Court File No. 23-02978830-0031
Estate File No. 31-2978830

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF WHYTE'S FOODS INC.

Applicant

FACTUM OF THE APPLICANT
(INITIAL ORDER)

August 30, 2023

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TO: THE SERVICE LIST

PART I - OVERVIEW[1]

1. Whyte's is a leading producer of pickled and fermented food products in Canada.

2. In recent years, Whyte's has faced significant operational and financial challenges that have impacted its production levels and profitability.

3. The Company's operations were adversely affected by the pandemic and consequential effects, including labour shortages, global supply chain disruptions, inventory supply, reduced demand from food service customers, and increased freight and logistic costs. Crop shortages in 2021 to 2023 further exacerbated the Company's situation.

4. In 2022 and 2023, the Company's financial situation worsened. Significant cash flow constraints and continued supply issues impacted the Company's ability to source ingredients and produce the level of inventory necessary to meet customer demands.

5. In response to these challenges, the Company made efforts to preserve cash, divest non-core assets, consolidate operations, increase revenue, decrease operational expenses, generate liquidity and restructure or refinance its debt obligations.

6. Despite these efforts, the Company now faces an imminent liquidity crisis and requires additional capital to continue operating in the ordinary course and to preserve the going-concern value of the business.

7. Accordingly, on August 23, 2023, Whyte's filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and commenced these NOI Proceedings. Alvarez was appointed as Proposal Trustee in the NOI Proceedings.

8. The current filing and commencement of the NOI Proceedings stems from the Company's need for additional capital to address its imminent liquidity crisis. The NOI Proceedings will provide the Company with the flexibility and breathing space required to: (a) secure and access additional financing under the DIP Facility Agreement; (b) ensure the Company can continue to operate in the ordinary course; (c) preserve the going-concern value of the Company; and (d) build on the work completed in the Prior Sale Process, complete the

[1] Capitalized terms used and not defined herein have the meaning ascribed to such terms in the Affidavit of Elizabeth Kawaja sworn August 28, 2023 ("**Kawaja Affidavit**").

SISP and execute a value-maximizing sale and/or investment transaction(s) for the benefit of the Company and its stakeholders.

9. This factum is filed in support of the Applicant's motion seeking an order, *inter alia*:

(a) authorizing and empowering the Applicant to obtain and borrow under the DIP Facility from the DIP Lender in order to finance the Company's working capital requirements and other general corporate purposes and capital expenditures;

(b) approving the engagement of Kroll in its capacity as Financial Advisor of the Applicant in the NOI Proceedings;

(c) approving the SISP for a sale or investment of the Applicant's Property and authorizing and directing the Financial Advisor and the Proposal Trustee, in consultation and together with the Applicant, to conduct the SISP;

(d) granting the priority Charges against the Property and/or the DIP Property, as applicable, and approving the following priority of such Charges:

(i) First – the Administration Charge (to the maximum amount of $250,000), as against the Property;

(ii) Second – the Directors' Charge (to the maximum amount of $350,000) as against the DIP Property;

(iii) Third – the DIP Lender's Charge (to the maximum amount of $2,700,000) as against the DIP Property; and

(iv) Fourth – the balance of the Directors' Charge (to the maximum amount of $350,000) as against the FCC Collateral;

(e) extending the time for the Applicant to file a proposal and the corresponding stay of proceedings until October 10, 2023; and

(f) with the consent of the Proposal Trustee, and in accordance with the Cash Flow Forecast and the DIP Facility, authorizing the Applicant to pay the Critical Suppliers.

PART II – FACTS

10. The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Elizabeth Kawaja sworn August 28, 2023 (the "**Kawaja Affidavit**").

A. CORPORATE STRUCTURE

11. Whyte's is a corporation incorporated under the *Business Corporations Act* (Québec) with its head office in Mississauga, Ontario and its registered office in Sainte-Thérèse, Québec. Whyte's is a wholly owned subsidiary of Triak Capital Inc. ("**Triak**"), a corporation incorporated under the *Business Corporations Act* (Canada) with a registered head office in Mississauga, Ontario.[2]

B. THE COMPANY'S BUSINESS AND OPERATIONS

(i) Business Segments

12. As the largest producer of pickled products in Canada offering a diverse product portfolio for the Canadian market, Whyte's carries on business through three key business segments:[3]

(a) **Co-Packing:** the Co-Packing segment is comprised of a multi-year contract secured with Smuckers for Bick's products and accounts for approximately 41.5% of the Company's net sales.[4]

(b) **Retail:** Whyte's produces popular private label SKUs for some of the largest retailers in the Canadian grocery market and mass channels, including Loblaws' *President's Choice* brand, Walmart's *Great Value* brand and Sobey's *Compliments* brand. The retail segment includes several prominent in-house brand names, including Strub's and Coronation. The retail segment accounts for approximately 30% of the Company's net sales.[5]

(c) **Food Service:** The food services segment of Whyte's business involves distributing Whyte's products to a variety of end markets, including restaurant groups, hotels and other hospitality businesses located across Canada and US.

[2] Kawaja Affidavit at para 13.
[3] Kawaja Affidavit at para 17.
[4] Kawaja Affidavit at para 19.
[5] Kawaja Affidavit at para 20.

The food services segment accounts for approximately 24% of the Company's net sales.[6]

(ii) Suppliers

13. The Company sources ingredients for its products from third-party suppliers.[7]

14. During the local crop season between June and September, the Company sources most of its crop from a single supplier in Ontario. During the imported crop season between October and May, crop is sourced from several suppliers across other countries, including Mexico, India and the US. The Company's remaining supplies and ingredients are purchased from suppliers in Canada and internationally, including the US, Europe and China.[8]

15. Whyte's purchases its cucumbers and other ingredients from multiple locations across the globe to help mitigate risks of weather dependent shortages. The Company sources cucumbers year-round to keep up with the strong demand for pickles across all seasons.[9]

(iii) Customers and Distribution

16. Whyte's has long-term relationships with approximately fourteen (14) customers, which are comprised of CPG companies, retailers and food service providers in Canada.[10] The majority of Whyte's sales are from contracted revenues with terms ranging from one to seven years, and a majority of the Company's customers are based in Canada.[11]

(iv) Owned and Leased Property

17. The Company owns the following property:

(a) **St. Louis Facility**: a 96,500 square foot manufacturing and warehousing facility purchased in 1991. The Company's fermented products that require longer inventory times and refrigerated products are generally manufactured at the St. Louis Facility;[12] and

[6] Kawaja Affidavit at para 21.
[7] Kawaja Affidavit at para 22.
[8] Kawaja Affidavit at para 23.
[9] Kawaja Affidavit at para 24.
[10] Kawaja Affidavit at paras 25-26.
[11] Kawaja Affidavit at para 27.
[12] Kawaja Affidavit at para 29.

(b) **Wallaceburg Facility**: a 150,000 square foot production and manufacturing space purchased in late 2017. The Company commenced manufacturing operations out of the Wallaceburg Facility in or around February 2020. Presently, approximately 80-90% of the Company's products are manufactured out of the Wallaceburg Facility.[13]

18. The Company has leasing arrangements for the following property:

(a) **Ste. Thérèse Facility**: 20-year long term lease agreement dated January 2006 (the "**Ste. Thérèse Lease**") for the Ste. Thérèse Facility, a 160,000 square foot warehouse and distribution space. The Company commenced operations out of the Ste. Thérèse Facility in or around January 2006; and

(b) **Mississauga Office**: Shared office space in Mississauga, Ontario, where its sales and administrative teams are based. The Applicant does not pay rent for this shared office space, which is owned by one of its affiliated entities.[14]

19. In accordance with the terms of the Ste. Thérèse Lease, Whyte's was able to assign the lease to an affiliated entity. To decrease the cash requirements of the Company, in April 2023, Whyte's assigned the Ste. Thérèse Lease to Care Real Estate Holdings ULC. Since that time, Care Real Estate Holdings ULC has paid, and continues to pay, rental payments directly to the ultimate landlord of the Ste. Thérèse Facility.[15]

(v) Employees

20. As of August 18, 2023, the Applicant employs a total of 283 employees, the majority of which are employed in Ontario. Of the Company's 283 employees, 39 are salaried employees, 29 are contract employees and 215 are hourly employees.[16]

21. The Company does not have any unionized employees, and the Company sponsors a group benefit plan for its full-time employees through three benefits providers.[17]

22. The Company does not have any registered pension plans.[18]

[13] Kawaja Affidavit at para 32.
[14] Kawaja Affidavit at para 33.
[15] Kawaja Affidavit at para 31.
[16] Kawaja Affidavit at paras 34-35.
[17] Kawaja Affidavit at para 37.

