BOYNECLARKE
LAWYERS | LLP

FEB – 9 2017

DELIVERY VIA:

FILE REFERENCE:
136351

Tim Hill, Q.C.
Direct Dial: (902) 460-3442
Facsimile: (902) 463-7500
E-mail: thill@boyneclarke.ca

Halifax Regional
Municipality

99 Wyse Road, Suite 600
Dartmouth
NS Canada B3A 4S5

Correspondence:
P.O. Box 876
Dartmouth Main
NS Canada B2Y 3Z5

T 902.469.9500
F 902.463.7500
www.boyneclarke.ca

TAGLaw
A Worldwide Network
of Quality Law Firms

February 9, 2017

Honourable Justice Glen G. McDougall
Supreme Court of Nova Scotia (Halifax)
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord:

Re: **Motion of Victory Farms Inc. ("VFI") and Jonathan Mullen Mink Ranch Limited ("JMMR") for Stay Extension pursuant to section 11.02(2) of the *Companies' Creditors Arrangement Act* ("CCAA")**

A motion is to be heard by your Lordship on January 30, 2017, at 2 p.m. VFl and JMMR ("the Applicants") seek the following orders:

1. An Order approving the sales process to market for sale the business of the Applicants, and approving, authorizing and directing the Applicants to enter into an asset purchase agreement (the "Stalking Horse APA") with North American Fur Auctions Inc. ("NAFA"), or its assignee, *nunc pro tunc*;

2. An order extending the stay of proceedings granted on August 31, 2016, up to and including April 28, 2017;

3. An order increasing the amount of the DIP Facility as defined in the Charging Order granted by the Honourable Court on September 27, 2016, from $1,500,000 to $3,000,000.

Filed on this motion are:

1. The Sixth Affidavit of Jonathan Mullen[1]
2. A Report of the Monitor[2]
3. Three draft orders;
4. This brief.

An affidavit of service will be filed when the matter comes before the court.

The Facts

The Fifth Affidavit of Jonathan Mullen filed at the last hearing may be summarized as follows:

(a) with the assistance of counsel and the monitor, the Applicants had prepared a draft Plan Outline which was provided to secured creditors for discussion purposes;

(b) the Applicants had proceeded with the harvest of the 2016 crop of mink, which is ultimately expected to produce between 78,000 and 80,000 pelts.

(c) the Applicants had retained 36,000 mink as breeders.

(d) the Applicants were continuing with the process of fur grading selection, size selection and blood testing, which will result in approximately 9,000 more pelts being produced for sale.

[1] A sworn version will be filed prior to the hearing
[2] The monitor will file prior to the hearing

(e) the Applicants planned to harvest the male breeders after mating in March, which will likely leave 20,000 to 21,000 fertile females. That will conclude the annual pelting giving a total number of pelts harvested at between 78,000 and 80,000, which will go to auction in May and July, 2017.

As previously noted, counsel for the Applicants has been engaged in discussions directly or through counsel with North American Fur Auctions Limited ("NAFA"), Nova Scotia Farm Loan Board ("NSFLB"), Farm Credit Canada ("FCC") and American Legend Cooperative ("ALC"), who are the senior secured creditors of the Applicants. While it was thought that there was a reasonable prospect of a Plan of Arrangement being developed which would satisfy the senior secured creditors, it now appears that agreement cannot be reached with ALC.

The Sixth Affidavit of Jonathan Mullen filed may be summarized as follows:

(a) the Applicants have substantially completed the harvest of the 2016 crop of mink;

(b) the Applicants have continued with the process of fur grading selection, size selection and blood testing;

(c) the Applicants have made arrangements with NAFA for the sale of the harvested pelts in the May, 2017, auction;

(d) the Applicants have continued discussion with secured creditors exploring the possibilities for an acceptable Plan of Arrangement, but have been unable to reach an agreement with ALC on such a Plan;

(e) as an alternative, in order to allow the business to survive as a going concern and maximize the return to creditors, the Applicants have reached an agreement with NAFA with a view to selling all of the assets and

undertakings of the Applicants in a stalking horse bid process, wherein NAFA will fulfill the stalking horse role;

(f) the Applicants have negotiated additional DIP financing with NAFA to allow continued operations while this process is undertaken

The details of the secured creditors are set out in the Affidavit of Tim Hill, Q.C., filed on August 24, 2016. To again summarize, the secured charges affecting the property of VFI and JMMR are as follows:

(a) VFI owns one real property parcel which is mortgaged in favour of Nova Scotia Farm Loan Board ("NSFLB");

(b) JMMR owns eight real property parcels, three of which are mortgaged in favour of Farm Credit Canada ("FCC");

(c) VFI has registered against its personal property charges in favour of ALC, NSFLB, FCC, the Bank of Nova Scotia, CNH Industrial Capital Canada Ltd. and NAFA;

(d) JMMR has registered against its personal property charges in favour of ALC, FCC, and NAFA; and

(e) There is one judgment in favour of the Workers' Compensation Board registered against the personal property of VFI.

