

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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 MCEWAN ENTERPRISES INC.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick, Caroline Descours, and Trish Barrett* for the Applicant

Sean Zweig and Joshua Foster, for the Monitor

Virginie Gauthier, for The Cadillac Fairview Corporation Limited

HEARD and DETERMINED: September 28, 2021

REASONS RELEASED: October 1, 2021

ENDORSEMENT

1. The initial hearing of this matter took place on September 28, 2021. At the conclusion of the hearing, I granted an Initial Order with reasons to follow. These are the reasons.

A. OVERVIEW

2. McEwan Enterprises Inc. (“MEI”) is a full-service restaurant, catering, gourmet grocery and events company (the “Business”) based in the Greater Toronto Area (the “GTA”). MEI was founded in 1987 by Mark McEwan, who leads the development, preparation and delivery of the culinary aspects of the Business.

3. Capitalized terms used but not defined herein have the meanings given to such terms in the Affidavit of Dennis Mark McEwan sworn September 27, 2021 (the “McEwan Affidavit”).

4. MEI brings this application for an initial order (the “Initial Order”) under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”). Counsel to MEI submits that the principal objectives of these CCAA proceedings are to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of MEI and its Business. As part of its restructuring efforts pursuant to these CCAA proceedings, MEI intends to seek to complete the sale and transfer of the Business pursuant to the proposed Transaction (as defined below).

5. MEI has been experiencing financial challenges for an extended period of time as a result of certain unprofitable McEwan Locations (as defined below), and the McEwan Group has not been profitable since 2017. MEI’s financial challenges have been exacerbated by the impacts of the COVID-19 pandemic over the last approximately 18 months.

6. Counsel submits that MEI has made extensive efforts to seek consensual arrangements with its landlords in respect of its leases, but has been unable to achieve a comprehensive out-of-court resolution.

7. After extensive review and consideration of its circumstances, and its options and alternatives, and following efforts to reach consensual arrangements with landlords, MEI

determined that the best available alternative in the circumstances would be a sale of substantially all of the McEwan Group's assets and the Business (the "Transaction") to the current owners of MEI, and the continuation of the Business with a reduced number of McEwan Locations. The continued involvement of Mr. McEwan as chef and operator of the Business, is premised on a continuation of Mr. McEwan's partnership with Fairfax (as defined below) as co-owners of the McEwan Group.

8. Having regard to its financial circumstances and ongoing challenges, MEI determined that it is necessary to seek protection under the CCAA in order to provide stability for the Business and preserve value, while MEI advances its efforts to restructure and right-size the Business, including pursuing the proposed Transaction.

9. Counsel advises that MEI intends to bring a subsequent motion to seek Court approval of the Transaction.

B. CURRENT CHALLENGES

10. The McEwan Group conducts the Business out of six restaurants (the "McEwan Restaurants"), as well as two food-hall locations and one gourmet grocery location (collectively with the McEwan Restaurants, the "McEwan Locations").

11. MEI is a private company incorporated under the laws of Ontario and is headquartered in Toronto. MEI is owned by Fairfax Financial Holdings Limited ("Fairfax"), through one of its subsidiaries, which holds a 55% equity interest in MEI, and by Mr. McEwan, through McEwan Holdco Inc., which owns a 45% equity interest in MEI.

12. Many of the McEwan Locations have been historically successful and profitable; however, certain locations have been underperforming for a number of years, causing an overall significant strain on MEI's profitability and liquidity. As a result of these financial challenges, in March 2020, MEI's shareholders provided approximately \$1.1 million of additional equity financing to support the operations of the Business.

13. In an effort to address the COVID-19 pandemic challenges, MEI implemented extensive cost-saving and cash conservation measures, negotiated various rent concessions, and obtained various government subsidies and support. Those efforts were insufficient to address MEI's liquidity needs during the COVID-19 pandemic. As a result, MEI needed to obtain additional financing, which it was able to obtain from one of its shareholders, Fairfax, by way of a number of unsecured loans provided in 2020 and 2021.

14. MEI has advised that it will also need further funding to continue operations while the impacts of the COVID-19 pandemic on the Business persist.

