

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 Monitor, Deloitte Restructuring Inc.
(for the Hearing scheduled for January 29, 2024, at 10:00 a.m. AST)

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TABLE OF CONTENTS

PART I - BACKGROUND.....	1
PART II - FACTS	2
PART III - ISSUES	8
PART IV - LAW & ARGUMENT	8
PART V - RELIEF SOUGHT	12
SCHEDULE "A"	13
SCHEDULE "B"	14

PART I - BACKGROUND

1. Deloitte Restructuring Inc. (“**Deloitte**”), in its capacity as the court-appointed monitor (the “**Monitor**”) 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**”), is bringing this motion to seek relief pursuant to the *Companies’ Creditors Arrangement Act* (Canada)¹ (the “**CCAA**”).

2. Specifically, the Monitor is requesting:

- (a) An order (the “**Approval and Vesting Order**”) approving the proposed sale (the “**Transaction**”) of substantially all of the property, assets and undertakings of the Debtors, as more specifically set out in an asset purchase agreement (the “**Sale Agreement**”) by and among the Debtors, by the Monitor, as vendors, and Phillips Bridge Seafood ULC (the “**Purchaser**”), executed on January 24, 2024;
- (b) An order (the “**Ancillary Order**”):
 - (i) extending the Stay Period (as defined below) from January 31, 2024 until and including April 30, 2024;
 - (ii) authorizing, but not directing, the Monitor to assign any or all of the Debtors into bankruptcy and authorizing Deloitte to act as trustee in any such bankruptcies;
 - (iii) approving the activities of the Monitor, as set out both in the fifth report of the Monitor dated December 20, 2023, and the sixth report of the Monitor dated January 24, 2024 (the “**Sixth Report**”); and

¹ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”).

- (iv) sealing the confidential supplement to the Sixth Report (the “**Confidential Supplement**”) until the earlier of the filing of the Monitor’s Certificate or further order of this Court; and
 - (c) An order (the “**Priority Claims Order**”) approving the Monitor’s proposed priority claims procedure (the “**Priority Claims Procedure**”) to identify, quantify and resolve any Priority Claims (as defined below).
3. The primary legal questions at issue on this motion relate to:
- (a) approval of the Transaction;
 - (b) establishing the Priority Claims Procedure; and
 - (c) sealing of the Confidential Supplement.

As such, this brief focuses on those three issues.

4. Capitalized terms used herein and not otherwise defined have the meaning attributed to them in the Sixth Report.

PART II - FACTS

Background

5. 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.
6. On September 21, 2023, upon application by the Toronto-Dominion Bank (the “**Applicant**”), this Court granted protection to the Debtors under the CCAA, pursuant to:
- (a) an initial order, which, among other things, appointed the Monitor and the CRO, and approved a stay of proceedings until October 1, 2023 (as subsequently extended, the “**Stay Period**”); and

- (b) a charging order, which, among other things, granted an administration charge in the amount of \$250,000 (as subsequently amended, the “**Administration Charge**”).²

7. On September 29, 2023, this Court approved, among other things:

- (a) an amended and restated initial order, which extended the Stay Period to October 6, 2023, and provided more limited powers to the Monitor; and
- (b) an amended and restated charging order, which increased the quantum of the Administration Charge to \$500,000.³

The SISP

8. Pursuant to an order granted on October 25, 2023, this Court approved, among other things, a sale and investment solicitation process (the “**SISP**”) and an extension of the Stay Period to January 31, 2024. The SISP was developed by the Monitor in consultation with the CRO and the Applicant.⁴

9. Pursuant to the SISP, target dates and milestones included the following:⁵

- (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.

² Sixth Report of the Monitor, Deloitte Restructuring Inc., dated January 24, 2024 (“**Sixth Report**”) at paras 1 and 2.

³ Sixth Report at para 7.

⁴ Sixth Report at paras 12 and 13.

⁵ Fourth Report of the Monitor dated October 23, 2023 at para 45.

10. Subsequent to the commencement of the SISP:
- (a) The Monitor undertook the following activities:⁶
 - (i) providing the Teaser to 52 interested parties identified by the Debtors, the Monitor, the CRO and other key stakeholders; and
 - (ii) advertising the SISP in The Telegraph Journal, The Daily Gleaner, The Times & Transcript, The Guardian, allAtlantic and The Insolvency Insider;
 - (b) 27 non-disclosure agreements were executed;⁷
 - (c) Upon the Phase 1 Bid Deadline, several non-binding expressions of interest were received;⁸
 - (d) On December 15, 2023, after consultation with the Applicant, BDC, BDC Capital and the Private Lenders, the Monitor informed certain parties they had been deemed to be Qualified Phase 1 Bidders;⁹ and
 - (e) Further bids were received on the Phase 2 Bid Deadline.¹⁰

The Transaction

11. Capitalized terms used in this section and not otherwise defined have the meaning attributed to them in the Sale Agreement.