C. FINANCIAL POSITION OF THE COMPANY

(i) Assets and Liabilities

23. As of July 31, 2023, the Company's assets had a net value of approximately $55,590,744[19] and liabilities of approximately $65,057,556.[20]

24. The Company's current and long-term liabilities combined exceed the net book value of its current and long-term assets such that, on a balance sheet test, the Company is insolvent.[21]

25. Significant operating losses over the past few years coupled with a lack of liquidity has resulted in the Company being unable to meet its obligations as they become due.[22]

(ii) Secured Obligations

26. The Company's secured debt includes the WF Credit Agreement which provides for revolving loans and term loans.[23] As of August 22, 2023, $8,133,427.80 is owed on the revolving loans and nothing is owed on the term loans.[24]

27. The Company's obligations under the WF Credit Agreement are secured by the WF Security.[25]

28. The Company's secured debt also includes the FCC Credit Agreement for two real property loans.[26] As of July 31, 2023, the Company is indebted to FCC under the FCC Credit Agreement in an aggregate amount of $34,374,879.[27]

29. The Company's obligations under the FCC Credit Agreement are secured by the FCC Security.[28] Pursuant to the A&R Intercreditor Agreement: (i) to the extent any debt is owing by the WF Loan Parties to Wells Fargo, the WF Security will rank first in priority in respect of the Trade Personal Property (as defined in the A&R Intercreditor Agreement); and (ii) to the extent any debt is owing by the FCC Loan Parties to FCC, the FCC Security will rank first in respect of

[18] Kawaja Affidavit at para 38.
[19] Kawaja Affidavit at para 47.
[20] Kawaja Affidavit at para 48.
[21] Kawaja Affidavit at para 49.
[22] Kawaja Affidavit at para 50.
[23] Kawaja Affidavit at paras 51-52.
[24] Kawaja Affidavit at para 56.
[25] Kawaja Affidavit at para 55.
[26] Kawaja Affidavit at paras 57-58.
[27] Kawaja Affidavit at para 62.
[28] Kawaja Affidavit at para 60.

of the Non-Trade Personal Property (as defined in the A&R Intercreditor Agreement) (the "**FCC Collateral**").[29]

30. In addition to the secured debt owing to Wells Fargo and FCC, the Company has outstanding secured obligations to Investissement Québec and EJJ Capital Inc., an affiliated company of Whyte's.[30]

31. Wells Fargo, FCC and EJJ have security registrations against Whyte's in Ontario for Inventory, Equipment, Accounts, Motor Vehicle and Other.[31] Wells Fargo, FCC, Investissement Québec and EJJ have security registrations in Quebec against the Company's Property and Securities.[32]

32. The Company is a party to eight (8) lease agreements for certain equipment used in its Business.[33]

(iii) Banking Arrangements

33. In the ordinary course of business, the Company uses a cash management system (the "**Cash Management System**") to, among other things, collect funds and pay expenses associated with its operations. This Cash Management System provides the Company with the ability to efficiently and accurately track and control corporate funds and to ensure cash availability.[34]

34. As part of the Cash Management System, the Applicant maintains four (4) bank accounts at Toronto-Dominion Bank, two (2) collection accounts comprised of one Canadian Dollar account and one U.S. Dollar account, and two (2) disbursement accounts comprised of one Canadian Dollar account and one U.S. Dollar account.[35]

35. On a regular basis, the Company's management team reviews near term cash requirements, overnight and intraday cash receipts and residual account balances. Wells Fargo has sole dominion over the Collections Accounts. On a daily basis, any receipts of the Company on deposit in the Collections Accounts are swept automatically into accounts of Wells Fargo, to

[29] Kawaja Affidavit at para 61.
[30] Kawaja Affidavit at para 68.
[31] Kawaja Affidavit at para 70.
[32] Kawaja Affidavit at para 71.
[33] Kawaja Affidavit at para 72.
[34] Kawaja Affidavit at para 39.
[35] Kawaja Affidavit at paras 40-41.

be applied against the revolving credit facility. When the Company requires funds for operations, they provide formal draw requests to Wells Fargo in accordance with the WF Credit Agreement (as defined below). Approved draws are transferred to the relevant Disbursement Accounts.[36]

(iv) Unsecured Obligations

36. The Company currently owes approximately $264,000 to La Commission des normes, de l'équité, de la santé et de la sécurité du travail ("**CNESST**") for additional amounts that were determined to be owing at the end of 2022 based on certain criteria, including the number of claims made (the "**Additional CNESST Amount**"). The Company pays the Additional CNESST Amount by way of a monthly payment plan.

37. As of August 28, 2023, the Company has accrued vacation pay of approximately $448,000.[37]

38. Gross payroll for active employees in Canada is approximately $480,000 biweekly for nonexecutive employees and approximately $120,000 monthly for executive employees.[38] While the Company is current with respect to its payment of payroll and the remittance of other employee source deductions, its ability to meet its payroll obligations is contingent on the granting of the relief sought in the Initial Order, and ongoing availability of the DIP Facility.[39]

39. According to the July 2023 Financial Statements, as of July 31, 2023, the Company owed approximately $12,808,501 in accounts payable.[40]

40. The Company is also part of the Agri-Innovate Program, a government program administered by the Agriculture and Agri-Foods Canada. Pursuant to a Repayable Contribution Agreement for the Agri-Innovate Program dated February 27, 2019, the Company received a loan of $4,888,985 for the purchase and installation of certain equipment.[41]

[36] Kawaja Affidavit at para 42.
[37] Kawaja Affidavit at para 76.
[38] Kawaja Affidavit at para 75.
[39] Kawaja Affidavit at para 74.
[40] Kawaja Affidavit at para 78.
[41] Kawaja Affidavit at para 79.

D. THE COMPANY'S FINANCIAL DIFFICULTIES

41. The Company is experiencing significant cash flow issues that adversely affect its ongoing operations. The Company's liquidity challenges stem from various operational and financial issues that the Company has faced in recent years.[42]

(i) Operational Challenges at Wallaceburg Facility

42. The Company experienced various operational challenges in the years following the purchasing of the Wallaceburg Facility in 2017. The Company experienced a change of senior management during this period and production/performance levels at this facility fell significantly below expectations due to labour shortages, and challenges with ramp up and cost overruns. There were further operational challenges related to the onboarding, training and management of new employees at the Wallaceburg Facility.[43]

(ii) COVID-19, Supply Chain and Labour Shortages

43. During the COVID-19 pandemic, the Company faced significant supply chain delays, which resulted in significant increases in produce costs and production inefficiencies. The food services segment of the Company's business was also severely impacted by the COVID-19 pandemic, as many of its restaurant, hotel and hospitality customers were affected by government-mandated closures. This resulted in reduced demand for product and decreased revenue.[44]

44. Challenges surrounding freight and logistics also impacted the Company during this period. Significant congestion and delays at border entry points further impacted the Company's production efficiency, as crop and supplies would often arrive delayed and/or damaged. Freight and logistic costs increased significantly as a result of the pandemic and continue at elevated levels.[45]

45. Throughout 2021 to 2023, the Company was also affected by severe cucumber shortages due to weather problems in Mexico. This resulted in the Company being unable to

[42] Kawaja Affidavit at para 80.
[43] Kawaja Affidavit at para 81.
[44] Kawaja Affidavit at paras 83-85.
[45] Kawaja Affidavit at para 84.

procure sufficient inventory in the off season, which impacted the Company's production and sales.[46]

(iii) Delay in Closing and Reduced Price of St. Rose Facility

46. The Company's financial difficulties were also exacerbated by delays in closing the sale transaction for the Company's warehousing facility in St. Rose, Quebec (the "**St. Rose Facility**"), which resulted in further constraints to the Company's liquidity, purchasing power and production capabilities, which resulted in a further decline to its sales, accounts receivable and borrowing base.[47]

(iv) Replacement of Prior Lenders

47. In 2022 and 2023 the Company sought to refinance it secured loan obligations. While the refinancing efforts were underway, the Company experienced additional restrictions on its available liquidity, as well as increased costs of advisors and refinancing costs.[48]

E. RESPONSE TO FINANCIAL DIFFICULTIES

48. The Company has undertaken various steps to address its financial difficulties.

49. Whyte's replaced key personnel and laid off excess employees in the fall and winter of 2022,[49] and downsized its warehouse/manufacturing footprint by closing the St. Rose Facility and streamlining production, distribution and warehousing to its current existing facilities.[50] Over the past few years, the Company has also sold various assets and property in response to the Company's liquidity challenges.[51]

50. Additional contributions were provided to the Company by affiliated companies to reduce expenses, including additional advances and the assignment of the Ste. Thérèse Lease in 2023.[52]

51. On July 21, 2023, the Company also entered into the Interim St. Louis Arrangements with Aliments Putters Inc. in respect of the St. Louis Facility. The Interim St. Louis Arrangements

[46] Kawaja Affidavit at para 87.
[47] Kawaja Affidavit at para 88.
[48] Kawaja Affidavit at paras 89-90.
[49] Kawaja Affidavit at para 93.
[50] Kawaja Affidavit at paras 93-94.
[51] Kawaja Affidavit at paras 92-94.
[52] Kawaja Affidavit at para 95.

provided for the purchase by Putters of crop from local Growers and purchase of other ingredients, and contribution towards various other production and operating costs.[53] The Company is currently in discussions to determine if there is a viable agreement to be reached, failing which the St. Louis Facility and related equipment will be included in the proposed SISP.[54]

52. In February 2023, the Company engaged Kroll to conduct the Prior Sale Process.[55] Ultimately, while two LOIs were signed and extensive diligence was commenced, the Company was not able to implement a viable transaction prior to the Filing Date. As a condition of the ongoing available liquidity in favour of the Company, it was necessary that the balance of the sales process be completed within an NOI filing.[56]

53. Accordingly, these NOI Proceedings represent the best path forward for the Company to maximize stakeholder value, preserve the Company as a going concern and complete the SISP with the assistance of the Proposal Trustee and the Financial Advisor. The Company will benefit from the work that has been conducted to date by the Financial Advisor in the Prior Sale Process.[57]

F. PROPOSED SISP

54. The Company seeks approval to continue the Prior Sale Process in accordance with the proposed SISP.[58]

55. Pursuant to the proposed SISP, the Proposal Trustee and Kroll, in consultation and with participation of the Company, will conduct the process in order to solicit interest for an “as is, where is” sale of the Property or investment in the Business.