15. Counsel submits that after extensive review and consideration of its circumstances and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative that could be implemented in the circumstances that would preserve the value of the Business for the benefit of MEI's many stakeholders, would be the Transaction. On September 27, 2021, MEI entered into a purchase agreement with 2864785 Ontario Corp. (the "Purchaser"), pursuant to which, subject to Court approval, the parties would complete the Transaction (the "Purchase Agreement").

16. MEI believes that the implementation of the Transaction will result in a sustainable Business going forward for the benefit of MEI's many stakeholders, including its 268 employees whose jobs will be preserved, its secured creditors whose obligations will be unaffected and assumed by the Purchaser, and its many suppliers and service providers whose contracts and obligations will also all be assumed. The Transaction also provides for the necessary funding for MEI's operations by way of the Transaction Deposit of up to \$2.25 million for the period up to the closing of the Transaction.

17. MEI and its board of directors have determined that it is in the best interests of MEI and its stakeholders for MEI to file for protection under the CCAA in order to preserve the value of the Business and continue as a going concern while seeking to implement a restructuring of the Business, including the proposed Transaction.

18. Counsel submits that the commencement of these CCAA proceedings and the granting of a stay of proceedings (the "Stay of Proceedings") are necessary to provide stability to the Business, to preserve value and to permit MEI to restructure its affairs, and are in the best interests of MEI and its stakeholders.

19. MEI is also requesting that this Court exercise its discretion to extend the Stay of Proceedings in respect of the personal guarantees, indemnities and security granted by Mr. McEwan in his personal capacity in connection with certain of MEI's obligations, as well as in favour of 2860117 Ontario Limited (the "McEwan Subsidiary"), a wholly-owned subsidiary of MEI which holds MEI's 50% interest in the ONE Restaurant Partnership. The McEwan Subsidiary and Mr. McEwan are collectively referred to herein as the "Non-Filing Parties".

20. As set out in the Cash Flow Forecast, with the remaining availability under the Secured Credit Facilities and the funding from the Transaction Deposit (if approved by the Court), MEI is expected to have sufficient funding through the period of the Cash Flow Forecast.

21. Alvarez & Marsal Canada Inc. ("A&M") has consented to act as the monitor of MEI in these proceedings (in such capacity, the "Monitor").

22. In connection with A&M's appointment as the Monitor, it is contemplated that a Court-ordered charge will be granted over MEI's assets, property and undertaking (the "Property") in favour of the Monitor, its counsel, and MEI's counsel in respect of their fees and disbursements incurred prior to and following the commencement of these proceedings at their standard rates and charges (the "Administration Charge").

C. ISSUES

23. The issues to be considered on this application are whether:

- (a) MEI is a "debtor company" to which the CCAA applies;
- (b) the relief sought in the proposed Initial Order is available under the CCAA;
- (c) the stay of proceedings under the Initial Order should be extended to the Non-Filing Parties; and
- (d) the Charges (as defined below) should be granted.

D. ANALYSIS and FINDINGS

24. The CCAA applies to a “debtor company” where the total claims against such company exceeds \$5 million. The terms “debtor company” is defined in Section 2 of the CCAA. In essence, a debtor company is an insolvent company.

25. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of “insolvent”, courts have taken guidance from the definition of “insolvent person” in Section 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “BIA”), which defines an “insolvent person” as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is “insolvent” under one of the following tests: (a) is for any reason unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. (See: *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 at paras. 21-22 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 [*Stelco*];).

26. The test for “insolvent person” under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.

27. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in MEI being unable to pay its debts as they generally become due if a stay or proceedings and ancillary protection are not granted by the court. (see: *Stelco, supra* at para. 40).

28. Having reviewed the McEwan Affidavit and hearing submissions, I am satisfied that MEI meets both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition.

29. As at August 31, 2021, MEI has aggregate liabilities exceeding \$10 million. Thus, total claims against MEI exceed the \$5 million threshold amount under the CCAA.

30. Accordingly, I am satisfied MEI is a “debtor company” to which the CCAA applies.

31. Subject to the terms of the Initial Order, MEI intends to honour all of its obligations in respect of its employees, suppliers and service providers in the ordinary course, as well in respect of its customer gift cards and the Customer Program. Pursuant to the proposed Transaction, any and all outstanding amounts owing in respect of MEI’s employee, trade or customer obligations will be assumed by the Purchaser upon implementation of the Transaction.

