

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF SAINT JOHN

**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 SOUTH SHORE SEAFOODS
LTD., CAPTAIN COOKE'S SEAFOOD INC., BY THE
WATER SHELLFISH (2012) INC., CAN-AM LOBSTER &
SHELLFISH LTD., SOUTH SHORE SEAFOODS
INTERNATIONAL LTD., BRIDGE LOBSTERS LIMITED,
ARSENAULT'S FISH MART INC. (each a "Company"
and collectively the "Companies")**

BETWEEN:

THE TORONTO-DOMINION BANK

APPLICANT

- and -

**SOUTH SHORE SEAFOODS LTD., CAPTAIN COOKE'S
SEAFOOD INC., BY THE WATER SHELLFISH (2012)
INC., CAN-AM LOBSTER & SHELLFISH LTD., SOUTH
SHORE SEAFOODS INTERNATIONAL LTD., BRIDGE
LOBSTERS LIMITED, ARSENAULT'S FISH MART INC.**

RESPONDENTS

**AFFIDAVIT OF ANDREA JAMNISEK
(sworn October 23, 2023)**

I, Andrea Jamnisek, of the City of Toronto in the Province of Ontario, **MAKE OATH AND**

SAY AS FOLLOWS:

1. I am a Director of the Financial Restructuring Group of The Toronto-Dominion Bank (the "Applicant"). As such, I have personal knowledge of the matters to which I hereinafter

depose in this Affidavit. Where I do not possess personal knowledge, I have stated the source of my information and, in all such cases, believe it to be true.

2. This affidavit is sworn in support of a motion by the Applicant for approval of the following relief:
 - (a) a second amended and restated initial order (the "**Second ARIO**") that, among other things, grants the Proposed Additional Powers (defined below) to the Monitor and extends the Stay Period (defined below) to January 31, 2024;
 - (b) a second amended and restated charging order (the "**Second ARCO**") that, among other things, (i) increases the maximum borrowing amount under the DIP Facility (defined below) to \$7,000,000; and (ii) carves out certain entitlements to collateral pursuant to the Premium Financing (as defined below); and
 - (c) approval of a sale and investment solicitation process ("**SISP**") to be conducted by the Monitor.

BACKGROUND

3. Additional information regarding the background and these proceedings can be found in my affidavit sworn September 18, 2023 (my "**September 18 Affidavit**"), the pre-filing report of Deloitte Restructuring Inc. ("**Deloitte**") dated September 18, 2023, the first report of the Monitor dated September 25, 2023, the supplemental report to the first report dated September 27, 2023 (the "**Supplemental Report**"), the second report of the Monitor dated October 4, 2023 (the "**Second Report**"), the third report of the Monitor dated October 16, 2023 (the "**Third Report**") and the fourth report of the Monitor dated October 23, 2023 (collectively, the "**Reports**") and are therefore not repeated herein.

Capitalized terms used herein and not otherwise defined have the meaning given to them in my September 18 Affidavit.

4. On application by the Applicant, this Court granted an order September 21, 2023 (the "**Original Initial Order**") providing protection to South Shore Seafoods Ltd. ("**SSSL**"), Captain Cooke's Seafood Inc. ("**CCSI**"), By the Water Shellfish (2012) Inc. ("**BTW**"), Can-Am Lobster & Shellfish Ltd. ("**Can-Am**"), South Shore Seafoods International Ltd. ("**SSSI**"), Bridge Lobsters Limited ("**Bridge**") and Arsenault's Fish Mart Inc. ("**AFM**" and collectively, the "**Debtors**") pursuant to the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**"). Pursuant to the Original Initial Order, Deloitte was appointed as the court-appointed monitor (the "**Monitor**") in these proceedings. On that date, the Court also granted a charging order (the "**Original Charging Order**" and together with the Original Initial Order, the "**Original Orders**") approving an administration charge in the maximum amount of \$250,000 (the "**Administration Charge**"), a Directors' Charge in the maximum amount of \$375,000; and (c) authorizing the Borrowers to borrow up to maximum principal amount of \$3 million, which borrowings (plus interest and expenses) were secured by a DIP Lender's Charge.
5. Prior to the filing and since at least June 2022, the Borrowers had consistently been in default of a number of their obligations under the Credit Agreement including numerous reporting and covenant defaults and, starting in February 2023, borrowing in excess of allowable availability under the Borrowing Base, resulting in an overadvance under the Credit Agreement (the "**Overadvance**"). The Overadvance was caused by the discovery of a significant overstatement of the Borrowers' inventory.
6. While it would have been open to the Applicant to seek the appointment of a receiver over the Debtors' assets, at the suggestion of the Debtors' own advisor, Bonfire Capital

Advisors, it agreed instead to continue to support the Debtors through a creditor-led CCAA proceeding. Through this process, it was contemplated that the proposed Monitor (Deloitte) would obtain enhanced powers and run a SISF for the business. The Applicant believed that agreeing to this process would provide the best chances of preserving a going concern and maximizing recovery for as many stakeholders as possible, while also ensuring an efficient and well controlled proceeding, which it would otherwise be entitled to under a receivership.