56. The SISP is to be conducted in accordance with the following timelines:[59]

Milestone	Deadline
Company to obtain Initial Order including approval of (i) Kroll’s engagement; and (ii) SISP	August 31, 2023

[53] Kawaja Affidavit at para 96.
[54] Kawaja Affidavit at para 97.
[55] Kawaja Affidavit at para 100.
[56] Kawaja Affidavit at para 105.
[57] Kawaja Affidavit at para 106.
[58] Kawaja Affidavit at para 113.
[59] Kawaja Affidavit at para 115.

Milestone	Deadline
Publish notice of SISP on the Proposal Trustee's website	Two (2) business days following date of the Initial Order
Deliver Teaser Letter and NDA to Known Potential Bidders and set up the virtual data room ("VDR")	Two (2) business days following the date of the Initial Order
Template purchase and sale agreement to be posted in the VDR	Seven (7) calendar days following date of the Initial Order
Bid Deadline	5:00 p.m. (EST) on September 21, 2023
Proposal Trustee to (i) review submitted Bids; (ii) seek clarification of Bids; (iii) select Successful Bid(s); and (iv) negotiate final agreements	On or before September 25, 2023
Hearing of the Sale Approval Motion	October 2, 2023
Target closing date for sale and/or investment transactions	October 6, 2023
Outside closing date for sale and/or investment transactions	October 10, 2023

G. DIP FACILITY

57. The Company is facing a liquidity crisis. The Cash Flow Statement demonstrates that the Company expects the need for interim financing to continue operating and to fund these NOI Proceedings.[60]

58. The Company has negotiated the terms of a DIP Facility Agreement with the DIP Lender to access additional financing in the maximum amount of $2,700,000, pursuant to existing loan facilities and structure.[61]

59. The Cash Flow Forecast demonstrates that, with the DIP Facility and provided the assumptions in the cash flows continue to be met, the Company anticipates having sufficient liquidity to fund its projected operating costs for the period of August 21, 2023 to October 8,

[60] Kawaja Affidavit at para 121.
[61] Kawaja Affidavit at para 121.

2023.[62] A significant assumption that requires confirmation is cash flow relating to supplies to and payment of receivables owing by Smuckers.

60. The material terms of the DIP Facility are as follows:[63]

(a) Borrowers: Whyte's and Maison Gourmet

(b) Guarantors: Triak and Mario Saroli

(c) Maximum Availability: $2,700,000

(d) DIP Fee: $75,000

(e) Maturity: The earlier of (i) October 10, 2023; and (ii) occurrence of a Terminating Event

(f) Interest: Interest at the annual rate of interest pursuant to the WF Credit Agreement, plus 2%

61. The DIP Facility provides that the DIP Lender's Charge of $2,700,000 will apply to all Property of the Company but will not prime the FCC Collateral (the "**DIP Property**").[64]

62. The DIP Facility is structured such that the Cash Management System remains in effect, which provides for the daily sweeping of deposits in the Collections account into accounts of Wells Fargo, to be applied against the revolving credit facility.[65]

PART III – ISSUES

63. The issues in respect of the relief being sought under the Initial Order are whether:

(g) this Court has jurisdiction to grant the Initial Order in the context of the NOI Proceedings under the BIA;

(h) this Court should approve the DIP Facility Agreement and authorize the Applicant to access the DIP Facility in order to fund its working capital requirements and other general corporate purposes and capital expenditures;

[62] Kawaja Affidavit at paras 120-121.
[63] Kawaja Affidavit at para 122.
[64] Kawaja Affidavit at paras 123-124.
[65] Kawaja Affidavit at para 42.

(i) this Court should approve the engagement of Kroll in its capacity as Financial Advisor of the Applicant in the NOI Proceedings;

(j) this Court should approve the SISP for a sale or investment of the Applicant's Property and authorize and direct the Financial Advisor and Proposal Trustee, in consultation and together with the Applicant, to conduct the SISP;

(k) this Court should grant the Administration Charge, the Directors' Charge and the DIP Lender's Charge (collectively, the "**Charges**") and approve the proposed priority of the Charges;

(l) this Court should grant the Applicant an extension of the time to file a proposal and the corresponding stay of proceedings until and including October 10, 2023; and

(m) the Court should authorize the Applicant, with the consent of the Proposal Trustee, and in accordance with the cashflows and the DIP Facility, to pay the Critical Suppliers.

PART IV – LAW AND ANALYSIS

A. INHERENT JURISDICTION

2. This Court has inherent jurisdiction under subsection 183(1) of the BIA to grant the Initial Order,[66] which contains the similar relief that Courts have granted in other proceedings under the BIA.[67]

3. Courts have routinely exercised inherent jurisdiction in proceedings under the BIA to grant a variety of relief necessary to advance restructuring proceedings.[68] Inherent jurisdiction has been used where: (a) there is a functional gap in the BIA; (b) there is no other alternative

[66] BIA, s. 183(1).
[67] See, for example, *Re Karrys Bros Ltd*, Endorsement of Penny J. (24 Dec 2014) ("***Karrys***").
[68] *Kingsway General Insurance Company v Residential Warranty Company of Canada Inc (Trustee of)*, 2006 ABCA 293 ("***Residential Warranty***") at paras 19-21; **see also** *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269 at para 64.

available; (c) it is necessary to promote the objects of the BIA and to accomplish what justice and practicality require.[69]

4. NOI proceedings under the BIA serve the same remedial purpose as the CCAA: "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[70] The Supreme Court of Canada has commented that the BIA and the CCAA should not be treated as "distinct regimes", but rather, should form "part of an integrated body of insolvency law."[71]

5. In *Century Services*,[72] the Supreme Court of Canada made the following statement regarding the two restructuring schemes:

> With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation.[73]

6. In *Bluberi*,[74] the Supreme Court observed that Canada's insolvency statutes pursue remedial objectives that reflect the "catastrophic" impacts insolvency can have.[75] The Court noted that these objectives include: (i) providing for timely, efficient and impartial resolution of a debtor's insolvency; (ii) preserving and maximizing the value of a debtor's assets; (iii) ensuring fair and equitable treatment of the claims against a debtor; (iv) protecting the public interest; and, (v) in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.[76]

7. As remedial legislation, the BIA should be liberally interpreted to facilitate these objectives.[77] A technical interpretation of the BIA should be avoided.[78] Interpretations that result in a result that differs from the CCAA should only be adopted pursuant to clear statutory language.[79]

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[69] *Residential Warranty* at para 21.
[70] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 ("***Century Services***") at paras 15 and 18.
[71] *Century Services* at para 78.
[72] *Century Services*.
[73] *Century Services* at para 24.
[74] *9354-9186 Québec inc v Callidus Capital Corp,* 2020 SCC 10 *("**Bluberi***") at para 74.
[75] *Bluberi* at paras 40 and 45.
[76] *Bluberi* at para 40.
[77] *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at para 43.
[78] *Kitchener Frame Limited (Re)*, 2012 ONSC 234 ("***Kitchener Frame***") at para 46
[79] *Kitchener Frame* at para 73.

8. This Court has recognized that the proposal provisions under the BIA are analogous to the CCAA and therefore cases applicable to one restructuring statute have application to the other.[80]

B. APPROVAL OF THE DIP FACILITY AND DIP LENDER'S CHARGE

9. The Court has the authority to approve the DIP Facility and DIP Lender's Charge pursuant to subsection 50.6(1) of the BIA.

10. Pursuant to subsection 50.6(3) of the BIA, the Court may order that the DIP Lender's Charge rank in priority over the claim of any secured creditor of the Company.[81]

11. Subsection 50.6(5) of the BIA enumerates the following factors the Court is to consider in determining whether to grant DIP financing:

(a) the period during which the debtor is expected to be subject to proceedings under the BIA;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the proposal trustee's report.[82]

12. In *Re Colossus Minerals Inc.*,[83] this Court approved DIP Financing and a DIP charge in circumstances similar to the present case. The court considered the following factors in authorizing the DIP facility and charge:

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[80] *Danier Leather Inc (Re)*, 2016 ONSC 1044 ("***Danier***") at para 24.
[81] BIA, s. 50.6(3).
[82] BIA, s. 50.6(1).

