

COURT FILE NUMBER 643 of 2016
COURT QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE SASKATOON
APPLICANTS 101133330 SASKATCHEWAN LTD. and
101149825 SASKATCHEWAN LTD.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
RSC 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF 101133330 SASKATCHEWAN LTD. and 101149825 SASKATCHEWAN LTD.

**BRIEF OF LAW ON BEHALF OF THE APPLICANTS,
101133330 SASKATCHEWAN LTD. and 101149825 SASKATCHEWAN LTD.**

**RE: FIFTH EXTENSION OF STAY OF PROCEEDINGS
AND DIP FACILITY #5**

I. INTRODUCTION

1. On May 20, 2016, the Honourable Justice N.G. Gabrielson granted 101149825 Saskatchewan Ltd. (“**825**”) and 101133330 Saskatchewan Ltd. (“**33330**”) (825 and 33330 hereinafter collectively referred to as the “**Applicants**”) an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”) which, among other things, provided for a stay of proceedings (the “**Stay of Proceedings**”) in favour of the Applicants and an opportunity for the Applicants to prepare and present a plan or plans of compromise or arrangement (a “**Plan**”) to their creditors and this Honourable Court.¹

2. The Stay of Proceedings granted by the Initial Order expired at 11:59 p.m. (local Saskatchewan time) on Sunday, June 19, 2016, since which time extensions have been

¹ Except where otherwise defined, capitalized terms appearing in this brief will have the meanings given to them in the collective affidavits filed and orders made thus far in these proceedings.

granted, the most recent of which being on May 31, 2017 (the “**Fourth Extension Order**”).

3. Since the Fourth Extension Order, the advancement of the work necessary for the City’s final consideration of the Amended Willows Concept Plan has been under the direction and control of the lead developer, Dream; consequently, the Applicants’ efforts have continued to focus on the Campus and Orr Centre. More time is needed, however, and the Applicants are therefore seeking a further stay of proceedings until June 17, 2018 (the “**Fifth Extension**”).

II. ISSUES

4. The Applicants submit that followings issues arise on this application:

A. Should this Honourable Court extend the Stay of Proceedings?

(i) Is it appropriate in the circumstances to extend the Stay of Proceedings?

(ii) Have the Applicants acted in good faith and with due diligence?

(iii) If granted, how long should the Stay of Proceedings be extended?

B. Should the Applicants be entitled to further Debtor-in-Possession Financing?

III. DISCUSSION

A. Extending the Stay of Proceedings

5. Subsection 11.02(2) of the CCAA provides that a court may extend the stay of proceedings under an Initial Order for such period of time as is deemed appropriate. The onus placed upon the debtor in making such an application is established by subsection 11.02(3):

11.02(3) 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.

6. The considerations which make a further extension of the stay of proceedings are discussed below.

(i) **The Extension is Appropriate in the Circumstances:**

7. In determining whether an extension of the Stay is “appropriate” the Court considers, among other things:

- (a) whether the extension sought furthers the underlying purposes of the CCAA, which are to “avoid the social and economic losses resulting from liquidation of an insolvent company” (*Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 70, [2010] 3 SCR 379 [TAB 1]) by facilitating a plan of arrangement or compromise between the debtors and creditors;
- (b) the debtor’s progress during the previous stay period toward a restructuring;
- (c) whether creditors will be prejudiced if the court grants the extension; and
- (d) the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension (*Federal Gypsum Co., Re*, 2007 NSSC 347 at paras 24-29, 40 CBR (5th) 80 (NS SC) [TAB 2]).

8. With respect to the underlying purposes of the CCAA, the professional advice received by the Applicants is that neither the 825 Land nor the Campus are saleable as is; consequently, liquidating these assets at present would result in the very social and economic loss to all stakeholders contemplated by the *Century Services* case. Conversely, the Applicants’ high level efforts with respect to both the 825 Land and Campus are aimed at achieving (to the extent possible) the municipal approvals aimed at achieving the highest and best use of these assets for the benefit of all stakeholders. The

CCAA's underlying purposes are therefore better served by granting the extension sought and allowing these processes to come to a conclusion.

9. In terms of progress:

- (a) for the Amended Willows Concept Plan, the sanitary study has been completed, the results are positive, and the City has agreed to consider the same for the purposes of permissible densities of development, such that the matter remains on track to come before City council in the first or second quarter of 2018, as previously projected;
- (b) the Campus' rezoning application was submitted on schedule, the public consultation process is largely complete, and the Orr Centre Owner's Consultant and 33330 is ready to address any matters that come up between now and the anticipated City of Regina council meeting in February or March of 2018; and
- (c) with the aid of its party property manager, Colliers, and the Orr Centre Owner's Consultant, 33330 has made significant progress in remediating and improving the Orr Centre facilities, and will continue to do so in the interim.

10. Again, these efforts are all aimed at improving the value of the assets in question for the benefit of all stakeholders (including the unsecured creditors) and have proceeded with the direct input and agreement of the secured creditors most directly affected. Affinity is especially supportive of the rezoning application for the Campus given the magnitude of its debt, while Firm Capital has agreed to extend the forbearance period in order to parallel that of an extension of the stay of proceedings conditional upon one being granted. The Applicants are thus unaware of any prejudice to the creditors that will occur to the creditors in the event the relief sought is granted, and further submits that any such prejudice would be outweighed by the potential benefits to all stakeholders in any event.