7. The Applicant's agreement to seek the Original Initial Order and support of the CCAA proceedings was contingent upon, among other things, the Debtors entering into a forbearance agreement dated as of September 18, 2023 (the "**DIP Facility Agreement**"), which set out the terms on which the Applicant was prepared to support the CCAA proceedings and provide funding. Critically, the DIP Facility Agreement provided that, among other things that the Applicant would make certain DIP funding available through and pursuant to the existing Credit Agreement (the "**DIP Facility**") in an initial maximum amount of \$3 million (increasing to a maximum of \$10 million on the comeback), subject to the Debtors having availability and further, that the following conditions, covenants and agreements would be followed:

- (a) the maximum Overadvance would not increase beyond \$2.5 million;
- (b) on the comeback motion (the "**Comeback**"), the Monitor's powers would be expanded;
- (c) the Debtors would not oppose any release sought by the Applicant or the Monitor or take any position adverse or contrary to the Applicant or the Monitor in connection with any motion or request for release; and

- (d) a SISP would be commenced no later than the Comeback.
8. All of the foregoing terms were agreed to by the Debtors in executing the DIP Facility Agreement. The Debtors received legal advice in connection with their decision to enter into the DIP Facility Agreement.
9. From the Applicant's perspective, the above provisions were crucial in its agreement to seeking the Original Initial Order and supporting the CCAA proceedings. These covenants were critical to ensuring efficiency in the cost of the CCAA proceedings as well as transparency in the operations of the business.

EVENTS AFTER THE INITIAL FILING

10. Almost immediately after the Initial Orders were granted and prior to the Comeback, the Debtors entered into two transactions in contravention of the Initial Orders (the "**Subject Transactions**"). Pursuant to the Subject Transactions, management authorized the Debtors to supply over 50,000 pounds of live product to two customers as an off-set against pre-filing debts.
11. The Subject Transactions had a number of extremely detrimental effects.
- (a) First, the transfer of over 50,000 pounds of live product (the Applicant's collateral) for \$0 consideration, resulted in a material erosion in liquidity, effectively eliminating any liquidity that was available under the borrowing base;
- (b) Second, the transfer and corresponding lack of availability resulted in a material adverse change ("**MAC**") which was reported by the Monitor pursuant to the Supplemental Report and who noted that the Debtors' liquidity was impacted by approximately \$382,000;

- (c) Third, the Subject Transactions reflected, at a minimum, poor or no oversight by management in terms of the operation of their business even after the appointment of a CRO; and
 - (d) Fourth, the Subject Transactions and impact of those transactions constituted a default under the DIP Facility Agreement.
12. Upon learning of the Subject Transactions (as well as the other negative variances to the Debtors' cash flow, which were reported in the Supplemental Report), the Applicant was very concerned about the implications for the cash flow, the proposed SISP including the timeframe and the CCAA proceedings generally. Among other things, it was unclear whether the Debtors would have sufficient funds to continue operations through to the end of the current lobster season.

The Comeback Hearing

13. As a result, at the Comeback, instead of supporting the original relief that had been intended to be sought (including approval of an increase in borrowings to \$10 million and approval of a SISP), the Applicant requested a short extension of the stay to allow the Monitor to work on a further revised cash flow.
14. The Applicant also requested significant enhancement of the Monitor's powers at the Comeback. The majority of the powers that were requested had always intended to be requested as contemplated by the DIP Facility Agreement. Certain additional powers were requested given the very alarming nature of the Subject Transactions.
15. At the Comeback, the Debtors raised objections to the release sought by the Applicant particularly as it related to the expanded powers of the Monitor. Such objections also constituted a default under the DIP Facility Agreement. The Applicant ultimately agreed

to carve back certain of the requested enhanced powers, at least for the interim, and the Court approved an amended and restated initial order (the "**First ARIO**"), which extended the Stay Period to October 6, 2023 and provided more limited expanded powers to the Monitor (which included the ability to investigate the Subject Transactions). The Court also granted an amended and restated charging order (the "**First ARCO**") increasing the Administration Charge to \$500,000.