(a) the DIP loan was to last during the currency of the sale and investment solicitation process;[84]

(b) the debtor faced an imminent liquidity crisis;[85]

(c) the DIP loan was required for the sales and solicitation process to proceed;[86] and

(d) the proposal trustee approved of the DIP loan and charge.[87]

13. In *Re P.J. Wallbank Manufacturing*[88] and *Re Mustang GP Ltd*,[89] the Court granted DIP facilities and charges where, (i) as in the present case, there was evidence that the debtors would cease operations if the relief were not granted; and (ii) as in the present case, the DIP facility was supported by the proposal trustee.[90] In these circumstances, any prejudice to creditors is outweighed by the benefit to all stakeholders in a sale of the business as a going concern.[91]

14. The above factors and criteria provided under subsection 50.6(1) of the BIA support granting the DIP Facility and the DIP Lender's Charge for the following reasons:

(a) The DIP Facility is to last during the currency of the SISP;

(b) The Company faces an imminent liquidity crisis;

(c) The DIP Facility is necessary for the Company to pursue its restructuring efforts, including conducting the SISP, which will preserve its maintenance as a going-concern for the benefit of all stakeholders;

(d) Without the DIP Facility, the Company may not be able to continue operating;

(e) The quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Statement; and

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[83] *Colossus Minerals Inc (Re)*, 2014 ONSC 514 ("***Colossus Minerals***").
[84] *Colossus Minerals* at para 4.
[85] *Colossus Minerals* at para 7.
[86] *Colossus Minerals* at para 8.
[87] *Colossus Minerals* at para 9.
[88] *Re PJ Wallbank Manufacturing Co Limited*, 2011 ONSC 7641 ("***PJ Wallbank***").
[89] *Mustang GP Ltd (Re)*, 2015 ONSC 6562 ("***Mustang***").
[90] *PJ Wallbank* at paras 18 and 24; *Mustang* at para 28.
[91] *PJ Wallbank* at paras 24-25.

(f) The Proposal Trustee is supportive of the approval of the DIP Facility and the corresponding DIP Lender's Charge.

15. Courts have granted DIP facilities structured to allow debtors to use their post-filing operating receipts to reduce the balance of a pre-existing asset-based revolving credit facility in accordance with the debtor's existing practices if it does not offend section 11.2 of the CCAA (language which subsection 50.6(1) of the BIA mirrors).[92]

16. Under such structures, the DIP Charge does not secure any pre-filing obligation of the debtor and the sweeping has no impact on the relative pre-filing position of secured creditors over the debtors' assets.

17. This point was made in *Performance Sports*.[93] In granting a "creeping" DIP by which funds from operational receipts could be used to repay certain prefiling amounts, the Court stated:

> Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.[94]
>
> [Emphasis added]

18. Courts have considered several non-exhaustive factors in approving asset-based DIP facilities structured in this manner:

(a) Whether the DIP facility only authorizes the debtor to pay pre-filing debts owing to the DIP Lender(s) out of operating cash receipts;

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[92] See, for example, *Gesco Industries Inc (Re)*, 2023 ONSC 3050, Endorsement of Penny J. (25 May 2023) ("***Gesco***").
[93] *Performance Sports Group Ltd (Re)*, 2016 ONSC 6800.
[94] *Performance Sports* at para 22.

(b) Whether the DIP facility prohibits the debtor from using DIP proceeds to pay down any pre-filing indebtedness; and

(c) Whether payments to the DIP lender regarding its pre-filing debt are made in a manner consistent with the pre-filing *status quo*.[95]

C. APPOINTMENT OF THE FINANCIAL ADVISOR

19. The Applicant seeks approval of Kroll's engagement for the purposes of assisting the Applicant and the Proposal Trustee with conducting the SISP to consummate a sale and/or investment transaction(s) for the Applicant's Property.

20. The Court has approved the appointment of advisors in restructuring proceedings where such advisor's knowledge and experience is critical to assisting the debtor with a successful restructuring or is necessary to assist the debtor with a liquidation sale.[96]

21. The Applicant will benefit from the appointment of Kroll as Financial Advisor in these NOI Proceedings. The proposed Financial Advisor has prior experience assisting the Company with the Prior Sale Process, along with its extensive experience in matters of this nature, make it well-suited to this mandate.

22. The Proposal Trustee is supportive of Kroll's engagement as Financial Advisor.[97]

D. APPROVAL OF THE SISP

23. Pursuant to section 65.13 of the BIA, the Court is authorized to approve a sale of assets in a proposal proceeding under the BIA.

24. Though the section only addresses the approval of the sale of assets rather than approval of a process, the non-exhaustive factors set out in subsection 65.13(4) of BIA provide useful guidance for this Court to consider in determining whether to approve a sale process:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

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[95] *Comark Inc (Re)*, 2015 ONSC 2010 at paras 40-41; *Performance Sports Group Ltd (Re)*, 2016 ONSC 6800 at para 22; *Medipure Pharmaceuticals Inc (Re)*, 2022 BCSC 1771 at paras 51-54; *Gesco* at paras 25-31.
[96] *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215, at paras 30 - 32; *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371 at para 27.
[97] Kawaja Affidavit at para 112.

(b) whether the Proposal Trustee approved the process leading to the proposed sale or disposition;

(c) whether the Proposal Trustee 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.[98]

25. In *Nortel Networks Inc. (Re)*,[99] this Court considered the following factors in determining if a proposed sale process should be approved in a CCAA proceeding:

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

(b) Will the sale benefit the whole 'economic community'?

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

(d) Is there a better viable alternative?[100]

26. While *Nortel* was decided in the context of CCAA proceedings, the above criteria have been applied in the context of a sale proposal proceeding under the BIA.[101]

27. The following factors support this Court granting the proposed SISP:

(a) the Company is facing a liquidity crisis and it is necessary to conclude the SISP on an expedited basis in order to identify and consummate a sale and/or investment transaction for the Property;

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[98] BIA, s. 65.13(4).
[99] *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) (*"**Nortel**"*).
[100] *Nortel* at para 49.
[101] See, for example, *Mustang* at paras 37-38.; *FlexITy Solutions Inc. et al.*, Endorsement of Osborne J. (23 July 2023) at para 13; *Behr Technologies Inc.*, Order of Kimmel J. (26 Jan 2022) at para 2; *Datataxbusiness Services Limited v KPMG Inc,* Endorsement of Cavanagh J. (17 Aug 2023).

(b) a sale and/or investment transaction for the Property is necessary to preserve the going concern value of the company and would benefit the whole 'economic community';

(c) given the expansive Prior Sale Process conducted by Kroll, the material terms and proposed timelines in the SISP are reasonable and appropriate in the circumstances;[102]

(d) the proposed SISP was developed in consultation with the Proposal Trustee, the Financial Advisor and the Lenders;

(e) the Proposal Trustee supports the approval of the proposed SISP; and

(f) the consultation rights granted to the Lenders are reasonable and appropriate given their respective secured priority over the Applicant's Property.[103]

E. APPROVAL OF THE ADMINISTRATION CHARGE

28. The Applicant seeks the Administration Charge in the maximum amount of $250,000 (the "**Administration Charge**") to secure the fees and disbursements of the Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Applicant that are incurred in connection with services rendered to the Applicant both before and after the commencement of the NOI Proceedings. The Administration Charge is needed to facilitate the NOI Proceedings and the SISP.

29. Subection 64.2(1) of the BIA provides that a court may grant a charge in favour of, among others, the Proposal Trustee and other professionals in respect of their fees and expenses to be incurred during NOI proceedings.[104] Subsection 64.2(2) of the BIA provides that that the court may order that the charge rank in priority over the claim of any secured creditor.[105]

30. In *Canwest Publishing*, the Court considered the following factors when addressing the analogous section of the CCAA:

(a) the size and complexity of the businesses being restructured;

[102] Kawaja Affidavit at para 116.
[103] Kawaja Affidavit at para 118.
[104] BIA, s. 64.2(1).
[105] BIA, s. 64.2(2).

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[106]

31. The Administration Charge should be granted for the following reasons:

(a) The Administration Charge was determined by the Company in consultation with the Proposal Trustee based upon the fees incurred by the beneficiaries of the Administration Charge prior to filing and the fees expected to be incurred in the NOI Proceedings;[107]

(b) The quantum of the Administration Charge is fair and reasonable in the circumstances given the complexity and size of the Applicant's business and operations;[108]

(c) The beneficiaries of the Administration Charge will play critical roles in assisting the Company in the NOI Proceeding and the SISP; there is no unwarranted duplication of roles of each of the proposed beneficiaries;[109] and

(d) The Proposal Trustee supports the Administration Charge.[110]

F. APPROVAL OF DIRECTORS' CHARGE

32. Section 64.1(1) of the BIA provides that a court may grant a charge in favour of any director or officer to indemnify them against obligations and liabilities that they may incur as a director or officer after the commencement of the proposal proceeding.[111]

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[106] *Canwest Publishing Inc (Re)*, 2010 ONSC 222 ("***Canwest***") at para 54.
[107] Kawaja Affidavit at para 130.
[108] Kawaja Affidavit at para 130.
[109] Kawaja Affidavit at para 129.
[110] Kawaja Affidavit at para 130.
[111] BIA, s. 64.1(1).

33. The Court has granted directors' and officers' charges ("**D&O charges**") in circumstances where there was uncertainty regarding existing insurance coverage for potential claims against directors and officers, noting the importance of ensuring the continued participation of directors and officers through insolvency proceedings and potential sales processes.[112]

34. In *Re PT Holdco, Inc.*, the directors and officers indicated that due to the significant personal exposure associated with the business' liabilities, they would resign from their positions unless the Initial Order granted a D&O charge. The Court granted the D&O charge and noted that such charge would allow the business to continue to benefit from the expertise and knowledge of its directors and officers.[113]

35. In *Canwest*, the Court referenced the following facts in support of granting a D&O charge: (a) the continued participation of the directors and officers, management and employees of the debtor was critical to the restructuring; (b) retaining the directors and officers would avoid destabilization; (c) the insolvency proceedings created new risks and potential liabilities for the directors and officers; (d) the charge appeared reasonable in light of the potential obligations and liabilities of the directors and officers; and (e) the debtor was unable to obtain additional or replacement directors' and officers' insurance coverage.[114]

36. The Company seeks a Directors' Charge over the Property to indemnify the Company's Directors and Officers in respect of liabilities they may incur as Directors and Officers during the NOI Proceedings, up to a maximum principal amount of $700,000.[115]

37. The Directors' Charge is essential for the continued participation of the Company's Directors and Officers to avoid destabilization of the Business.

