



April 15, 2021

By Hand Delivery

67840-MD

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

Dear Presiding Justice:

**Re: CIBC v. 3304051 Nova Scotia Limited – Hfx No. 503367
Receiver’s Motion for Sales Approval and Vesting Orders and
Confidentiality Order - April 27, 2021 at 9:30 a.m.**

We represent the moving party, Deloitte Restructuring Inc. (“Deloitte”), in its capacity as Court-appointed receiver of all of the assets, undertakings and properties of 3304051 Nova Scotia Limited (the “Company”).

This is Deloitte’s brief in support of its motion for an order:

- a) abridging the time for service;
- b) approving sales of the Company’s assets to MacAdam Construction Inc. (“MacAdam”) and Nova Scotia Power Inc. (“NSPI”); and
- c) maintaining the confidentiality of the Confidential Supplement to the Second Report which contains confidential bidding and financing information.

Filed in support of this motion is the following:

- a) Deloitte’s Second Report dated April 15, 2021 including a Confidential Supplement dated April 15, 2021 (collectively the “Second Report”); and
- b) affidavit of Marc Dunning sworn on April 15, 2021.

I. Facts

The Company operated Hefler Forest Products at 230 Lucasville Road, Middle Sackville, Nova Scotia. Operations included a sawmill and biomass electric co-generation facility, including a Power Purchase Agreement (“PPA”) with NSPI and related agreements and approvals.

CIBC holds first charge security over all of the Company’s real and personal property with the exception of one vehicle secured by a third party, VFS Canada Inc. (“VFS”).

On August 4, 2020, Deloitte was engaged by CIBC to perform an independent business review of the Company’s operations, following which it undertook a sale process together with the Company and CIBC to identify a buyer for the Company’s assets.

The sale process identified an offer that was acceptable to the Company and CIBC but the deal fell through in early January 2021, following which all of the Company’s officers and directors resigned.

On January 22, 2021, this Court granted CIBC’s emergency motion to appoint Deloitte as Interlocutory Receiver on the basis that the Company’s assets were left unsupervised.

On February 11, 2021, this Court granted a Bankruptcy Order, a final Receivership Order and an Order Approving Sales Process approving a sale and investment solicitation process to sell the Company’s assets. The sale process involved the following:

- a) preparing marketing materials and advertising in local media;
- b) preparing a tender package and non-disclosure agreement;
- c) providing the tender package to interested persons upon execution of the non-disclosure agreement; and
- d) evaluating bids and making a recommendation on the most favourable bid.

On March 5, 2021, bids closed.

Deloitte analyzed the bids, conducted further negotiations and entered into the following agreements to sell the Company’s assets:

- agreement with MacAdam to sell the Company’s real property and certain personal property; and
- agreement with NSPI to sell the PPA.

Collectively, these offers deal with all of the Company’s assets except the vehicle secured by VFS and other leased equipment.

As set out in the Confidential Supplement to the Second Report, Deloitte's opinion is that the proposed sales to MacAdam and NSPI represent the best opportunities for selling the Company's assets for the highest value with the least risk for the following reasons:

1. the McAdam/NSPI offers are not subject to conditions whereas the higher offer was conditional on financing and obtaining approval from the Minister of Energy and Mines and NSPI to transfer the PPA and related agreements and approvals and Deloitte had concerns that the highest bidder may not be able to meet those conditions including:
 - a. its failure to close a deal in 2020 in relation to a lumber mill in New Brunswick that filed for protection under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36, after seeking and obtaining multiple extensions;
 - b. its failure to provide satisfactory documentation about the magnitude of its financing or substantiate that it has the ability to obtain financing; and
 - c. its failure to comply with the bidding documents by only including a 10% bid deposit with its offer rather than the required 20% and refusing to increase its deposit when asked.
2. MacAdam and NSPI each submitted compliant bids with their initial offers with the required 20% deposit;
3. the bidding process established a market value for the Company's assets that is within the range of the NSPI/MacAdam offers as the second highest bids collectively and establishes and that the highest bid appears to be an outlier;
4. MacAdam/NSPI are prepared to close within ten (10) days of Court approval compared to Deloitte's estimate of at least 2-3 months for the highest bidder, if it was able to close at all, during which time Deloitte estimates that it will incur approximately \$180,000 to \$270,000 in holding costs plus additional professional fees;
5. the only secured creditor who will receive a distribution from the proceeds of sale, even if the sale to the highest bidder closed, is CIBC and CIBC does not oppose Deloitte's motion to approve the sale to NSPI/MacAdam;
6. although the guarantors of the Company would be better off if a sale to the highest bidder closed within a reasonable time, Deloitte is of the view that the NSPI/MacAdam offers provide the best value with the least risk and most certainty of closing; and

7. CIBC and the guarantors would be in a considerably worse position if this Court approved a sale to the highest bidder and that sale did not close, forcing Deloitte to either re-negotiate with previous bidders or re-start a new sale process, which would most likely result in offers of significantly less value and further holding costs and professional fees being incurred.

