

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

BRIEF ON LAW

Submitted on Behalf of the Applicant, The Toronto-Dominion Bank
(for the Hearing scheduled for September 28, 2023 at 10:30 a.m.)

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PART I - BACKGROUND

1. The Applicant is bringing this motion to seek orders pursuant to the *Companies' Creditors Arrangement Act* (Canada)¹ ("**CCAA**") in respect 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 and Arsenault's Fish Mart Inc. (collectively, the "**Debtors**").

2. Specifically, the Applicant seeks the granting of:

(a) an amended and restated initial order (the "**ARIO**");

(b) an amended and restated charging order (the "**ARCO**"); and

(c) an order approving the sale and investment solicitation process (the "**SISP Approval Order**").

3. Capitalized terms used herein and not otherwise defined have the meaning given to them in the first report of the monitor dated September 25, 2023 (the "**First Report**").

PART II - FACTS

4. The Debtors are a group of privately-held companies carrying on business as buyers, processors and wholesalers of live and cooked lobster in Atlantic Canada. SSSL was established in 1996 as one of the first Canadian lobster processors in the province of Prince Edward Island.

¹ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ["**CCAA**"].

The current shareholders, Timothy Williston and Michel Jacob (the “**Shareholders**”), acquired the Debtors through several transactions between 2019 and 2021.²

5. On September 21, 2023, this Court granted:

- (a) An initial order (the “**Initial Order**”) pursuant to which the Court approved³:
 - (i) A stay of proceedings to and including October 1, 2023 (the “**Stay Period**”);
 - (ii) The ongoing use of the Debtors’ cash management system;
 - (iii) The appointment of David Boyd, a representative of Resolve Advisory Services Ltd., as a chief restructuring officer (“**CRO**”);
 - (iv) The appointment of Deloitte Restructuring Inc. as monitor (the “**Monitor**”);
 - (v) The Debtors to make payments with respect to certain critical pre-filing liabilities up to an amount of \$900,000 (with the consent of the Monitor);
and
 - (vi) Scheduling the comeback hearing (the “**Comeback Hearing**”) for 10:30 AM (AST) on September 28, 2023;⁴
- (b) A charging order (the “**Charging Order**” and together with the Initial Order, the “**Initial Orders**”) pursuant to which the Court approved:⁵

² Affidavit of Andrea Jamnisek sworn September 18, 2023 [“**Jamnisek Affidavit**”], para 11.

³ First Report of the Monitor, Deloitte Restructuring Inc., dated September 25, 2023 [“**First Report**”], para 2.

⁴ First Report, para 5.

⁵ First Report, para 2.

- (i) Post-filing borrowing by the Debtors pursuant to a DIP Facility Agreement (defined below) up to an initial maximum amount of \$3 million;
- (ii) An administration charge (the “**Administration Charge**”) up to a maximum amount of \$250,000;
- (iii) A directors’ charge of up to a maximum of \$375,000; and
- (iv) A DIP lender’s charge (the “**DIP Lender’s Charge**”) to secure amounts under the DIP Facility Agreement.

6. On Friday, September 22, 2023, the Applicant served the Initial Orders and the unredacted pre-filing report of the proposed monitor containing the Debtors’ cash flow forecast to the service list.⁶

7. Upon its appointment, the Monitor initiated contact with various interested parties including BDC, BDC Capital, the Cooke Group, Arsenault, MTTCl and ACOA. As of the date of the First Report, the Monitor was unaware of any objections to any of the proposed relief sought in respect of the Comeback Hearing.⁷

Proposed SISP

8. The Monitor, in consultation with the CRO and the Applicant, have developed a proposed sale investment and solicitation process (“**SISP**”) to solicit sale and investment offers for the Debtors and/or their property.⁸ In light of the expressed interest by the Shareholders to participate in the SISP as bidders, the SISP is to be run exclusively by the Monitor.⁹

⁶ First Report, para 4.

⁷ First Report, paras 14-25.

⁸ First Report, para 40.

⁹ First Report, para 34.

9. Target dates and milestones under the proposed SISP include the following:¹⁰

- (a) No later than October 4, 2023: the Monitor will publish and provide direct marketing of the SISP to Known Potential Bidders;
- (b) November 13, 2023: Phase 1 Bid Deadline for submission of non-binding expressions of interest;
- (c) November 17, 2023: Monitor to advise parties whether their expression of interest qualifies for Phase 2;
- (d) December 11, 2023: Phase 2 Bid Deadline for submission of bids;
- (e) January 12, 2024: Target Court approval date; and
- (f) February 15, 2024: Target closing date.