38. The Directors' Charge would be subordinate to the proposed Administration Charge but the initial tranche of $350,000 would rank in priority to all other Encumbrances (as defined below), including the DIP Lender's Charge in respect of the DIP Property, and the second

[112] *Laurentian University of Sudbury*, 2021 ONSC 1098 at para 82.
[113] *PT Holdco, Inc., Re*, 2016 ONSC 495 at paras 38-39.
[114] *Canwest* at para 56.
[115] Kawaja Affidavit at para 131.

tranche of $350,000 would rank behind the DIP Lender's Charge in respect of the FCC Collateral.[116]

G. EXTENSION OF TIME

39. Section 50.4(9) of the BIA provides that the Court may grant an extension or further extension not exceeding forty-five (45) days for any individual extension or five months in the aggregate following the expiry of the original 30 day period, where the Court is satisfied that the insolvent person has acted, and is acting, in good faith and with due diligence, would likely be able to make a viable proposal if the extension being applied for was granted, and no creditor would be materially prejudiced if the extension being applied for was granted.[117]

40. In determining whether to grant a debtor an extension under s. 50.4(9) the Court is required to examine three factors: (a) whether the debtor has acted in good faith and with due diligence; (b) whether the debtor would likely be able to make a viable proposal if the extension being applied for were granted; and (c) whether any creditor will be materially prejudiced by the extension.[118]

41. The intent of the BIA proposal sections is to give the insolvent person an opportunity to put forward a plan. The purpose of the legislation is rehabilitation and not liquidation. Insolvent companies should have the chance to put forward their proposal.[119]

42. The Applicant submits that each of the factors have been met in this instance and the extension of the proposal period is appropriate as:

(a) the extension will allow the Applicant to complete the SISP, negotiate any sale and/or investment transaction(s) resulting from the SISP and seek Court approval; and

(b) the extension will prevent an additional motion before the Court, reducing professional fees incurred by the Applicant.

43. The Proposal Trustee and the DIP Lender support the extension of the proposal period.[120]

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[116] Kawaja Affidavit at para 135.
[117] BIA, s. 50.4(9).
[118] BIA, s. 50.4(9); *In the Matter of the Proposal of Cogent Fibre Inc.,* 2015 ONSC 5139 ("**NS United**") at para 7.
[119] *NS United* at para 8.

44. There is no known prejudice that will be suffered by any creditors or other stakeholders by the proposed extension which is necessary to give effect to the SISP.[121] With the DIP Facility, the Applicant is projected to have sufficient cash to continue operating through the end of the Stay Period.[122]

H. CRITICAL SUPPLIER PAYMENTS

45. The Company may seek to pay certain prefiling arrears to the Critical Suppliers, being those vendors whose products and/or services are essential to the Company's ongoing operations and/or may also be critical to implementing the contemplated sale or other restructuring alternatives in the NOI Proceedings.[123]

46. In *Re Contech Enterprises Inc.*,[124] the Court approved a proposal that provided for additional recovery to a "key supplier". In *Contech*, the Court found that if the critical supplier refused to continue to supply products, it was unlikely that the debtor could continue to carry on business.[125] The Court found that the critical suppliers would receive this additional amount if they first agreed to continue to supply product to the debtor on terms acceptable to the debtor.[126] The Court reasoned that if the critical supplier were to refuse to continue to supply, then the company would be deemed to be assigned into bankruptcy and affected creditors would not recover any part of their proven claims.[127]

47. In *Karrys*, the Court similarly approved post-filing payment for pre-filing obligations to "key suppliers", noting as follows:

> Unlike the CCAA, the concept of "critical suppliers" is not found in the proposal provisions of the BIA. Nevertheless, in my view, similar considerations can and should be taken into account in appropriate circumstances. In this case, Karrys and its advisors reasonably believed that the ongoing viability of the business and the […] sale [transaction] […] required thee ongoing available of this critical source of supply. There is also a significant net benefit to Karrys arising from sales of the product supplied. The supply contract negotiated, in the context of both the importance of the supply and significant litigation risk, was, I find, reasonable in the circumstance.[128]

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[120] Kawaja Affidavit at para 145.
[121] Kawaja Affidavit at para 144.
[122] Kawaja Affidavit at para 146.
[123] Kawaja Affidavit at para 139.
[124] *Re Contech Enterprises Inc,* 2015 BCSC 129 ("***Contech***").
[125] *Contech* at para 32.
[126] *Contech* at para 32.
[127] *Contech* at para 32.
[128] *Karrys* at para 22.

48. The Court of Appeal for Ontario commented on this issue in *1732427 Ontario Inc. v. 1787930 Ontario Inc.*,[129] where the respondent argued that the parties could not enter into an agreement for the payment of past debts in order to secure future supplies. In rejecting this submission, the Court provided as follows:

> […] This would undermine the first stage of the BIA process that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97 of the BIA is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.[130]

49. Payment to the Critical Suppliers is necessary for the Company to preserve value and continue operating as a going concern.

50. The Proposal Trustee will oversee any payments of pre-filing amounts made to the Critical Suppliers. Payments will only be made with the express authorization of the Proposal Trustee, and only to Critical Suppliers that the Proposal Trustee agrees are essential to the Company's business operations and such payments are provided for in the Cash Flow Forecast.[131]

51. The Proposal Trustee and the DIP Lender support the Company's request for approval to make the above payments to Critical Suppliers and for post-filing goods and services in the ordinary course.[132]

PART VI – ORDER SOUGHT

52. For the above reasons, the Applicant requests an Order substantially in the form of the draft Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2023.

Krambaran

STIKEMAN ELLIOTT LLP
Counsel for the Applicant

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[129] *1732427 Ontario Inc. v 1787930 Ontario Inc*, 2019 ONCA 947 ("***173 Ontario***").
[130] *173 Ontario* at para 13.
[131] Kawaja Affidavit at para 140.
[132] Kawaja Affidavit at para 141.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *1732427 Ontario Inc. v 1787930 Ontario Inc*, 2019 ONCA 947.

2. *9354-9186 Québec inc v Callidus Capital Corp,* 2020 SCC 10*.*

3. *Behr Technologies Inc.*, Order of Kimmel J. (26 Jan 2022).

4. *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269.

5. *Canwest Publishing Inc (Re)*, 2010 ONSC 222

6. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.

7. *Colossus Minerals Inc (Re)*, 2014 ONSC 514.

8. *Comark Inc (Re)*, 2015 ONSC 2010.

9. *Danier Leather Inc (Re)*, 2016 ONSC 1044.

10. *Datataxbusiness Services Limited v KPMG Inc,* Endorsement of Cavanagh J. (17 Aug 2023).

11. *FlexITy Solutions Inc. et al.*, Endorsement of Osborne J. (23 July 2023).

12. *Gesco Industries Inc (Re)*, 2023 ONSC 3050, Endorsement of Penny J. (25 May 2023).

13. *In the Matter of the Proposal of Cogent Fibre Inc.,* 2015 ONSC 5139.

14. *Kingsway General Insurance Company v Residential Warranty Company of Canada Inc (Trustee of)*, 2006 ABCA 293.

15. *Kitchener Frame Limited (Re)*, 2012 ONSC 234.

16. *Laurentian University of Sudbury*, 2021 ONSC 1098.

17. *Medipure Pharmaceuticals Inc (Re)*, 2022 BCSC 1771.

18. *Mustang GP Ltd (Re)*, 2015 ONSC 6562.

19. *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC).

20. *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215.

21. *Performance Sports Group Ltd (Re)*, 2016 ONSC 6800.

22. *PT Holdco, Inc., Re*, 2016 ONSC 495 at paras 38-39.

23. *Re Contech Enterprises Inc,* 2015 BCSC 129.

24. *Re Karrys Bros Ltd*, Endorsement of Penny J. (24 Dec 2014).

25. *Re PJ Wallbank Manufacturing Co Limited*, 2011 ONSC 7641.

26. *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508.

27. *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371.

SCHEDULE "B"
RELEVANT LEGISLATION

Bankruptcy and Insolvency Act, **RSC 1985, c B-3, as amended**

Extension of time for filing proposal

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

Order — interim financing

50.6(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

50.6(5) Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;
(b) how the debtor's business and financial affairs are to be managed during the proceedings;
(c) whether the debtor's management has the confidence of its major creditors;
(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
(e) the nature and value of the debtor's property;
(f) whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

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

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

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective Administration charges have previously been granted in proceedings under the BIA.

Restriction on disposition of assets

Factors to be considered

65.13(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36)

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

SCHEDULE “C”
SUPPLEMENTAL AUTHORITIES

CITATION: Karrys Bros. Ltd. (Re), 2014 ONSC7465
COURT FILE NO.: 32-1942339/1942340/1942341
DATE: 20141224

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF AN INTENTION TO MAKE A PROPOSAL OF KARRYS BROS., LIMITED, KARRYS SOFTWARE LIMITED AND KARBRO TRANSPORT INC.,

COUNSEL: *E. Pillon and K. Esaw* for the Applicants

L. Rogers for PWC

S. Graft for BMO

C. Armstrong for Core-Mark

HEARD: December 23, 2014

ENDORSEMENT

Overview

[1] On December 23, 2014 I granted orders approving a sale of substantially all of the applicants' assets together with various related administrative orders, with reasons to follow. These are those reasons.