12. Certain additional key terms of the Sale Agreement are as follows:¹¹

⁶ Fifth Report of the Monitor dated December 20, 2023 ("Fifth Report") at para 28.

⁷ Fifth Report at para 29.

⁸ Fifth Report at para 30.

⁹ Fifth Report at para 32.

¹⁰ Sixth Report at para 39.

¹¹ Sixth Report at para 44.

- (a) Purchased Assets: The Purchased Assets include substantially all of the assets of the Debtors used in the business with the exception of the Excluded Assets;
- (b) “As is Where is”: The Purchased Assets are being acquired on an “as is where is” basis;
- (c) Purchase Price: The Purchase Price is the cash paid at closing plus the 10% deposit already received;
- (d) Excluded Assets: The Excluded Assets include inventory (unless abandoned at closing), accounts receivable, certain vehicles subject to financing, certain equipment financed by BDC which is located at Aboiteau Wharf, insurance proceeds or claims and certain non-core assets consisting primarily of loans made to management or other individuals;
- (e) Assumed Liabilities: The Purchaser is assuming the mortgage loan given to Capitan Cooke’s Seafood Inc. and By the Water Shellfish (2012) Inc. by BDC based on a term sheet dated as of April 21, 2022;
- (f) Assigned Contracts: The Purchaser intends to take assignment of the lease in respect of the premises at 21 Ranger Drive, Kittery, Maine, USA, 03904;
- (g) Conditions to Closing: The Sale Agreement stipulates standard conditions to closing as well as:
 - (i) granting of the Approval and Vesting Order; and
 - (ii) receipt by the Purchaser of the necessary permits pursuant to the [Land Protection Act, RSPEI 1988, c L-5](#) (the “LPA Permit”) to authorize the purchase of the Owned Real Property in Prince Edward Island by non-residents, such as the Purchaser; and

- (h) Outside Date: The Outside Date is February 29, 2024, which date shall be automatically extended to no later than March 31, 2024, solely to accommodate the receipt by the Purchaser of the LPA Permit.

Priority Claims Order

13. Capitalized terms used in this section and not otherwise defined have the meaning attributed to them in the Priority Claims Order.

14. The Monitor, in consultation with its legal counsel, the CRO and the Applicant's legal counsel, has designed the Priority Claims Process with the purpose of identifying, quantifying and resolving claims ranking in priority to the Applicant's security (the "**Priority Claims**") against the assets being sold as part of the Transaction.¹²

15. The Priority Claims Process as outlined in the Priority Claims Order filed with the Monitor's motion materials is summarized below:¹³

- (a) The Monitor shall provide notice of the Priority Claims Process and the Priority Claims Bar Date within five Business Days of the issuance of the Priority Claims Order to all Persons who are known to have a Priority Claim based on the books and records of the Debtors;
- (b) The Monitor shall also publish notice for one Business Day in the following newspapers:
 - (i) The Chronicle Herald;
 - (ii) The Telegraph Journal; and

¹² Sixth Report at para 55.

¹³ Sixth Report at para 56.

- (iii) The Guardian;
- (c) The Monitor shall also, within three Business Days of the issuance of the Priority Claims Order, post notice of the Priority Claim Process on the Monitor's website;
- (d) As soon as practically possible following receipt of a request therefor, the Monitor shall provide a copy of the Proof of Claim form to any Person claiming to be a Priority Claimant;
- (e) Priority Claimants shall have until 5:00 p.m. Atlantic Standard Time on April 1, 2024, to file a Proof of Claim form with the Monitor;
- (f) The Monitor, in consultation with the CRO, shall review all Proof of Claim forms and shall accept, settle or dispute the amount and priority of each asserted Priority Claim;
- (g) If the Monitor is unable to resolve any asserted Priority Claim within a time period or in a manner satisfactory to the Monitor, the Monitor shall deliver a Notice of Dispute to the applicable Priority Claimant; and
- (h) The Monitor may, at any time, refer any Disputed Priority Claim or a portion thereof to the Court, or to such alternative dispute resolution process or other court of competent jurisdiction as may be ordered by the Court or agreed to by the Monitor and the applicable Priority Claimant.

Sealing Order

16. As part of the Ancillary Order, the Monitor is seeking an order that the Confidential Supplement be sealed (the “**Sealing Order**”). The Confidential Supplement contains the bid comparison as well as the unredacted Sale Agreement containing the financial terms of the Transaction.¹⁴

PART III - ISSUES

17. The principal issues to be determined on this motion are as set out above.

PART IV - LAW & ARGUMENT

The Approval and Vesting Order Should be Granted

18. Pursuant to Section 36 of the CCAA, the Court has the jurisdiction to approve a sale transaction within the context of CCAA proceedings. Subsection 36(3) of the CCAA sets out the relevant factors for consideration as follows:¹⁵

- (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

¹⁴ Sixth Report at para 39.

