Justice John A. Keith

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The Law Courts
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VIA E-MAIL

cc. The Service List

Dear Counsel:

RE: HFX 539955 - Annapolis Management Inc.
Motion by Correspondence for Stay Extension

I have reviewed the file materials and the letters sent by counsel for the Proposal Trustee and the Primary Lenders (via Mr. O'Keefe on behalf of himself and co-counsel Mr. Dunning).

Section 50.4(9) of the BIA states:

> **Extension of time for filing proposal**
>
> (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.

There is no dispute that the requested extension does not exceed 45 days and would not, if combined with the earlier extensions, terminate more than 5 months after expiry of the 30-day period referred to in s. 50.5(8).

There is also no dispute that the insolvent person (Annapolis Management) has satisfied the statutory preconditions for an extension set out in ss. 50.4(9)(a) and (c).
The only potential controversy relates to whether the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted.

On this issue, Mr. O'Keefe's letter says that, based on discussions with the Primary Lenders, several offers were "considered unacceptable and will likely be rejected."

No further details were provided regarding which specific offers were considered unacceptable; although Mr. O'Keefe equally acknowledges that the Primary Lenders are continuing to review the offers received; are reviewing their options; and require additional time to formalize their position.

Mr. O'Keefe concludes by cautioning that "at this junction, it does not appear likely to us that the Debtor will be able to present a viable proposal."

I am uncertain as to whether the reference to "us" refers to co-counsel (i.e. their impressions based on discussions with the Primary Lenders) or is an attribution to the Primary Lenders directly.

In my view, the materials filed are sufficient to satisfy s. 50.4(9)(b). In particular, Annapolis Management would likely be able to make a viable proposal if the requested extension is granted.

In *Convergix Inc., Re*, 2006 NBQB 288, Justice Glennie wrote at para. 40:

> The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S. S.C.).

In this case, it has been made clear from the start that the insolvent person seeks to sell its assets to repay its debts. To that end, a SISP process was approved and has yielded multiple offers for Annapolis Management's main assets. While certain unidentified offers have been described as "unacceptable", there is nothing before me to suggest that the offers generally are so low or as to preclude presenting a reasonable offer to a reasonable creditor.

Further, the word "likely" in s. 50.4(9)(c) requires proof on the balance of probabilities that the debtor will not be likely to make a viable proposal that will be accepted by creditors, but it does not require proof beyond a reasonable doubt: *Magasin Coop Dégelis, Re* (1993), 24 C.B.R. (3d) 49, 1993 CarswellQue 42 (Que. S.C.).

In this case, I have no evidence or proof. I have only (at best) preliminary impressions from the Primary Lenders regarding certain offers received, together with a more general consensus that all parties require additional time to more formally and properly assess and then articulate their positions.

Overall, it is clear that additional time is required to fully review the offers received; develop the specific content of the proposal to be presented; and ultimately, for the parties to consider and articulate their positions. In the interim, as indicated, there is no identifiable material prejudice.

The extension is granted.

Sincerely,

Justice John A. Keith
JAK/ams