[2] This motion seeks approval of a sale of the applicants' assets out of the ordinary course, authorization to distribute funds to the senior secured lender, a sealing order of certain confidential information and various administrative orders, including:

(i) extending the time for filing a proposal;

(ii) approving a key employee retention agreement;

(iii) approving an administrative charge;

(iv) approving the consolidation of the applicants' proposal proceedings; and

(v) approving the report of the proposal trustee.

Background

[3] Karrys is a wholesale distributor of tobacco, confectionery, snacks, beverages, automotive supplies and other products to retail, gas and convenience stores across Canada. As of November 1, 2014, Karrys' assets were exceeded by its liabilities by over $1 million. Karrys expericnced net losses of over $3 million in each of the last two years.

[4] As a result of its financial difficulties, Karrys committed defaults under its loan agreement with the Bank of Montréal in 2013. BMO is Karrys' senior secured lender. BMO agreed to a number of forbearance agreements to enable the sales process which is at the heart of this motion.

[5] Karrys commenced a sales process in December 2013. It retained a financial advisor, Capitalink. Karrys had initial, exclusive negotiations with Core-Mark, itself a wholesale distributor of similar goods, in May through July 2014. Those negotiations did not result in an agreement.

[6] Karrys retained Price Waterhouse Coopers to assist Karrys and Capitalink in undertaking a more expansive sale process. In the fall of 2014, Karrys developed a process in which Core-Mark agreed to make a stalking horse bid for substantially all of Karrys' assets.

[7] Over 53 potential strategic and financial buyers were also invited to bid on the assets. Thirteen of these potential buyers entered into confidentiality agreements and received a confidential information memorandum and access to Karrys' data room. PWC and Capitalink responded to all reasonable requests for information.

[8] By the bidding deadline of noon on December 10, 2014, however, no other bids were received. Core-Mark was, accordingly, declared the successful bidder.

[9] Karrys now asks for the court's approval of the asset purchase agreement with Core-Mark and for a vesting order, together with approval of distribution, from the proceeds, of the amount owed to BMO and other related relief.

The Sale and Vesting Order

[10] Jurisdiction to make orders approving the sale derives from s. 65.13 of the BIA. Factors for the court to consider when asked to approve a sale out of the ordinary course are also listed in s. 65.13.

[11] It is not necessary for the debtor to present its proposal under the BIA before an order approving a sale, *Re Komtech*, 2011 ONSC 3230.

[12] In this case, the sale was the result of a broad and comprehensive marketing process. Two financial advisors were engaged. When initial negotiations with Core-Mark did not produce an amount the applicants originally thought acceptable, another process was initiated with the assistance of PWC. Efforts to lever the Core-Mark offer were, however, although widely promoted, ultimately unsuccessful. The "market" has, in that sense, spoken.

[13] The proposal trustee, PWC, has reviewed the sale process and is supportive of the process and the result. The proposal trustee has, as well, conducted a detailed analysis of the Core-Mark bid measured against a "liquidation in bankruptcy" scenario. Even under a "best case" liquidation scenario, the unsecured creditors would be expected to recover significantly less than under the Core-Mark sale transaction. Under the proposed sale, there is the possibility of surplus for distribution to unsecured creditors. There would be no such possibility under a liquidation scenario. BMO, the senior secured lender, is also supportive of the process and the result.

[14] Because the purchase price represents, through an extensive sales process, the highest price realizable and an amount which is greater than what could be realized under a liquidation, the consideration to be received for the assets is reasonable and fair. Further, the sale will enable Karrys to make the payments contemplated under s. 65.13(8) of the BIA.

[15] The fact that the sales process was not pre-approved by the court is not a bar to the court's approval in this case. Is clear on the evidence that the Core-Mark transaction is the best available option in the circumstances. No one has come forward to argue otherwise. The test is the same whether approval is sought before or after the process – the principles in *Soundair* govern. The *Soundair* test has been met. A judgment call had to be made whether to further extend the process in hopes of perhaps finding a better bid. Further delay would just as likely have resulted in a greater erosion of value. An immediate sale was, on the evidence, the only way to maximize recovery.

[16] In addition, the process actually followed is indistinguishable from what the court might reasonably have approved had prior authorization been sought. There is no evidence, or likelihood, that Karrys or its creditors would be in a better position if some further, or other, sales process had been followed.

[17] The sale is approved and the vesting order shall issue.

The Key Supplier Issue

[18] On the very day Karrys filed its notice of intention to make a proposal, Karrys' principal tobacco supplier delivered a substantial quantity of tobacco. A dispute arose over payment. The supplier took the position it was under no legal obligation to continue to supply and that it would not supply unless payment was received. Karrys' supply agreement had expired and the parties were operating on the basis of an informal supply arrangement.

[19] Ensuring ongoing tobacco supply from this supplier was critical to Karrys in terms of the ongoing operations of the business pending the closing of the sale to Core-Mark, the satisfaction of conditions precedent to the closing with Core-Mark, including the loss of potential customers should their tobacco requirements not be satisfied, and the resulting risk that the Core-Mark transaction would be lost as a result.

[20] Karrys and its legal advisers considered there was significant litigation risk relating to the ability to enforce a stay of proceedings against the supplier in any event and, accordingly, entered into negotiations with the tobacco supplier.

[21] These negotiations resulted in a substantial payment to the supplier which, arguably, involved post-filing payment for a pre-filing obligation. Given the importance of this supplier to ongoing operations and to the success of the Core-Mark sale, however, Karrys, along with its advisors, had little option but to reach a settlement.

[22] Unlike the CCAA, the concept of "critical suppliers" is not found in the proposal provisions of the BIA. Nevertheless, in my view, similar considerations can and should be taken into account in appropriate circumstances. In this case, Karrys and its advisors reasonably believed that the ongoing viability of the business and the Core-Mark sale (which, as found

above, represents the highest realizable price for Karrys' assets available in the circumstances) required the ongoing availability of this critical source of supply. There is also a significant net benefit to Karrys arising from sales of the product supplied. The supply contract negotiated, in the context of both the importance of the supply and significant litigation risk, was, I find, reasonable in the circumstances.

BMO Distribution

[23] BMO delivered notices of intention to enforce its security. The unchallenged evidence before the court is that BMO holds a valid, perfected security interest over each of the applicants' assets. BMO is entitled to a distribution of proceeds from the sale in satisfaction of its claim.

Sealing Order

[24] I am satisfied that the confidential appendices should be sealed until the deal is closed. There is an important public interest in maximizing returns in proceedings of this kind. It is important, therefore, that until the deal is concluded, commercially sensitive information about the deal not be publicly disclosed. Failure to grant the order would impair the integrity of any subsequent process. In addition, in the context of the key employee retention agreement, there is sensitive personal information which ought not to be disclosed.

[25] The *Sierra Club* test has been met on the facts of this case, *Elleway Acquisitions Ltd.*, 2013 ONSC 7009. The salutary effects of granting the sealing order outweigh the limited deleterious effect of restricting access to these limited pieces of evidence.

Extension

[26] Section 50.4(9) of the BIA grants the jurisdiction to grant the extension. The initial proposal period expires on January 12, 2015. The Core-Mark transaction will not close until February 2015.

[27] The applicants are acting in good faith. There is some prospect of surplus funds for distribution to unsecured creditors, given time to close the Core-Mark sale and assess the remaining priorities and claims. The cash flow statements indicate that Karrys has sufficient cash to fund operations through to the end of February 2015. There is no evidence any creditor will be prejudiced by the extension.

[28] Accordingly, the time for filing a proposal is extended to February 23, 2015.

Key Employee

[29] It is often recognized in restructuring proceedings that retention of key employees is vital. Securing payment is, in turn, a vital incentive for the employee to remain.

[30] In this case, there is one employee whose assistance has been, and will remain, key to ongoing operations to the date of sale. The retention bonus in issue is relatively modest. It is supported by the proposal trustee and BMO. Without securing the retention payment, there is a

significant risk the employee would leave. In addition, given the abbreviated timeframe for closing the Core-Mark sale, it would be almost impossible to find a timely replacement.

[31] For these reasons, the retention agreement and charge, as requested, is approved.

Administrative Charge

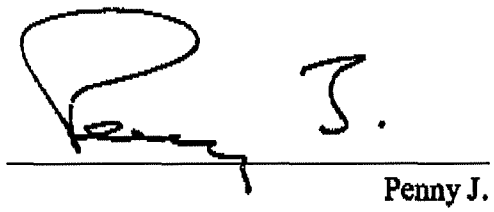
[32] Section 64.2 of the BIA provides for a super-priority to secure the fees for needed professional services during the restructuring. Secured creditors have received notice of this request. The proposal trustee supports the granting of the charge. The amount sought is, in my view, appropriate. The administrative charge requested is approved.

Consolidation

[33] It is clear that the operations of the three applicants are closely intertwined such that it would be difficult to disentangle their affairs. In order to secure the just, most expeditious and least expensive resolution, it is necessary to consolidate these closely related bankruptcy proceedings. This will avoid duplication and reduce cost. The requested order is therefore granted.

