] ... The risk it [D+H/Resolve] identified is specific to its interests only and there is no serious risk to any broader public interest. Otherwise, all litigants possessing confidential information specific to its own commercial interest would demand confidential orders in legal proceedings based on a right to fair trial public interest which would be an affront to the proper administration of justice and the open court principle.

29 In my respectful view, the judge's reasoning erroneously restricted the meaning of "public interest in confidentiality"

under *Sierra Club*.

30 That D+H and Resolve have a specific private interest does not exclude the existence of a concurrent public interest. The two are not mutually exclusive. In *Sierra Club*, Justice Iacobucci said (para 55) "the interest in question cannot *merely* be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality" [emphasis added]. The question is whether D+H/Resolve's clear private interest also can be expressed in terms of a public interest in confidentiality.

31 The motions judge accepted that "there would be a public interest in fair competition". I agree, for the following reasons.

32 This is a tender call, issued by the Government of Canada, for a publicly funded, several hundred million dollar contract for a government-sponsored program governing loans to thousands of students across the country. The Government's Rules of Engagement state that "the utmost of fairness and equity between all parties" is an "overriding principle", and that the Government "will not disclose proprietary or commercially-sensitive information concerning a Participant to other Participants or third parties, except and only to the extent required by law". Clearly the integrity of the tendering process for a new CSLP Contract is a matter of public interest.

33 In *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.), para 88, Justices Iacobucci and Major, for the Court, said that the implication of a term of fair and equal treatment in a tender process "has a certain degree of obviousness to it" and "is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved". See also *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104 (Alta. C.A.), paras 23, 52, affirmed [2007] 1 S.C.R. 116 (S.C.C.), para 32.

34 The motions judge said that public interest did not apply here because the RFP "has yet to be issued" (by the decision date of December 4, 2013), and "will be issued in late 2013 with the valuation of the confidential bids set for the spring of 2014".

35 With respect, I don't follow the judge's reasoning. The motions judge acknowledged that an RFP was expected within weeks, and an evaluation of tenders within several months. If D+H/Resolve's confidential material were made available to its competitors, the competitors could tailor their imminent tenders to that material, while D+H/Resolve would not have those competitors' equivalent confidential information. This would contravene the Government's Rules of Engagement and the judicially endorsed principles of fairness and equality that should govern the tender process. That the RFP had not yet issued, but was anticipated in the immediate future, has no bearing on the public's interest in the integrity of the upcoming tender process. The risk may well peak immediately before the expected RFP, when prospective tenderers gather information to prepare their bids. The motions judge's qualification to the legal characteristics that define the public interest, in my view, errs in principle.

36 The first branch of *Sierra Club*'s test is satisfied. There is a real and substantial risk to an important commercial interest that can be expressed in terms of a public interest in confidentiality, and there is no reasonable alternative, short of a confidentiality order, that would preserve the interest in question.

37 *Sierra Club*'s second branch asks whether the salutary effects of the confidentiality order outweigh its deleterious effects, including the right to freedom of expression and the public interest in open and accessible court proceedings.

38 Despite notice, no representative of the media appeared in either the Supreme Court or this Court to object. There is little discernable public appetite for access to D+H/Resolve's operational manuals and scripts.

39 At the chambers hearing in the Supreme Court, counsel for D+H/Resolve said "the confidential information, which we're seeking to protect here, would be available to the parties and to the Court, and the order wouldn't do anything which would impair public access to any hearings related to this matter". Similarly, D+H/Resolve's factum to the Court of Appeal said "the Appellants did not ask that the public be restricted from any hearings, nor that the media be restricted from any reporting". In *Sierra Club*, para 79, Justice Iacobucci noted that such a restricted confidentiality order "represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle".

40 In my view, *Sierra Club*'s second branch is satisfied.

Conclusion

41 I would grant leave to appeal and allow the appeal. I would order that, if the confidential information from D+H or Resolve's training and systems manuals and scripts is to be included in an affidavit for a chambers motion, then that confidential information be sealed from the public, but be available for the unrestricted use of counsel and the court in a hearing to which the public would have the normal access.