In conclusion:

(a) It does not appear that a Plan of Arrangement acceptable to the Applicants and all creditors can be reached;

(b) A stalking horse process is proposed to maximize the return to creditors and allow the business to survive. NAFA has agreed to act as the stalking horse bidder.

(c) NAFA, which is the DIP lender, has advanced the sum of $1,500,000, as provided for in the Court's order of September 27, 2016, and is prepared to advance a further $1,500,000 to finance operations as the sales process is undertaken.

Stalking Horse and Bidding Procedures Order

The purpose of the stalking horse offer is to test the market for the Applicants' assets in advance of an auction of them should there be higher bids. The intent is to maximize the value of the Applicants' assets and to avoid low bids in a going concern sale. Should a bid or bids be made in excess of that of NAFA, NAFA and those bidders with excess bids will participate in an auction to obtain the best price. Regardless of whether the NAFA stalking horse offer is the best bid, or whether an auction realizes a greater result, the actual sale will be subject to further approval of the court.

While a stalking horse offer usually contains bidding protections such as breakup fees to the stalking horse offeror, the stalking horse offer in this case contains no such fees.

The NAFA offer is subject to the Bidding Procedures appended to the Stalking Horse and Bidding Procedures Order. To summarize:

1. The base bid is the stalking horse bid of NAFA in the amount of $4,000,000 plus assumption of the payment of the monies due on the mortgages of real property made by the Applicants in favour of Nova Scotia Farm Loan Board and Farm Credit Canada.

2. Other bids must generally conform with that of NAFA, exceed the stalking horse offer price, and be for all the assets of the Applicants.

3. If there is a qualified bid in excess of NAFA, an auction will be held in which NAFA and all excess bidders participate.

4. If there are no bids in excess of that of NAFA, NAFA's offer will be brought to the court for approval. If there is an auction, the winning offer will be brought to the court for approval

5. The Applicants will bring a motion to approve the sale within five (5) business days following the auction.

It is submitted that:

> 20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM*

Master Qualified Fund Ltd. v. blutip Power Technologies Ltd., 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7[3].

The seminal case in Canada dealing with the approval of a stalking horse process is *Re Brainhunter Inc.*[4] In that case Justice Morawetz set out the factors a court should consider when approving a stalking horse sales process, and made it clear that process approval and ultimate sale approval are two different steps:

> 13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (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 a sale of the business?
>
> (d) Is there a better viable alternative?
>
> 14 The Nortel decision predates the recent amendments to

---

[3] *Re Danier Leather Inc.*, 2016 ONSC 1044

[4] 2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

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

The Applicants have made every effort to reach an accommodation with secured creditors, but as far as ALC is concerned, to no avail.

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

Sale as a going concern will likely maximize the return for secured creditors, and will certainly benefit the employees and those others who depend economically upon the business either directly or indirectly. This would certainly include feed and other suppliers and the pelting plant.

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

There will be no objection from the bulk of the secured creditors. It is difficult to see how ALC may argue against the sale given that it is designed to obtain the maximum return while ensuring the business survives.

(d) Is there a better viable alternative?

The Applicants are not aware of any viable alternative. As ALC will not agree to the terms of a Plan of Arrangement there is no alternative which would allow the business to survive.

In conclusion, it is respectfully submitted that for the reasons advanced this is an appropriate case in which to grant the order sought.

The Extension of the Stay

The applicants seek a stay extension to allow the sales process to run its course.

In our previous submissions we drew the attention of the court to the following points. We have not attached the cases cited again, as they remain in the court file.