Proposal Trustee Report

[34] Given my approval of the elements above, it follows that the first report and activities of the proposal trustee should also be approved.



Penny J.

Date: December 24, 2014

CITATION: Gesco Industries Inc. (Re), 2023 ONSC 3050
COURT FILE NO.: CV-23-00699824-00CL
DATE: 230525

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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 GESCO INDUSTRIES INC., GESCO GP ULC and TIERRA SOL CERAMIC TILE LTD.

BEFORE: Penny J.

COUNSEL: *Elizabeth Pillon and Philip Yang* for the Applicants

Monique Sassi for the Monitor

Jeffrey Levine and Waël Rostom for the Bank of Nova Scotia

Natasha MacParland for Ironbridge Equity Partners Management Limited

HEARD: May 19, 2023

ENDORSEMENT

[1] The applicants have made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as am., and seek an initial order.

[2] On May 19, 2023, after reviewing the material filed and hearing oral submissions, I granted the relief sought with written reasons to follow. These are my reasons.

Background

[3] The applicants and closely related entities comprise the Gesco group, which is a distributor of various floor covering alternatives. Gesco is the largest flooring distributor in Canada and one of the largest in North America in in terms of market share. The Gesco group serves a base of approximately 2,200 long standing, recurring customers through four main distribution channels: (a) dealer; (b) residential contractor; (c) commercial contractor; and (d) lumber and business materials. Gesco does not own any real property. All of its operations are conducted from leased facilities located throughout Canada.

[4] The applicants collectively employ a total of 189 full-time employees; 33 of the applicants' employees at its warehouse operation in Brampton, Ontario are subject to a collective bargaining agreement between Gesco and UNIFOR Local 462. Gesco sponsors a defined contribution pension plan provided by Sunlife. All of the employees (including the bargaining unit members) are eligible to participate.

[5] Since 2019, the Gesco group been operating at a loss. It suffered a net loss for the fiscal year ended September 30, 2022 of nearly $11.5 million and an EBITDA loss of approximately $3.8 million from operating activities. For the six months October 1, 2022 to March 31, 2023, Gesco suffered a net loss of approximately $5.7 million and an EBITDA loss of approximately $4.2 million from operating activities. Gesco's current financial difficulties largely stem from issues encountered during the COVID-19 pandemic. While there are other contributing factors to Gesco's financial difficulties which are specific to its operations, some of these were exacerbated by the COVID-19 pandemic, supply chain issues, high product and freight costs and a subsequent slow down in demand and contraction in revenue and profit margins.

[6] Gesco's primary secured financing has come from the Bank of Nova Scotia through what is described as the ABL Credit Facility (capitalized terms of this nature have the meanings ascribed in the applicants' material). The ABL Credit Agreement represents the key secured indebtedness of the applicants. As of the beginning of May this year, Gesco was indebted to the Bank in respect of principal and accrued interest under the ABL Credit Agreement in the following amounts:

(a) Canadian and US Revolver: $21,653,447.79;

(b) Canadian Term: $1,748,299.17; and

(c) BCAP Loan: $6,375,933.8326

[7] Gesco has security registrations against various pieces of warehouse equipment used in its operations. Gesco also has accrued: (a) vacation pay of approximately $930,557; (b) commission payments of approximately $130,320; and (c) 165 hours of banked overtime. Gesco LP is indebted to the CRA in the amount of $3,907,920. Gesco owes approximately $26 million for accounts payable. One or more of the Gesco group are named as defendants in a number of ongoing lawsuits. In the aggregate, the amounts clamed are over $11 million.

[8] In July 2022, Gesco retained PwC as financial advisor to commence a process to seek refinancing. Due to deteriorating financial circumstances, the group was obliged to enter into a forbearance agreement with the Bank in August 2022. The Bank required Gesco to seek and obtain refinancing to repay its obligations under the credit agreement in full and in cash by no later than November 30, 2022. This milestone could not be achieved.

[9] In January 2023, Gesco expanded PwC's mandate to canvas the market for strategic parties who might want to acquire Gesco's operations as a going concern. While Gesco was in discussions with parties who had conducted due diligence, prior to May 2023 no binding offers were received.

[10] However, on May 8, 2023, Gesco began discussions with Ironbridge Equity Partners Management Limited regarding the potential of a going concern sale. Iron Bridge owned the Gesco group about a decade ago and is familiar with the Gesco group, the industry and with companies in distressed circumstances generally. These parties have negotiated the terms of a letter of intent, providing the framework for a going concern transaction with the applicants. Ironbridge is completing its due diligence and the parties are continuing negotiations with a view to entering into a definitive acquisition agreement by no later than June 8, 2023, with a proposed closing date of no later than June 15, 2023.

[11] Absent access to further funding, however, Gesco is unable to satisfy its obligations as they come due. Accordingly, the applicants have commenced these proceedings to obtain the flexibility and breathing space afforded by the CCAA to permit them the opportunity to complete discussions with Ironbridge and enter into and implement the acquisition agreement, which will permit a going concern sale for some or all of the business. The Bank is supportive of these discussions and is prepared to provide funding through the terms of a DIP facility agreement while the acquisition agreement is negotiated.

Issues

[12] The issues regarding the relief being sought are whether:

(a) the applicants meet the criteria for bringing an application under the CCAA;

(b) the relief being sought is reasonably necessary;

(c) the stay of proceedings should be granted;

(d) the stay of proceedings should be extended to Gesco Holdings and Gesco LP;

(e) the chief restructuring officer should be appointed;

(f) Gesco should be authorized to pay pre-filing arrears owing to critical suppliers, subject to the approval of the proposed monitor;

(g) the DIP Facility Agreement should be approved and the DIP Lender's Charge granted;

(h) the Administration Charge and the Directors' Charge should be granted: and

(i) the proposed monitor should be appointed.

Analysis

Jurisdiction and Need

[13] Subsection 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." Gesco's chief place of business is in Ontario. Gesco's head office is in Brampton, Ontario.

[14] The CCAA applies to a “debtor company" or “affiliated debtor companies” where the total of claims against the debtor or its affiliates exceeds $5 million. Gesco, Gesco GP, and Tierra Sol, as companies incorporated by or under an Act of Parliament or of the legislature of a province (Ontario, Canada, and Alberta, respectively), meet the CCAA definition of “company” and are therefore eligible to make this application under the CCAA.

[15] The applicants are insolvent due to the following:

(a) as demonstrated by the proposed monitor’s Cash Flow Statement, the applicants are unable to meet their obligations generally as they become due without the additional financing provided by the DIP Facility; and

(b) the applicants, either individually or together, have debts in excess of $5 million.

[16] Gesco has worked with its advisors and the proposed monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses. In each case, I must consider whether the requested relief is necessary for the immediate stabilization of Gesco’s businesses to protect it and the interests of its various stakeholders. I am required to limit any authorizations to what is required within the proposed initial stay period. Additional authorizations must be addressed at the comeback hearing.

Stay

[17] Section 11.02(1) of the CCAA provides that a court may grant an initial order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

[18] I am satisfied that the applicants require a stay of proceedings in order to provide them with the breathing room necessary to obtain the necessary funding to continue operations while pursuing various restructuring options The commencement of a CCAA proceeding to address the significant issues Gesco faces represents the only realistic path forward at this time. The inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Gesco group, including the employees and customers.

[19] The applicants seek to extend the stay of proceedings to Gesco Holdings and Gesco LP. The court’s authority to grant such an order is derived from the broad jurisdiction under s. 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. The court has, on numerous occasions, extended the initial stay of proceedings to non-applicants. It is, for example, just and reasonable to extend a stay of proceedings to: (a) one or more subsidiaries or affiliates of the CCAA applicants that has guaranteed the applicants’ secured loans; and (b) non-applicants who are deeply integrated with the applicants’ business operations.

[20] The extension of the stay of proceedings to Gesco Holdings is just and reasonable in the circumstances because Gesco Holdings is a guarantor under Gesco’s credit agreement with the Bank. The CCAA expressly applies, by its terms, to debtor companies, but not

partnerships. Where the operations of partnerships are integral and closely related to the operations of the Applicant, it is well-established that the court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. While Gesco LP is not an applicant, Gesco LP is the main operating entity of the Gesco group and therefore carries on operations that are integral to the business of the applicants. Gesco LP is also a borrower under the ABL Credit Agreement. The stay is extended to these non-applicant entities.

Chief Restructuring Officer

[21] Gesco has lost several key employees from October 2022 through February 2023 during its prefiling restructuring attempts. The departure of (and inability to replace) these employees has resulted in considerable operational turmoil and difficulty. The key employees who have resigned or were terminated during this time frame include the Chief Financial Officer, the Vice President of Operations, the Vice President of Sales, the Regional Sales Leader, and the Vice President of Human Resources. The applicants, therefore, seek approval to appoint David Planques, of Bellwood, as CRO. Mr. Planques was retained in November 2022 to assist Gesco with its restructuring efforts after the former Chief Financial Officer resigned. The proposed monitor is satisfied that a CRO is needed in these circumstances and is satisfied with the qualifications, expertise, and experience of Mr. Planques. The proposed monitor supports the applicants' retention of Mr. Planques as CRO under the terms of the CRO Engagement Letter. The Bank is also supportive.

[22] The court has the statutory jurisdiction to make any order appropriate in the circumstances under s. 11 of the CCAA. I am satisfied that the appointment of a CRO is appropriate. Mr. Planques' expertise will help to ensure ongoing corporate governance and assist the debtors in achieving the objectives of the CCAA.