42 I would order that any costs paid further to the motions judge's decision be repaid. I would order costs of $750 for the motion in the Supreme Court and appeal costs of $2,000 plus disbursements be paid by CFW to the Appellants.

Appeal allowed.

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2017 NSSC 80, 2017 CarswellNS 187, 277 A.C.W.S. (3d) 21, 50 C.B.R. (6th) 168

2017 NSSC 80
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

2017 CarswellNS 187, 2017 NSSC 80, 277 A.C.W.S. (3d) 21, 50 C.B.R. (6th) 168

In the Matter of the Proposal of Kocken Energy Systems Inc.

Gerald R.P. Moir J.

Heard: January 5, 2017
Judgment: January 10, 2017
Written reasons: March 22, 2017
Docket: Hfx. 458774, 40675, Estate No. 51-2097016

Counsel: Tim Hill, Q.C., for Kocken Energy Systems Incorporated
Gavin MacDonald, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Applicant company manufactured process equipment for oil and gas industry — In 2011, two shareholders of company moved manufacturing from Alberta to Nova Scotia and company acquired plant in New Brunswick in 2015 and incorporated in Barbados — Company's main secured creditor bank had 3 million dollars in venture — Company brought motion for 45 day extension to file proposal for bankruptcy pursuant to Bankruptcy and Insolvency Act — Motion granted with conditions — Since cross-examinations had not been heard, there was no resolve to conflicting evidence on company's side and generalized opinions without raw facts on bank's side — However, judge was satisfied on three points that absence of information left bank and insolvency practitioners with serious questions relevant to bank's interest in company's inventory and receivables and they had rationally founded suspicion that equipment could be transferred to Barbados company without payment, compromising bank's interest in inventory and receivables — On conditional approval, reservation stemmed from strange purchase orders from Barbados company to Canadian company with large prices — It was ordered that company give four business days' notice of bank before shipping anything out of Canada and advise bank of amount to be paid and arrangements for payment.

Table of Authorities

Cases considered by *Gerald R.P. Moir J.*:

H & H Fisheries Ltd., Re (2005), 2005 NSSC 346, 2005 CarswellNS 541, 239 N.S.R. (2d) 229, 760 A.P.R. 229, 18 C.B.R. (5th) 293 (N.S. S.C.) — considered

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (2015), 2015 ONSC 5139, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 178 — considered

MOTION for 45 day extension to file proposal pursuant to *Bankruptcy and Insolvency Act*.

Gerald R.P. Moir J. **(orally):**

Introduction

1 Kocken Energy Systems Incorporated filed a notice of intention to make a proposal on December 7, 2016. It moves to extend the deadline for filing the proposal by the maximum allowed under the *Bankruptcy and Insolvency Act*, forty five days. Its major secured creditor, the Bank of Montreal, opposes the extension. It says that the stay should end and Kocken should be bankrupt. Alternatively, the extension should be no more than thirty days.

Facts

2 Kocken manufacturers specialized process equipment for the oil and gas industry. The company's predecessor did business in Alberta since about 2005. By 2007, it had just two shareholders, William Famulak and Arthur Sager. In 2011, they decided to move manufacturing to Eastern Canada. In 2015, Kocken acquired a plant at St. Antoine, New Brunswick.

3 The Bank of Montreal provided financing to purchase the plant as well as current financing. Kocken also had a relationship with the Royal Bank of Canada.

4 On Tuesday, November 8, 2016 the Bank of Montreal stopped extending current credit. Kocken reverted to the Royal Bank. The Bank of Montreal invited PricewaterhouseCoopers to review Kocken's performance and make recommendations. PricewaterhouseCoopers prepared, and Bank of Montreal and Kocken endorsed, an engagement letter dated November 14. Mr. David Boyd took charge of the assignment. (I have an affidavit from him.)

5 PricewaterhouseCoopers studied the St. Antoine plant, read accounting records, and interviewed Kocken operatives until about November 21, 2015. After that, it reported to the Bank of Montreal. The bank issued a notice of intention to enforce security on November 25.