32. I am also satisfied that the Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. (See: *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at paras. 41, 43; *Cinram International Inc., Re*, 2012 ONSC 3767 at para. 37 and Sch. C at paras. 66-71; and *Performance Sports Group Ltd., Re*, 2016 ONSC 6800 at para. 24 [*Performance Sports*]).

33. In arriving at this conclusion, I have taken into account a number of factors in authorizing the payment of pay pre-filing obligations, including: (a) whether the goods and services were

integral to the business of the applicant; (b) the applicant's need for the uninterrupted supply of the goods and services; (c) whether the applicant had sufficient inventory of the goods on hand to meet its needs; (d) the effect on the applicant's operations and ability to restructure if it could not make pre-filing payments; and (e) the fact that no payments would be made without the consent of the Monitor. (See: *Cinram*, *supra* at para. 37 and Sch. C at paras. 66-71; *Performance Sports*, *supra* at para. 25; and *JTI-Macdonald Corp., Re*, 2019 ONSC 1625 at para. 24 [*JTI-Macdonald*]).

34. Pursuant to the proposed Initial Order, it is proposed that the Monitor not be required to comply with the notification requirements of Section 23(1)(a) of the CCAA to: (a) publish a newspaper notice in respect of the CCAA proceedings; (b) send a notice to known creditors; or (c) make publicly available a list showing the names, addresses and estimated claim amounts of those creditors.

35. I am satisfied that pursuant to Section 23(1)(a) of the CCAA, the Court has the jurisdiction to grant an order not requiring compliance with the applicable notice provisions and/or varying those requirements. The question is whether it is appropriate for the court to exercise its jurisdiction.

36. MEI believes that the issuance of a newspaper notice and the public posting of a list of individual creditors and their claims will not serve to provide any material benefit to the relevant parties, who are intended to not be impacted by these CCAA proceedings, and will add unnecessary costs. MEI believes that a notice issued by MEI to its creditors will be a more efficient and less disruptive means of notifying such parties in these circumstances.

37. I have not been persuaded that it is appropriate or necessary, in these circumstances to deviate from the notice provisions prescribed by the CCAA.

38. CCAA proceedings are public proceedings. The Supreme Court, in the recent decision *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37-38, confirmed that court proceedings are presumptively open to the public. It seems to me that, absent extenuating circumstances, any attempt to limit the publication of CCAA proceedings by altering the prescribed notice provisions is not consistent with the open court presumption which must be respected.

39. It is necessary to recognize that it is MEI that is seeking court protection from its creditors and has resorted to the CCAA to achieve its objectives. It does not lie with MEI to alter the notice provisions to suit its purposes.

40. The CCAA sets out notice provisions, which I do not consider to be onerous. Further, the costs associated with a newspaper notice are, in my view, inconsequential when one considers the assets and liabilities of MEI.

41. However, in an effort to eliminate any possible confusion surrounding the publication of individuals whose claims are expected to be unaffected in these proceedings, I have authorized minor adjustments to the notice provisions which are reflected in the signed order.

Extending the Stay of Proceedings to the Non-Filing Parties

42. Courts have the authority under the broad jurisdiction granted under Sections 11 and 11.02 of the CCAA and the Court's inherent jurisdiction to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding. (See: CCAA, Sections 11 and 11.02(1); *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21 [*Tamerlane*]; *Laurentian*

University of Sudbury, Re, 2021 ONSC 659 at para. 39 [*Laurentian*]; and *Lehndorff, supra* at paras. 5, 16, 21; BOA, Tab 3).

43. The Court has considered the following non-exhaustive list of factors in determining whether to extend a stay of proceedings to non-applicant third parties:

- (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;
- (b) extending the stay to the third party would help maintain stability and value during the CCAA process;
- (c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;
- (d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;
- (e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;
- (f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and
- (g) the balance of convenience favours extending the stay to the third party. (See: *JTI-Macdonald, supra* at para. 15; *Laurentian, supra* at para. 40; *Cinram, supra* at para. 37 and Sch. C at paras. 63-64; *Lehndorff, supra* at para. 21).