Subsequent Court Hearings

16. On October 5, 2023, the parties returned to Court for a further stay extension. The Applicant understood that the Debtors and the Monitor continued to work on the cash flow and that further time was required such that a more reliable cash flow could be provided. At that hearing, the Court further extended the Stay Period to October 25, 2023 and scheduled the next hearing for October 25, 2023 (the "**October 25 Hearing**").
17. However, prior to the October 25 Hearing, the Debtors advised the Monitor that their projected borrowings under the DIP Facility were going to exceed the maximum amount available the week of October 16, 2023. The Monitor communicated this to the Applicant and advised that an immediate increase of approximately \$1 million was required in order to fund certain critical payments including payroll and payments to fishers and fisher helpers.
18. To accommodate the Debtors, the Applicant agreed to seek an increase of the borrowing limit on an emergency basis. The Applicant agreed to seek yet another court appearance and provisional relief as it has been cognizant of the Court's direction as to payment of employees and fishers. On October 17, 2023, the Court granted an order increasing the borrowing limit to \$4 million under the DIP Facility.

19. In connection with the motion on October 17, 2023, the Monitor filed the Third Report outlining the requested funding increase as well as the projection that the Debtors would remain within the required \$2.5 million Overadvance, as required by the DIP Facility Agreement.
20. Two days later, on October 19, 2023, the Applicant was informed by the Monitor that, in fact, the Debtors would not have sufficient availability to make the payments to the fishers on October 20, 2023 if the Applicant did not accommodate the Debtors by agreeing to an increase in the Overadvance of approximately \$150,000. As reflected in the Second Report, the variance was due to among other things, significantly lower than forecast collections due to a timing variance as well as lower than forecast sales post-filing.
21. The Applicant accommodated the request for the increase in the Overadvance so that such payments could be made, which funding constituted yet another default under the DIP Facility Agreement.

The Subject Transactions

22. As set out above, pursuant to the First ARIO, the Monitor was provided the power to investigate the Subject Transactions. The preliminary results of the Monitor's investigations were summarized in the Second Report. As of that date, October 4, 2023, the Monitor understood that the Debtors would be reversing the credit notes and seeking payment in full. I understand the Monitor continued to follow up with the Debtors over the following weeks but that it was only on October 19, 2023 that even first written communications were sent out by the Debtors.

23. The Applicant has significant concerns about leaving such collection efforts in the hands of the Debtors given the conduct to date. This is only one example of the immediate need for an enhanced powers of the Monitor.

REQUESTED RELIEF

24. The Applicant is now seeking the Second ARIO, Second ARCO and the SISP Order in order to progress these proceedings.

Enhancement of the Monitor's Powers

25. As condition to supporting the next phase of these CCAA proceedings, the Applicant is requesting that the powers set out in the proposed Second ARIO be granted. A summary of the proposed additional powers is as follows (the "**Proposed Additional Powers**"):

- (a) Authority to develop and conduct a SISP;
- (b) Execute agreements, instruments, notices, directions settlements, filings authorizations and other documents on behalf of the Debtors;
- (c) Retain or hire employees (including awarding non-material discretionary bonuses) and terminating employees;
- (d) Ability to disclaim contracts;
- (e) Authority to cause the Debtors to administer the Business or Property as the Monitor deems necessary or desirable for the purposes of completing any transaction involving the Business or the Property or for purposes of facilitating distributions to creditors of the Debtors; and

- (f) cause the Debtors to engage assistants or advisors as the Monitor deems necessary or desirable and to provide instructions and directions to any current advisors of the Debtors.
26. Significant concessions have been made by the Applicant to date despite the numerous defaults of the Debtors under the DIP Facility Agreement. Despite that, the Applicant has continued to fund the proceedings to ensure that critical payments are made including to employees and fishers and, in fact, has agreed to defer payment of its own interest of just under \$200,000.
27. However, the Applicant is no longer willing to fund the CCAA proceedings without clear reduction in overhead cost and increased oversight and control by the Monitor. The Proposed Additional Powers are intended to address the following issues and concerns:
- (a) The SISP clearly needs to be conducted by the Monitor in all respects – the Monitor is the court-appointed officer in these proceedings. Further, the Debtors' shareholders Tim Williston and Michel Jacob (the "**Shareholders**"), have indicated that they intend to participate as bidders in the SISP. It is critical that the SISP be conducted and implemented independently of the Shareholders in order to preserve the integrity of the process.
 - (b) The ongoing overhead cost of the Debtors needs to be reduced. With the PEI lobster season now over and as set out in the Fourth Report, the primary remaining activities in these proceedings relate to collections, winterizing the plants and the conduct of the SISP. I am advised by Mr. Foran that the Proposed Additional Powers will allow certain reductions in headcount and reduction in other costs which will assist the cash flow.