Kocken and Bank of Montreal Breakdown

6 I have the affidavit of Ms. Anna Graham for the bank. She swears to a debt well over $3 million dollars and security in the St. Antoine plant, personal property, accounts receivable, and inventory. She also swears to these defaults at para. 9 of her affidavit:

Based on the information available to BMO, the Borrower has breached its obligations to BMO including the following:

> insufficient working capital to meet financial covenants, inability to fund current operations, entering into the Reorganization, as defined in the Boyd Affidavit, failing to provide financial statements and information, ceasing to conduct its banking with BMO and disposing of assets subject to the Security.

7 In para. 10, Ms. Graham swears that these defaults continue. She adds that Kocken failed to respond to requests for basic information. She offers her opinion that Kocken is deliberately hiding information.

8 At the heart of Ms. Graham's concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transferred to a related company recently incorporated in Barbados. That company is Kocken Energy Systems International Incorporated.

9 That this is the fundamental concern underlying the bank's decisions to suspend current financing, to enforce security, and to oppose the proposal is apparent from para. 16 of Mr. Boyd's affidavit as well as Ms. Graham's affidavit as a whole.

10 According to Mr. Sager, Kocken was simply a manufacturer. Most contracts for the sale of manufactured equipment and the intellectual property behind the equipment were with Mr. Famulak independently. Mr. Sager retained Mr. Rick Ormston, an accountant and consultant of Halifax about establishing a company that would be the design and engineering base for Mr. Famulak. That consultation lead to the Barbados company I mentioned, which I shall refer to as Kocken Barbados.

11 Mr. Ormston developed a plan, the details of which were unknown to the Bank of Montreal or PricewaterhouseCoopers. There are numerous contradictions between Mr. Boyd's affidavit and Mr. Sager's second affidavit, which responded to Mr. Boyd's. The contradictions concern what one said to the other, what Mr. Sager informed Mr. Boyd, and the subjects on which information was withheld or unavailable.

12 No one was cross-examined and I am in no position to resolve the evidentiary contradictions. The conflicting evidence is therefore unhelpful for making findings. Similarly, Ms. Graham's affidavit contains many generalized opinions without the raw facts required for findings on her subjects. I am, however, satisfied on three points.

13 Firstly, neither the Bank of Montreal nor PricewaterhouseCoopers knew the details of the Ormston plan. The absence of information left the bank and the insolvency practitioners with serious questions, itemized at para. 18 of Mr. Boyd's affidavit. Secondly, these questions were relevant to the bank's interest in Kocken inventory and receivables. Thirdly, the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment, compromising the bank's interest in inventory and receivables.

Recent Developments

14 In the last three working days, Kocken made some disclosure to the bank and PricewaterhouseCoopers. Most importantly, Kocken delivered a copy of the Ormston plan. It referred to draft documents that had not been disclosed yet, but the bank and the trustee must now know what the plan was really about.

Disposition

15 Subsection 50.4(9) provides three thresholds that the insolvent must prove before the court has any discretion to grant an extension:

> (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.

16 I am not prepared to embrace the generalized allegations made in Ms. Graham's affidavit because this court makes findings on evidence of raw fact. Nor can I resolve the evidentiary contradictions between Mr. Sager and Mr. Boyd. What is left suggests good faith and due diligence.

17 I reject the submission that Kocken's initial evidence failed to disclose material facts. This submission is premised on the PricewaterhouseCoopers characterization of the relationship between Kocken and Kocken Barbados. As I said, the contradictions between the evidence of Mr. Boyd and Mr. Sager are irresolvable at present. The rest of the evidence supports good faith and due diligence.

18 I am satisfied on the first threshold.

19 Next is the requirement that a viable proposal is likely to be made.

20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.

21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.

22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.

23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

25 Finally, I have only one reservation about "no creditor would be materially prejudiced". The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices. They purport to be conditional on resolving issues between Kocken and the Bank of Montreal.

26 By virtue of its s. 178 security, the bank owns the inventory. The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first.

27 I can diminish my concern by exercising my inherent jurisdiction to control this proceeding and the parties to it. I will order that Kocken give four business days' notice to the bank before it ships anything out of Canada and, along with the notice, advise the bank of the amount to be paid and the arrangements for payment. In view of my willingness to make such an order, I find that no creditor will be prejudiced by the order extending time.

28 I am prepared to extend the period for filing a proposal by the full 45 days, counting from last Thursday.

Motion granted with conditions.

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