44. MEI submits that it is appropriate to extend the Stay of Proceedings to the Non-Filing Parties given:

- (a) Mr. McEwan has granted certain personal guarantees, indemnities and/or security in respect of certain of MEI's obligations, and the McEwan Subsidiary holds MEI's interests in the ONE Restaurant Partnership, an important part of the overall Business of MEI;
- (b) if any enforcement proceedings were commenced against any of the Non-Filing Parties, it would cause significant disruption to MEI, would have a detrimental effect on MEI's restructuring efforts, and there could be a significant erosion of value to the Business to the detriment of all stakeholders; and
- (c) the obligations which Mr. McEwan has guaranteed, indemnified and/or secured are not anticipated to be impacted by the CCAA proceedings and would be assumed as part of the proposed Transaction, thus MEI believes there would be no prejudice in granting the requested extension of the Stay of Proceedings.

45. I accept that the extension of the Stay of Proceedings in favour of the Non-Filing Parties is appropriate in these circumstances while MEI works to implement a restructuring of the Business, including the proposed Transaction, for the benefit of its many stakeholders.

46. MEI is also seeking approval of the Administration Charge in respect of certain administrative costs of these proceedings and the Directors' Charge in respect of the indemnification of its directors and officers (the "Charges"). Pursuant to the proposed Initial Order, the Charges would rank in priority to all Encumbrances in favour of any person, except for any secured creditor of MEI. At the Comeback Hearing, MEI intends to seek an Order granting priority of the Charges ahead of all Encumbrances of those secured creditors given notice of the Comeback Hearing, other than the Encumbrances granted by MEI in favour of RBC.

47. The proposed Initial Order provides that the priority of the Charges, as among them, shall be as follows: (a) First – the Administration Charge; and (b) Second – the Directors' Charge.

48. MEI is seeking the granting of the Administration Charge over the Property to secure the fees and disbursements of the Monitor and its counsel, and MEI's counsel, in each case incurred at their standard rates and charges in the amount of \$225,000, at this time.

49. Section 11.52 of the CCAA provides the Court with the jurisdiction to grant an administration charge.

50. MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Administration Charge given that:

- (a) the proposed restructuring of MEI will require the involvement of professional advisors;
- (b) the proposed beneficiaries of the Administration Charge have each contributed and will continue to contribute to MEI's restructuring efforts;
- (c) there is no unwarranted duplication of roles; and
- (d) the amount of the requested Administration Charge reflects the estimated costs of these proceedings to be incurred in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

51. MEI is seeking the Directors' Charge over the Property to secure the indemnification of the Directors and Officers pursuant to the Initial Order for any liabilities they may incur during the CCAA proceedings in their capacities as directors and officers in the amount of \$600,000, at this time.

52. Section 11.51 of the CCAA provides the Court with the authority to grant a charge relating to directors' and officers' indemnification on a priority basis.

53. MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge given that:

- (a) it is possible for the Directors and Officers to be held personally liable for certain of MEI's obligations during the course of these CCAA proceedings;
- (b) MEI's D&O Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage for the Directors and Officers under such D&O Policy;
- (c) the proposed Directors' Charge would apply only to the extent that the Directors and Officers do not have coverage under the D&O Policy;

- (d) the Directors' Charge would only cover liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;
- (e) the Directors and Officers have been actively involved in MEI's efforts to address the current circumstances of MEI, including the review and consideration of MEI's financial circumstances, efforts to manage and address MEI's challenging liquidity position, overseeing MEI's negotiations with landlords, the pursuit of restructuring alternatives, and the preparation for and commencement of these CCAA proceedings;
- (f) to carry on business during the CCAA proceedings and to complete a successful restructuring for the benefit of MEI and its stakeholders, MEI requires the active and committed involvement of the Directors and Officers; and
- (g) the amount of the Directors' Charge has been calculated based on the estimated exposure of the Directors and Officers in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

54. MEI believes that that the proposed amounts of each of the Charges are appropriate for the period from and after the granting of the Initial Order (if approved) until the date of the Comeback Hearing. MEI expects to request at the Comeback Hearing that the Administration Charge be increased to \$350,000 and that the Directors' Charge be increased to \$1.45 million.

55. I accept these submissions and accordingly I am satisfied that the Administration Charge and the Directors' Charge should be included in the Initial Order.

DISPOSITION

56. I am satisfied, for the foregoing reasons, that MEI meets all of the qualifications established for relief under the CCAA. An Order has been signed to reflect the foregoing. The comeback hearing has been scheduled for Thursday, October 7, 2021 at 9:00 a.m.



Chief Justice G.B. Morawetz

Date: October 1, 2021