¹⁵ CCAA, [s 36\(3\)](#).

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

19. The above factors, however, are not intended to be exhaustive, nor are they to be considered a checklist that must be followed in every transaction.¹⁶ Courts have also continued to consider the *Soundair* criteria as relevant to whether a sale should be approved, which factors are similar to those set out in Subsection 36(3) of the CCAA and are as follows:¹⁷

- (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.

20. The Transaction and the Sale Agreement satisfy the above test. Among other things:

- (a) The SISP was approved by the Court and conducted by the Monitor in accordance with its terms;¹⁸
- (b) The Monitor is of the opinion that the marketing activities contained within the SISP were robust and exposed the Debtors' assets to the market for a reasonable period of time and, as such, the Sale Agreement is commercially reasonable and should be approved;¹⁹
- (c) The Transaction will provide for the preservation of the going concern business, which the Monitor considers beneficial for many of the stakeholders in the

¹⁶ *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\)](#) ("**Target**") at para 16.

¹⁷ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#) at para 16; *Target*, *supra* at paras 14-17.

¹⁸ Sixth Report at para 46(i).

¹⁹ Sixth Report at para 46(ii).

community, including fishers, and it will create employment opportunities for the majority of the Debtors' employees, including seasonal employees and foreign temporary workers;²⁰

- (d) The Monitor does not believe that further marketing would lead to any greater recovery;²¹ and
- (e) The Applicant is supportive of the Transaction and BDC has indicated it does not oppose approval of the Transaction.²²

The Priority Claims Order Should be Granted

21. Pursuant to Section 11 of the CCAA, the Court has the jurisdiction to grant any order that is appropriate in the circumstances.²³

22. The establishment of the Priority Claims Procedure will assist the Monitor in completing the administration of these proceedings and reliably bringing a motion for distribution for the Applicant and other secured creditors without the need for conservative holdbacks or reserves. The terms of the Priority Claims Procedure are consistent with other priority claims orders that have been granted in similar circumstances.²⁴

23. The terms of the Priority Claims Procedure are fair and reasonable in the circumstances and will provide creditors with sufficient time to file a claim and a fair process for resolution.²⁵

²⁰ Sixth Report at para 46(v).

²¹ Sixth Report at para 46(vii).

²² Sixth Report at para 45.

²³ CCAA, [s 11](#).

²⁴ See, e.g., *Ignite Group (Re)*, [Priority Claims Order](#) (November 29, 2023), ONSC Court File No. CV-23-00708635-00CL, Kimmel J.

²⁵ Sixth Report at para 60.

The Sealing Order Should be Granted

24. The Confidential Supplement contains sensitive information with respect to the other bids received as well as the financial terms of the proposed Transaction.²⁶

25. The test for determining whether a sealing order should be granted is set out in *Sierra Club*²⁷ as contemplated by and *Sherman Estate*.²⁸

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

26. The Supreme Court of Canada, in *Sierra Club* and *Sherman Estate*, explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are “important public interests” for the purposes of this test.²⁹

27. The Sealing Order is appropriate and adheres to the principles of *Sherman Estate*, in that:

- (a) redactions to the Sale Agreement are limited to the commercial terms of the Transaction (price, deposit and allocation);³⁰
- (b) disclosure of such terms in advance of closing the Transaction could materially impair the Monitor’s ability to re-market the assets if the Transaction did not close;³¹
- (c) the Sealing Order is time limited;³² and

²⁶ Sixth Report at para 39.

²⁷ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at para 53.

²⁸ *Sherman Estate v. Donovan*, [2021 SCC 25](#) (“*Sherman Estate*”) at para 38.

²⁹ *Sherman Estate*, *supra* at paras 46-85.

³⁰ Sixth Report at para 44.

³¹ Sixth Report at para 40.

³² Sixth Report at para 39.

(d) the Monitor has provided the information to the key interested stakeholders, including the Applicant, BDC and the CRO.

PART V - RELIEF SOUGHT

28. For the reasons set out above, the Monitor requests the orders substantially in the forms attached to the Monitor's Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2024.

COX & PALMER



Gavin MacDonald
Simon-Pierre Godbout

Solicitors for the Moving Party, Deloitte Restructuring Inc., in its capacity as the court-appointed monitor 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.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\)](#).
2. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#).
3. *Ignite Group (Re)*, [Priority Claims Order](#) (November 29, 2023), ONSC Court File No. CV-23-00708635-00CL, Kimmel J.
4. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#).
5. *Sherman Estate v. Donovan*, [2021 SCC 25](#).

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.

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.

[...]

Factors to be considered

36 (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.