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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: Application by Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited (the "Applicants") for relief under the *Companies' Creditors Arrangement Act* ("CCAA") - Hfx No. 454744

A motion is to be heard by your Lordship on September 16, 2016, at 2 p.m. The Applicants seek an order providing for interim ("DIP") financing pursuant to section 11.2 of the CCAA. Please accept this as the pre-hearing brief of the Applicants.

Filed on this motion are:

1. The Affidavit of Jonathan Mullen sworn September 9, 2016¹;
2. The First Report of the Monitor;
3. A draft Order;
4. This Brief.

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

FACTS

The background facts are described in the First Affidavit of Jonathan Mullen², and details of the secured creditors in the Affidavit of Tim Hill, Q.C.³.

An Initial Order in the CCAA proceedings was granted by Justice Arnold on August 31, 2016. That order had no provision for priority secured charges, other than an administrative charge in the amount of \$150,000.⁴

The secured charges affecting the property of Victory Farms Incorporated ("VFI") and Jonathan Mullen Mink Ranch Limited ("JMMR") are as follows:

¹ Hereafter "the Mullen DIP Affidavit"

² filed on August 24, 2016

³ filed on August 24, 2016

⁴ At para 23



- (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 American Legend Cooperative ("ALC"), NSFLB, FCC, the Bank of Nova Scotia, CNH Industrial Capital Canada Ltd. and North American Fur Auctions Limited ("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.

The Mullen DIP Affidavit contains as Exhibit "A" a term sheet from the prospective DIP lender, NAFA. NAFA proposes to lend the sum of \$1,500,000 to the Applicants to allow the Applicants to continue operations pending the development of a plan of arrangement.

The amount to be lent to the Applicants is sufficient to meet the shortfall in the Applicants' filed cash flow statement (a copy of which is attached to the Mullen DIP Affidavit as Exhibit "B"). The prospective loan has the approval and support of Deloitte Restructuring Inc., the court appointed Monitor. It is anticipated that the remaining secured creditors will acquiesce to the loan and the charge being sought.

The order sought reflects the charge sought in the NAFA term sheet, that is an interest ranking first "over the livestock (mink) of the Applicants, including breeding stock, the pelts derived therefrom, and the proceeds thereof", but subject to the aforementioned administrative charge which was provided for in the Initial Order.

ARGUMENT

The charging order sought in the case at bar follows the wording of the Model CCAA Charging Order with the following changes:

1. As there are joint applicants in this proceeding the plural is used where required;
2. The following paragraphs in the Model CCAA Charging Order have been omitted as not being required on this motion:



- 3: Restructuring
- 4 - 6: Directors' and Officers' Indemnification and Charge
- 7: Administrative Charge
- 14 - 18: Critical Suppliers Charge

3. Beginning at paragraph 3 of the order being sought the details of the DIP loan have been inserted, including the amount and nature of the charge;
4. At paragraph 9 of the order being sought the priorities of the extant security are prescribed.

With respect to section 11.2 of the CCAA the court's attention is drawn to *Canwest Publishing Inc./Publications Canwest Inc.*⁵, 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 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

⁵ 2010 ONSC 222



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 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. 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) Presently it appears that the Applicants will likely require up until late November (the end of the 13 week period found in the cash flow statement) to develop and submit a plan of reorganization;

(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. One of those, NAFA, is offering the DIP loan;
- (d) the loan will enhance the prospects of a viable compromise or arrangement being made in that it allows the Applicants to continue to grow the mink to maturity so as to be able to sell the pelts;
- (e) the nature and value of the Applicants' property sought to be charged is crucial. Unless and until grown to maturity, the mink have little value. The value will increase as the DIP loan is drawn down and the mink grow;
- (f) No creditor will be materially prejudiced as a result of the charge being sought, as the value of the immature mink is minimal, in short "there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing"⁶.

The Monitor has in its report endorsed the need for a DIP loan, and approves of this loan in particular. The court will be aware of the issues surrounding the mink farming industry at the present, and the DIP loan for which approval is being sought conforms in terms of cost to others recently approved by the court.

Summary

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:

- (a) The major creditors do not oppose the order and will not be materially prejudiced;
- (b) without the DIP loan the business will cease to operate; and
- (c) the loan will enhance the prospects of a viable compromise or arrangement.

All of which is respectfully submitted.

BOYNECLARKE LLP

Tim Hill, Q.C.
TH/vbb

⁶ Ibid, at para 45