(ii) The Applicants are acting in good faith and with due diligence

11. Although "good faith" and "due diligence" are not defined terms in the CCAA, there is judicial authority suggesting that "good faith" involves honesty, an absence of intent to defraud, and observance of reasonable commercial standards of fair dealings

towards all stakeholders involved in the CCAA process (*San Francisco Gifts Ltd., Re*, 2005 ABQB 91 at paras 14-17, 42 Alta LR (4th) 337 [TAB 3]).

12. Other factors that the Courts have considered when evaluating “good faith” and “due diligence” includes the number of parties involved, the reasonableness of any delays, and the debtors willingness to comply with or consider the Monitor’s recommendations (*Skeena Cellulose Inc., Re*, 2001 BCSC 1423 at paras 14-16, 29 CBR (4th) 157 [TAB 4]).

13. There have been no allegations the Applicants have not been operating in good faith and with due diligence in the CCAA proceedings, and the affidavit material filed in these proceedings by Messrs. Orr and Calyniuk detail the significant efforts expended in order to move the parallel processes for improving the Saskatoon and Regina assets for the benefit of the stakeholders. There is no intention to defraud, and any delays experienced thus far are on account of factors outside of the Applicants’ control (e.g., the inherent slow-moving nature of the land development process). Finally, the Monitor has opined in its Seventh Report that the Applicants have acted and are continuing to act in good faith and with due diligence.

iii. How long should the Stay of Proceedings be extended?

14. The Applicants have requested that the Stay of Proceedings be extended until 11:59 p.m. on June 17, 2018 to allow the Amended Willows Concept Plan and Campus rezoning applications to be brought before the respective municipal authorities for consideration.

15. On the recommendation of the Orr Centre Owner’s Consultant, 33330 intends to demolish the Dorms to further its efforts to improve the Campus thereby maximizing the value of the property to any prospective purchaser and minimizing any risks associated with the property that may otherwise depress the value of the same.

16. The six month extension requested will allow these matters proceeds, as well as

give the Applicants the ability to turn their minds to the formulation of a plan of arrangement and compromise. The Applicants plan to collaborate with other stakeholders in working towards a plan of arrangement early in the New Year in the event that the requisite relief is granted.

B. Need for Further DIP Financing

17. The relevant provisions of the CCAA that relate to DIP Financing are reproduced below:

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.

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

(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.

(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.

18. The New Brunswick Court of Queen's Bench succinctly summarize the judicial application of section 11.2 of the CCAA in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 6, [2005] NBJ No 570 [Tab 5]:

[16] In order for DIP financing with super-priority status to be authorized pursuant to the CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors whose security is being eroded. See *United Used Auto & Truck Parts Ltd. (Re)* 1999 CanLII 5374 (BC SC), [1999] B.C.J. No. 2754 (S.C.) affirmed 2000 BCCA 146 (CanLII), [2000] B.C.J. No. 409 [C.A.]

[17] DIP financing ought to be restricted to what is reasonably necessary to meet the debtors urgent needs while a plan of arrangement or compromise is being developed.

...

[19] A Court should not authorize DIP financing pursuant to the CCAA unless there is a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself. In this case the Monitor has advised the Court that there is a reasonable prospect that Simpson's Island and Tidal Run will be able to make such arrangements with their creditors.

19. DIP Financing has been utilized in CCAA proceedings involving complex real property assets that require additional construction and development (*League Assets Corp., Re*, 2013 BCSC 2043 at paras 42-45, 234 ACWS (3d) 837 [Tab 6]).

20. The Applicants require the approval of the New DIP Facility in the amount of \$3.8 million to:

- (a) pay out the pre-existing indebtedness to the DIP Lender;
- (b) fund the projected cash-flow deficiency during the Applicants' next phase of the restructuring initiative, which includes paying the essential professionals, consultants, and contractors and arranging for the demolition of the Dorms;

21. The Applicants respectfully submit that this Honourable Court ought to grant the New DIP Facility for the following reasons:

- (a) notice of this application has been provided to all people on the service list;
- (b) Affinity, the largest secured creditor, has supported the development strategies for both 825 and 33330, as well as the amount of the associated New DIP Facility that is required to bring the respective with strategies to fruition;
- (c) liquidating the assets in their current condition would be highly inefficient from both a cost and value perspective in light of the pending developments, rezoning applications, and construction activities that are scheduled to take place in the coming months, which will very significantly increase the pool of funds available to fund a plan of arrangement;
- (d) there is no reason to believe that any creditor will be materially prejudiced by the New DIP Facility as the value of the assets will only increase with the passage of time given the strategies that have been implemented and will continue to be implemented in the future.

V. CONCLUSION AND RELIEF REQUESTED

For all the reasons set forth above, the Applicants respectfully request that this Honourable Court grant an Order in the form of the draft Order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of December, 2017.

McDOUGALL GAULEY LLP

Per: 

Solicitors for the applicants,
101133330 Saskatchewan Ltd., and
101149825 Saskatchewan Ltd.

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TABLE OF AUTHORITIES

LEGISLATION

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

JURISPRUDENCE

1. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379
2. *Federal Gypsum Co., Re*, 2007 NSSC 347, 40 C.B.R. (5th) 80 (NSSC)
3. *San Francisco Gifts Ltd., Re*, 2005 ABQB 91, 42 Alta LR (4th) 337
4. *Skeena Cellulose Inc., Re*, 2001 BCSC 1423, 29 CBR (4th) 157
5. *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 6, [2005] NBJ No 570
6. *League Assets Corp., Re*, 2013 BCSC 2043, 234 ACWS (3d) 837