

October 2, 2020

HAND DELIVERED

The Honourable Justice Presiding in Chambers
Supreme Court of Nova Scotia
The Law Courts Building
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord/My Lady:

Re: In the matter of the Receivership of Civic Homes Limited – HFX 494188

We represent Deloitte Restructuring Inc (the “**Receiver**”), the Court appointed receiver (the “**Receiver**”) of the assets of Civic Homes Limited (the “**Respondent**”), in respect of the motion to be heard in regular chambers on October 13, 2020 pursuant to the *Bankruptcy and Insolvency Act* (“**BIA**”) sections 243 and 247.

SERVICE AND NOTICE

The relief sought in this motion is pursuant to the *Bankruptcy and Insolvency Act* (“**BIA**”) and therefore the Bankruptcy and Insolvency General Rules supersede our *Nova Scotia Civil Procedure Rules* in the event of any inconsistency. BIA Rule 3 states:

- 3** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Because this is a matter where BIA act does not specify a minimum notice requirement, the BIA Rule 6 applies. Rule 6 states:

- 6** (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must

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be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

In terms of measuring the four days provided for under BIA Rule 6, the period of time is governed by BIA Rule 4, which stipulates clear business days:

- 4 If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

In accordance with Rule 6(1), it is the intention of the Receiver to serve the motion materials in the time prescribed. Proof by affidavit of service will be filed prior to or at the hearing of this Motion.

This motion includes a request for an abridgement pursuant to Rule 6(4), if necessary, for the matter to be heard on the scheduled date.

Matter No. 1: Motion for Sale Approval and Vesting

The Receiver was authorized to market and carry out the sale process in respect of the assets of the Respondent by the Order for Approval of Sales Process issued on July 7, 2020 (the "Sales Process Order").

With respect to the sale of property, the applicable test was considered by the Court in *Royal Bank of Canada v 2M Farms Ltd.*, 2017 NSSC 105 where Justice Moir noted that section 247 of the BIA should now be considered the governing test for such a matter (see paras 7-8).

Section 247 of the BIA provides as follows:

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

The above noted statutory test requires that the receiver deal with receivership property in a commercially reasonable manner (see *2M Farms* at paras 7-8).

As prescribed by the Sales Process Order, the Receiver engaged in a tender process and called for offers. Offers were received and reviewed by the Receiver. Following review, one of those offers was recommended by the Receiver and is acceptable to the appointing creditor, Royal Bank of Canada. The Receiver submits that the offer was made in accordance with the approved sales process and that the price is reasonable. The totality of the offer proposed by the successful potential buyer exceeds the appraised fair market value. The contemplated sale is on an “as is, where is” basis and without conditions so there is minimal risk to stakeholders. Based on the evidence and its actions, the Receiver submits that they have dealt with the property in accordance with the Court’s direction and in a commercially reasonable manner and therefore the proposed sale should be approved.

With respect to the proposed sale approval order, the Receiver requests an approval and vesting order. The authority of this Court to grant such orders was considered by Justice Rosinski in *Royal Bank of Canada v. Eastern Infrastructure Inc. and Allcrete Restoration Limited* 2019 NSSC 297. He concluded that this Court did have the necessary authority pursuant to BIA section 243(1)(c). The proposed form of order has been prepared in accordance with vesting orders issued since that decision.

Matter No. 2: Bankruptcy

The power to make an assignment in bankruptcy is not a standard power granted to receivers in this Court’s model order and it was not a power granted by the Court in its order appointing this Receiver. Nevertheless, the Court has broad jurisdiction to instruct the Receiver to take further actions, including filing an assignment in bankruptcy. Section 243 of the BIA provides:

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

As noted, subsection (c) provides that the Court may order the Receiver to take any other action the Court considers advisable.

The Receiver submits that an assignment in bankruptcy of the Respondent is both advisable and appropriate in these circumstances. The Respondent is insolvent, which was a required factual finding for the Court to appoint the Receiver. The Receiver has consented to act as trustee in bankruptcy. The Receiver is of the opinion that a bankruptcy of the Respondent will result in more efficient estate administration. There is no evidence of any improper motive for this bankruptcy.

The proposed form of Order authorizes the Receiver to make the assignment.

Matter No. 3: Order for Confidentiality

In accordance with the *Nova Scotia Civil Procedure Rules*, Rule 85.04(4) and (5) the Receiver has filed a motion by correspondence to the prothonotary seeking an Interim Order for Confidentiality until the conclusion of this Motion. The Receiver is seeking an Order for Confidentiality pursuant to Rule 85.04(1) and (2) which state:

85.04(1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with the law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open court principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

(a) sealing a court document or an exhibit in a proceeding;...

In *Canadian Financial Wellness Group v. Resolve Business Outsourcing* 2014 NSCA 98 the court summarized the approach to be taken when assessing a Motion under Rule 85.04:

24 The judge's discretion under Rule 85.04(1) is to be exercised in accordance with the open courts principle that was discussed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) and *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.) and was summarized in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.). See also *Coltsfoot*, paras 22-24, 27.

25 In *Sierra Club*, Justice Iacobucci for the Court formulated the *Dagenais/Mentuck* test in the context of *Federal Court Rule 151*, that stated:

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

Federal Court Rule 151 does not differ materially from Nova Scotia's Rule 85.04(1).

...

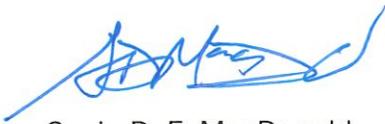
26 To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

The Receiver submits that the Order for Confidentiality is necessary in order to protect the realizable value of the assets. The Order for Confidentiality allows for the maintenance of confidentiality in respect of the appraised value of the assets and offers received. In the unlikely event that the proposed sale fails, a new process could be undertaken without prejudice from the financial results of this summer's tender.

The Order for Confidentiality requested would only be in place for a period of six months, so as to allow sufficient time for the sale of the assets to be completed, as contemplated by the Sale and Vesting Order. The Receiver submits that the short duration of the Order for Confidentiality sought decreases any deleterious effects to the public interest.

As a court appointed receiver, the Receiver is undertaking its actions as officer and agent of the Court rather than any creditor or group of creditors. The proposed order maintains the integrity of the Court process for realization. We submit it is the least intrusive means to do so.

All of which is respectfully submitted,



Gavin D. F. MacDonald

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Enclosures

Cc: Service List