Section 11.02(2) of the CCAA, reads:

> **11.02(2) Stays, etc. — other than initial application**
>
> A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

The prerequisites for the making of such an order are set out in section 11.02(3):

> **11.02(3) Burden of proof on application**
>
> The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The Court's attention is respectfully drawn to the following extracts from *Re San Francisco Gifts Ltd.*[5], which summarize the approach taken to the issues raised in section 11.02(3) (although it is noted that the sections are renumbered as a result of the 2009 amendments):

> ***Fundamentals***
>
> 11 The well established remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees. The Act is to be given a large and liberal interpretation.
>
> 12 The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a *CCAA* order) is preconditioned on the applicant satisfying it that:
>
> (a) circumstances exist that make such an order appropriate; and
>
> (b) the applicant has acted, and is acting, in good faith and with due diligence.

[5] 2005 ABQB 91

13 Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly insolvent; has acted in bad faith; or where the plan of arrangement is unworkable, impractical or essentially doomed to failure.

Meaning of "Good Faith"

14 The term "good faith" is not defined in the *CCAA* and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage. [Emphasis added]

15 "Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.

16 Regardless of which definition is used, honesty is at the core. ...

Supervising Court's Role

28 The court's role during the stay period has been described

> as a supervisory one, meant to: "...preserve the *status quo* and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure." That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.
>
> 29 Although the supervising judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the *CCAA* courts, preserving their public esteem, and doing equity. She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the *CCAA* process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

To summarize, the Court is vested with a great deal of discretion on a motion such as this. Throughout its inquiry the Court will bear in mind the "well established remedial purpose of the CCAA", which is "to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business".

In reaching a decision on the motion the Court is informed by its appreciation of the honesty of the intentions of the debtor, the effect of an extension on the stakeholders in the business (which may include equity owners, employees and creditors, amongst others), and the integrity of the CCAA process.

In the case at bar, there is no suggestion that the applicants lack integrity in their operations or approach to the CCAA process, or that the process is doomed to failure. There was a patently honest attempt to save the business by reaching a realistic compromise with the creditors. That failed. The Applicants now wish to run a sales process that will both maximize the return for creditors and allow the business to survive as a going concern, both laudable objective.

This extension will allow the sales process to proceed, and will "preserve the status quo" until the process culminates.

The DIP Order

The additional charging order sought in the case at bar incorporates the wording of the original Charging Order with the following changes:

1. The amount is increased from $1,500,000 to $3,000,000;
2. The security is clarified to cover cash from the DIP advances and accounts receivable from the sale of mink.

There are no other changes.

With respect to section 11.2 of the *CCAA* the court's attention is drawn to *Canwest Publishing Inc./Publications Canwest Inc.*[6], wherein Justice Pepall commented as follows:

> 42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re*, I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may

[6] 2010 ONSC 222

be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of

the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

Section 11.2 reads:

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.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

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

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

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

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

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

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

The Applicants seek to continue to have part of their property made subject to a charge in favour of NAFA, which has agreed to lend to the Applicants an amount required by the Applicants, having regard to their cash-flow statement (section 11.2(1)). All the secured creditors were served with notice of this motion, so that the Applicants' intent is amply clear.

In any event, with respect to section 11.2(2) the Applicants seek to have the charge "prime" only those creditors with security over the mink and the proceeds of the sale of the pelts, and over the Applicants' bank accounts to the extent the same contains a DIP advance. The charge does not secure any amounts owing to NAFA prior to the filing.

With respect to section 11.2(4) and the factors the court should consider as discussed by Pepall, J., it is respectfully submitted that:

(a) The Applicants will likely require up until late April to complete the sales process;

(b) the company's business and financial affairs will continue to be managed during the proceedings by Mr. Mullen, with the active guidance of the Monitor;

(c) at this time the Applicants' management appears to have the confidence of its major creditors, perhaps with the exception of ALC. One of those, NAFA, is offering an additional DIP loan;

(d) the loan will enable a sale to be made so as to allow the business to survive;

(e) there is no real change in the nature and value of the Applicants' property sought to be charged is crucial.

(f) No creditor will be materially prejudiced as a result of the charge being sought, as the value as the value of the business at this time likely minimal in any event".

The Monitor has in its report endorsed the need for an additional DIP loan, and approves of this loan in particular. The cost remains as in the original DIP loan.

In conclusion, the Applicants submit that this is an appropriate case in which the court may exercise its discretion to grant the DIP order sought in that same is necessary to allow continued operations while the sales process is carried out.

All of which is respectfully submitted

BOYNECLARKE LLP

Tim Hill, Q.C.