10. Pursuant to the proposed SISP, bidders must clearly allocate value attributable to the BDC Priority Collateral and the Buchanan Road Properties (to the extent such assets are included in the bid).¹¹

Enhancement of Monitor's Powers

11. The Applicant seeks to expand the Monitor's powers as set out in the Initial Order to include the following:¹²

- (a) Approve all receipts and disbursements;

¹⁰ First Report, para 41; First Report, Appendix A – SISP Procedures [**"SISP Procedures"**], art 2.4.

¹¹ SISP Procedures, art 5.2(a)(ii).

¹² Notice of Motion, Schedule A – Draft Amended and Restated Initial Order, para 24.

- (b) Develop and conduct the SISP;
- (c) Execute and sign all agreements and other documents on behalf of the Debtors;
- (d) Retain or hire employees or assistants, award discretionary non-material bonuses and terminate or lay off employees;
- (e) Take steps to cause the Debtors to disclaim contracts;
- (f) Report and meet with any persons the Monitor deems appropriate;
- (g) Cause the Debtors to complete any transaction; and
- (h) Cause the Debtors to engage assistants or advisors and provide instructions to same.

PART III - ISSUES

12. The new issues to be determined in connection with this motion are as follows:

- (a) Should the SISP be approved;
- (b) Is it appropriate to expand the Monitor's powers; and
- (c) Should the other requested relief be granted.

PART IV - LAW & ARGUMENT

The SISP Should be Approved

13. The Court has the jurisdiction to approve the SISP.¹³ Courts have recognized that the broad remedial nature of the CCAA confers the power upon the Court to, among other things,

¹³ CCAA, s 11.

approve sale and investment solicitation processes in respect of CCAA debtors and their property.¹⁴

14. Courts have routinely recognized that the following factors are applicable when determining if a proposed sale process should be approved in the context of 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?¹⁵

15. Courts have found that there is a distinction in the application of the criteria set out in Section 36 of the CCAA when seeking approval of a SISP as opposed to the subsequent approval of a sale.¹⁶ However, the criteria set out in Section 36 of the CCAA may still be instructive when considering the terms of the proposed SISP.

16. Additional factors that have been considered by Courts include:

- (a) The fairness, transparency and integrity of the proposed process;
- (b) The commercial efficacy of the proposed process in light of the specific circumstances; and

¹⁴ *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\)](#) ["*Nortel*"] at para 36.

¹⁵ *Nortel*, *supra* at para 49.

¹⁶ *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#) at paras 16-17.

- (c) Whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.¹⁷

17. These factors are also to be considered in light of the principles set out in *Royal Bank v. Soundair* [**“Soundair”**].¹⁸ As the Court in *Terrace Bay Pulp Inc. (Re)* pointed out, the *Soundair* principles largely overlap with the factors set out in Section 36(3) of the CCAA:

- (a) Whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
- (b) The interest of all parties;
- (c) The efficacy and integrity of the process by which the offers are obtained; and
- (d) Whether there has been unfairness in the working out of the process.¹⁹

18. The proposed SISF meets the criteria set out above. Among other things:

- (a) The primary purpose of the CCAA proceedings is to conduct a sale process to attempt to preserve a going concern and maximize value for all stakeholders;²⁰
- (b) The only other viable alternative at this time is liquidation – the proposed SISF enhances the prospects of the continuation of a going concern and maximization of value;

¹⁷ *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#) at para 6; *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107 \(CanLII\)](#) at para 20.

¹⁸ *DCL Corporation (Re)*, [2023 ONSC 3686 \(CanLII\)](#) at para 19.

¹⁹ *Terrace Bay Pulp Inc. (Re)*, [2012 ONSC 4247 \(CanLII\)](#) at para 44.

²⁰ First Report, para 39.

- (c) The SISP has been developed by and will be conducted by the Monitor to ensure the integrity of the process particularly in light of the expressed intention of the Shareholders to participate in the SISP;²¹
- (d) The SISP provides for allocation of value to the BDC Priority Collateral and the Buchanan Road Properties, being the only assets of the Debtors on which the Applicant does not have first priority security;²²
- (e) The proposed SISP allows the Monitor to consult with applicable secured creditors;²³
- (f) The proposed length of the SISP has been developed by the Monitor and provides extensive time for submission of non-binding expressions of interest and final binding bids with due consideration to, among other things, the holidays;²⁴ and
- (g) The Monitor recommends the proposed SISP and believes it is fair and reasonable in the circumstances.²⁵

The Monitor's Powers Should be Expanded

19. The Court has the jurisdiction to expand the powers of a monitor beyond what has been provided for in Section 23 of the CCAA and the standard model orders.²⁶

20. Section 23(1)(k) of the CCAA provides that the Monitor may carry out any "other functions in relation to the company" that the Court may direct.²⁷ Indeed, in recent years, Courts have

²¹ First Report, para 34.