- (c) Even absent the concerns that the Applicant has with respect to the conduct of management, other than the Shareholders, the only other member of management is the CFO. I believe that, even with the assistance of the CRO, she cannot address all operational and restructuring matters on her own and that further assistance from the Monitor is required.
 - (d) It is clear the Debtors have not been proactive in recovering amounts under the Subject Transactions and potentially otherwise. The Applicant requires the Monitor to have the power to directly pursue recovery in this regard.
28. The Debtors are not prejudiced by the granting of the Proposed Additional Powers. Given the PEI lobster season is over, there is significantly less operational matters to be addressed and most matters relate to the CCAA proceedings and the SISF. Additionally, this could hardly be considered a surprise to them as they agreed to consent to such a request pursuant to the DIP Facility Agreement.
29. With the conclusion of the PEI lobster season, the Applicant has had ongoing discussions with the Monitor as to its view whether the CRO continues to be required. The Monitor has advised the Applicant that it believes that the CRO has provided value in these CCAA proceedings so far and that there may be some ongoing efficiency in retaining him for the next while. I understand that the Monitor has been engaged with discussions with the CRO to discuss the coordination of the CRO's ongoing role and the Monitor's role. Both the CRO and the Monitor are highly experienced insolvency professionals who I believe will be able to coordinate their efforts in order to ensure there is no duplication of efforts.

Increase in DIP Funding

30. As set out above, the Debtors' revised cash flow forecast indicates that the Debtors require an increase in the maximum borrowing amount to fund required costs during the proposed extended Stay Period. Provided that the Monitor's enhanced powers are granted, the Applicant has agreed to request an increase of the borrowing limit under the DIP Facility from \$4 million to \$7 million.
31. The cash flow forecast shows that the Debtors are unlikely to have availability to fund their required expenses during the Stay Period absent a further increase in the Overadvance by an estimated \$3.2 million, which is a further violation under the DIP Facility Agreement.
32. Notwithstanding the breach, the Applicant has agreed to provide such funding but only in the event that the Monitor's enhanced powers are granted.
33. I understand that the Monitor supports the increase in the borrowing limit and is of the view that the proposed quantum is reasonable and appropriate in the circumstances.

Premium Financing

34. I am advised by James Foran of the Monitor that the Debtors have entered into certain financing arrangements to finance their insurance premiums (the "**Premium Financing**"), which would otherwise be fully payable to the insurer. I understand that the financier requires certain relief clarifying its priority security interest in any unearned or returned insurance premiums. The Applicant has agreed to certain changes in the proposed Second ARCO to accommodate for such arrangements.

SISP Order

35. I understand that the Fourth Report will provide a comprehensive overview of the proposed SISP. Provided that the Proposed Additional Powers are granted, the Applicant has agreed to seek approval of the SISP including the proposed milestones and timelines.
36. The SISP provides for the following timelines:¹
- (a) Commencement of the SISP: October 30, 2023;
 - (b) Phase 1 Bid Deadline: December 11, 2023;
 - (c) Phase 2 Bid Deadline: January 12, 2024;
 - (d) Approval Hearing: on or before January 31, 2024; and
 - (e) Target Closing Date: on or before February 28, 2024.
37. The SISP clearly needs to be conducted by the Monitor to the exclusion of management given their intended participation as a bidder.

Extension of the Stay Period

38. The Applicant is seeking an extension of the stay period to January 31, 2024.
39. Under the proposed SISP, it is expected that the Phase 2 Bid Deadline will occur in mid-January 2024 with a target date for sale approval by the end of January 2024.
40. Absent an extension of the Stay Period to the end of January 2024, the Applicant would be required to incur further costs in bringing another interim motion solely for the purpose

¹ Capitalized terms used in this section have the meanings ascribed to them in the Fourth Report.

of extending the Stay Period. I understand that the Monitor will provide an interim report to the Court after the Phase 1 Bid Deadline in December 2023.

41. The revised cash flow forecast is or will be attached to the Fourth Report and I understand the Fourth Report will provide commentary thereon.


CONCLUSION

42. To date, the professional cost of these proceedings has been significantly higher than expected. The October 25 hearing will be the Applicant's 6th appearance in Court in just over a month. The request for, in particular, the Proposed Additional Powers, SISP and stay extension will hopefully provide for a reduction in certain professional fees while the Monitor focuses on running the SISP.

43. For the reasons set out above, I respectfully request the Court grant the proposed relief.

44. I swear this affidavit in support of this Application and for no other or improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on October 23, 2023.



Commissioner for Taking Affidavits



ANDREA JAMNISEK