Critical Suppliers

[23] The applicants are seeking authorization to pay pre-filing arrears to certain critical suppliers that provide essential services and/or products, although they do not seek a specific order under s. 11.4. There is ample authority, however, supporting the court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies.

[24] The evidence supports the conclusion that certain critical suppliers are essential to Gesco's on-going operations and its ability to implement a sale or liquidation in these CCAA proceedings. Gesco does not have any readily available means to replace critical suppliers if they refused to conduct further business. The proposed form of order provides that the proposed monitor will oversee all payments of pre-filing amounts made to critical suppliers, that payments will only be made with the express authorization of the proposed monitor and that payments will only be made to critical suppliers which the proposed monitor agrees are essential to Gesco's business operations. The maximum aggregate amount that may be paid to critical suppliers for pre-filing arrears is $400,000.

DIP Facility Agreement and Lenders' Charge

[25] Gesco is facing a liquidity crisis. The Cash Flow Statement demonstrates that Gesco expects the need for interim financing to fund these CCAA proceedings. The applicants are requesting approval of the DIP Facility between Gesco, Gesco LP and Gesco GP, as borrowers, and the Bank as the DIP Lender, the terms of which are further described in the DIP Facility Agreement attached to the pre-filing report of the proposed monitor.

[26] Under the terms of the DIP Facility Agreement, the Bank has agreed to loan the initial principal amount of $1,500,000 to Gesco, Gesco LP and Gesco GP during the initial ten day period of the CCAA proceedings. Access to the DIP Facility is conditional upon the provision of an order of the court approving the DIP Facility Agreement and granting the DIP Lender's Charge.

[27] Section 11.2 of the CCAA provides the court with the express statutory authority to approve the DIP Facility Agreement and the DIP Lender's Charge, and to provide that the DIP Lender's Charge rank in priority over the claim of any secured creditor of the debtor.

[28] I am satisfied that the notice requirements under s. 11.2(1) of the CCAA have been met. Given Gesco's circumstances, it cannot obtain alternative financing outside of these CCAA proceedings. The DIP Facility is necessary for the applicants to pursue their restructuring efforts, which are intended to preserve Gesco's business as a going-concern for the benefit of all its stakeholders. Without the DIP Facility, Gesco may not be able to continue operating. The quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Statement. Finally, the proposed monitor is supportive of the approval of the DIP Facility Agreement and corresponding DIP Lender's Charge. The Bank, as primary secured creditor, is also supportive, as demonstrated by the fact that the Bank is providing the DIP Facility.

[29] A notable feature of the DIP Facility Agreement is that ongoing cash receipts in the ordinary course of business will be used to pay down the accrued balance under the Bank's Revolving Loan, just as they were pre-filing. The DIP Facility will only be used to pay post-filing expenses; it cannot be used to pay down pre-filing debt obligations.

[30] This structure under the DIP Facility Agreement is in accord with the express terms of and the policy underlying s. 11.2 of the CCAA. The DIP Facility Agreement preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By prohibiting the use of DIP advances to pay down the Revolving Loan, and by requiring that Gesco only use post-filing cash receipts to pay down the accrued balance under the Revolving Loan, the DIP Lender is in no better position with respect to its priority of its pre-filing debt relative to other creditors. As relative priorities are preserved, the status quo – creditors' relative pre-stay position – is undisturbed. Similar structures have been approved by this court in: *Comark Inc. (Re)*, 2015 ONSC 2010 at paras. 40-41; and *Performance Sports Group Ltd. (Re)*, 2016 ONSC 6800 at para. 22.

[31] I accept that it is essential that the DIP Facility Agreement be approved, and the DIP Lenders' Charge granted, so that the Gesco group may be certain that adequate financing

is available from the first day of these CCAA proceedings to support the operation of the business, vendor and customer relationships, and pursuit of the sale process to completion.

Administration Charge

[32] The applicants seek the grant of a super-priority Administration Charge in favour of the CRO, the proposed monitor, counsel to the proposed monitor, and counsel to the applicants. The Administration Charge being requested is in the amount of $800,000 in respect of the initial stay period.

[33] This amount reflects the fact that there have been extensive pre-filing efforts to restructure which have brought the applicants to the advanced point they are in the current proceedings. This is unlike, for example, a situation where an applicant is starting from scratch and has no legitimate pre-filing professional expenses of this nature. It is not proposed that the Administration Charge increase after the initial period is over. Indeed, it is possible that the quantum of this charge may diminish.

[34] I am satisfied that the Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the beneficiaries of the Administration Charge have provided and will continue to provide essential legal and financial advice throughout these CCAA proceedings;

(b) there is no anticipated unwarranted duplication of roles;

(c) the applicants' advisors have engaged in a significant amount of work on a pre-filing basis in exploring strategic alternatives, conducting the pre-filing strategic process (all as summarized above) and obtaining the DIP Facility for the benefit of the applicants' and their stakeholders. There is ample authority supporting the court's grant of a charge to secure payment of both pre- and post-filing administrative expenses in circumstances of this kind; and

(d) the proposed monitor believes that the proposed quantum of the Administration Charge is reasonable, and it is supported by the Bank.

Directors' Charge

[35] The applicants request a priority Directors' Charge in the initial amount of $600,000 in favour of the Gesco groups' current and future directors and officers. The Directors' Charge would rank subordinate to the Administration Charge.

[36] The Directors' Charge is intended to protect the current and future directors and officers against obligations and liabilities they may incur as directors and officers of Gesco after the commencement of the CCAA proceedings, except to the extent that any such claim or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[37] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the Directors' Charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it. The notice requirement is met in the circumstances.

[38] In *Jaguar Mining Inc., Re*, 2014 ONSC 494, Justice Morawetz (as he then was) stated that, in order to grant a directors' charge, the court must be satisfied of the following factors:

(a) notice has been given to the secured creditors likely to be affected by the charge;

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the directors at a reasonable cost; and

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

[39] During oral argument I questioned applicants' counsel about the fact that there seems to be directors' and officers' insurance in place already and, if this is so, whether the directors and officers would be deriving a benefit, or be "better off", post-filing than they were pre-filing because of the additional protection the Directors' Charge would be providing to them. Additional submissions were provided on this point. In essence, the applicants submit that remaining in office post-filing engages additional risk to the directors and officers because, in the event existing insurance coverage is inapplicable or insufficient, the Gesco group, being insolvent, will not be in a position to indemnify them if claims are made. The initial order is clear that the Directors' Charge is only applicable to the extent insurance coverage is not available.

[40] Earlier law concerning directors' charges focussed on the lack of any insurance to protect directors and officers. However, more recent precedent approving a directors' charge makes it clear that a charge is available not only where there is no or inadequate insurance but where uncertainty about the applicability of existing coverage, due to exclusions for example, will tend to discourage directors and officers from continuing to serve: examples include *MJardin Group, Inc. (Re)*, 2022 ONSC 3338 at paras. 32-33 and *Laurentian University of Sudbury*, 2021 ONSC 659 at paras. 54-59.

[41] I am satisfied that the additional risk associated with remaining in office during the CCAA proceedings and the need for stability, including the continued benefit of the experience and expertise of the directors and officers, justifies the Directors' Charge in the circumstances of this case. The Directors' Charge is reasonable because:

(a) the applicants will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring;

(b) the applicants cannot be certain whether the existing insurance will be applicable or respond to any claims made, and they do not have sufficient funds available to satisfy any given indemnity should their directors and officers need to call upon such indemnities;

(c) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct;

(d) absent approval by this court of the Directors' Charge in the amounts set out above, some or all of the directors and officers may resign;

(e) the amount being sought relates to estimated liabilities for wages, vacation pay and pensions accruing during the initial period only;

(f) the Directors' Charge will only apply to the extent insurance coverage is not available; and

(g) the proposed monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances. The Directors' Charge is also supported by the Bank, which is the entity likely to be most affected by the Directors' Charge.

Proposed Monitor

[42] PwC meets the technical requirements for appointment as Monitor. PwC is well positioned to fill the role, having acted as a pre-filing consultant to Gesco in the context of informal restructuring efforts. The applicants wish to enjoy the continued support of PwC in the role of Monitor to preserve and benefit from the knowledge and experience already gained. I find the appointment of Michelle Pickett, a Senior Vice President with PwC, as Monitor is warranted.

Conclusion

[43] For the reasons laid out above, the initial order is granted:

(a) there shall be a stay of proceedings against the applicants for ten days, which shall be extended to Gesco Holdings and Gesco LP;

(b) the CRO shall be appointed;

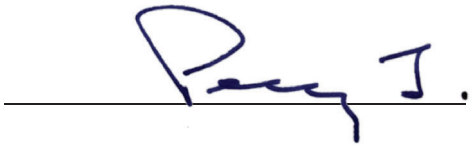
(c) Gesco is authorized to pay pre-filing arrears owing to critical suppliers, subject to the approval of the Monitor;

(d) the DIP Facility Agreement is approved and the DIP Lender's Charge granted;

(e) the Administration Charge and the Directors' Charge are granted; and

(f) PwC is appointed as Monitor.

[44] The come back hearing will take place before me at 10:00 AM on May 29, 2023 via Zoom.



Penny J.

Date: May 25, 2023

Court / Estate File No. 31-2978830

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF WHYTE'S FOODS INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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