²² SISP Procedures, art 5.2(a)(ii).

²³ First Report, para 41; SISP Procedures, arts 3.1(b), 4.1, 5.3, 6.5, and 6.14.

²⁴ First Report, para 41; SISP Procedures, art 5.

²⁵ First Report, para 53.

²⁶ CCAA, ss 11 and 23(1)(k).

²⁷ CCAA, s 23(1)(k).

routinely granted the Monitor expanded powers where it has been appropriate in the circumstances.²⁸

21. The proposed expansion of the Monitor's powers is appropriate in the circumstances given:

- (a) The expansion will assist in streamlining the magnitude of the professional fees incurred as part of the CCAA proceedings;²⁹
- (b) The ability to conduct the SISP will preserve the integrity of that process including the selection of successful bid(s);³⁰
- (c) The Monitor has discussed the proposed scope of the expanded powers with the Debtors and the CRO;³¹
- (d) It is a condition of the DIP Facility Agreement that the Monitor's powers be expanded;³² and
- (e) The Monitor intends to continue to consult with the Debtors and the CRO where appropriate (and where doing so would not interfere with the integrity of the SISP).³³

The Additional Relief under the ARIO and the ARCO Should be Granted

22. The additional relief contemplated by the ARIO and the ARCO should be granted.

²⁸ See e.g. *Arrangement relatif à Bloom Lake General*, [2021 QCCS 2946 \(CanLII\)](#); *Ernst & Young Inc. v. Essar Global Fund Limited*, [2017 ONCA 1014 \(CanLII\)](#).

²⁹ First Report, para 32.

³⁰ First Report, para 32.

³¹ First Report, para 35.

³² Jamnisek Affidavit, Exhibit "JJ", art 4.2(b)(iv).

³³ First Report, para 34.

(a) Increase in DIP Facility:

- (i) The increase in the post-filing borrowing limit under the DIP Facility Agreement from \$3 million to \$10 million is required in order for the Debtors to have funds to continue to fund their operations and these restructuring proceedings – the proposed borrowing limit is supported by the Debtors' cash flow;³⁴
- (ii) The cash flow forecast has been provided to the service list;³⁵
- (iii) No change in the priority of the DIP Lender's Charge is being proposed;

(b) Administration Charge: The increase in the Administration Charge from \$250,000 to \$500,000 will ensure that the beneficiaries of that charge have adequate protection throughout these CCAA Proceedings until the end of the Stay Period;³⁶

(c) Extension of the Stay Period:

- (i) The proposed extension of the Stay Period to and including November 24, 2023 will permit the Monitor to proceed with Phase 1 of the SISP;³⁷
- (ii) In the event that qualifying expressions of interest are received, a further extension of the Stay Period would be sought to allow the Monitor to complete the SISP; and

³⁴ First Report, para 48.

³⁵ First Report, para 4.

³⁶ First Report, para 43.

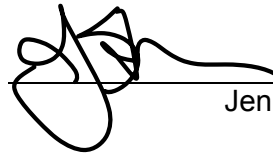
³⁷ First Report, paras 41 and 51(ii).

- (iii) The Monitor is satisfied that the Debtors have and continue to act in good faith and with due diligence.³⁸

PART V - RELIEF SOUGHT

23. For the reasons set out above, the Applicant requests the Orders substantially in the forms attached to the Applicant's notice of motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of September, 2023.



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³⁸ First Report, para 51(iii).

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(On SC\)](#)
2. *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#)
3. *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#)
4. *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107 \(CanLII\)](#)
5. *DCL Corporation (Re)*, [2023 ONSC 3686 \(CanLII\)](#)
6. *Terrace Bay Pulp Inc. (Re)*, [2012 ONSC 4247 \(CanLII\)](#)
7. *Arrangement relatif à Bloom Lake General*, [2021 QCCS 2946 \(CanLII\)](#)
8. *Ernst & Young Inc. v. Essar Global Fund Limited*, [2017 ONCA 1014 \(CanLII\)](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, RSC 1985, c C-36

General power of court

11 Despite anything in the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#), if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Duties and functions

23 (1) The monitor shall

- [...]
- **(k)** carry out any other functions in relation to the company that the court may direct.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

- (3) 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 monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor 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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF SOUTH SHORE
SEAFOODS LTD., ET AL.

New Brunswick
**COURT OF KING'S BENCH OF NEW BRUNSWICK
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PROCEEDING COMMENCED AT
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