II. Law and Application of Law to Facts

A. Sales Approval and Vesting Orders

The applicable test for a receiver's sale of property was considered by this Court in *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105, at paras. 7-8, where Justice Moir held that section 247 of the *Bankruptcy and Insolvency Act* ("BIA") should be considered as the governing test for such a matter. [Book of Authorities, Tab 2]

Section 247 of the BIA states:

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 key issue is whether the receiver has acted in a commercially reasonable manner.

In L.W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Carswell: Westlaw, 2021), at L§20, the authors refer to *Royal Bank v. Soundair Corp.* (1991) 46 O.A.C. 321 (Ont. C.A.) and other leading cases and comment on the duties of the court in reviewing a proposed sale of assets by a receiver as follows:

The duties of the court in reviewing a proposed sale of assets by a receiver that is opposed by other interested parties are as follows:

- (i) it should consider whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (ii) it should consider the interests of all parties;
- (iii) it should consider the efficacy and integrity of the process by which offers have been obtained; and
- (iv) it should consider whether there has been unfairness in the working out of the process: *Royal Bank v. Soundair Corp.* (1991) [other citations omitted]

...

The Ontario Superior Court of Justice, on a motion by a court-appointed receiver to approve a sale of assets, held that it will show considerable deference to the receiver and will be disinclined to second-guess the various decisions of the receiver in connection with the sales process and the adequacy of the receiver's efforts; ...

...

The court should not lightly withhold the approval of a sale by a court-appointed receiver. If the receiver acted fairly and reasonably and has made sufficient efforts to obtain the best price, the court will not interfere unless there has been some unfairness or the sale is improvident: [citations omitted]

In deciding whether to accept an offer recommended by a receiver, the court should consider the interests of all parties: [citations omitted]

...

The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer, may decide to recommend to the court the acceptance of an unconditional offer rather than a higher offer that contains conditions. If there are conditions in the offer, the receiver must analyze them to determine whether they are within the receiver's control or if they appear, in the circumstances, to be minor and very likely to be fulfilled. The alternatives should be gridded with a view to maximizing the return and minimizing the risk: [citations omitted]

[Book of Authorities, Tabs 4, 6]

The authors' comments on accepting an unconditional offer over a conditional offer are particularly relevant to this motion. In *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641 (Ont. Sup. Ct. J.), aff'd (2000) 130 O.A.C. 273 (Ont. C.A.), Farley J. held as follows:

[5] In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that far) may accept an unconditional offer rather than risk delay or jeopardize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See *Crown Trust Co. v. Rosenberg* at p. 107 where Anderson J. stated:

The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it.

See also *Royal Bank v. Soundair* at p. 8. Obviously if there are conditions in offers, they must be analyzed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

[our emphasis]
[Book of Authorities, Tab 5]

Deloitte submits that the proposed sales to MacAdam/NSPI are commercially reasonable for the reasons set out in its Confidential Supplement to the Second Report, namely, they represent the highest, complaint bids with no conditions, provide offers consistent with fair market value, offer a quick closing without the need to incur additional holding costs and professional fees, and perhaps most important, offer the least risk and highest likelihood of closing. For these reasons, it is our submission that the sales should be approved.

The draft sales approval and vesting orders follow the standard form this Court has approved since its decision in *Royal Bank of Canada v. Eastern Infrastructure Inc. and Allcrete Restoration Limited*, 2019 NSSC 297, where the authority of this Court to grant such orders was confirmed [Book of Authorities, Tab 3]. We have removed the usual reference to s. 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, as it is not necessary to disclose or transfer any human resources or payroll information.

B. Confidentiality Order

Deloitte seeks a confidentiality order for the Confidential Supplement to its Second Report. The Supplement contains confidential bidding and financial information which, if disclosed to the public, risks negatively impacting on the realizable value of the Company's assets in the unlikely event that the proposed sales to MacAdam/NSPI do not close.

The relevant *Nova Scotia Civil Procedure Rule* is Rule 85.04, which states:

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 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 courts 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;

(b) requiring the prothonotary to block access to a recording of all or part of a proceeding;

(c) banning publication of part or all of a proceeding;

(d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

(3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the *Judicature Act*, may make an order for confidentiality to aid the purpose of the exclusion.

(4) A party who moves for a confidentiality order may make a motion by correspondence to the prothonotary, or the chambers judge, for an interim order for confidentiality.

(5) A prothonotary, or chambers judge, to whom a motion for an interim order for confidentiality is made may restrict access to the record of the motion, and to any other record sought to be made the subject of the confidentiality order, for such time as is required to give notice of the motion and bring the motion to a hearing.

Pursuant to Rules 85.04(4) and (5), Deloitte filed a motion by correspondence to the Prothonotary at the same time it filed the documents for this motion seeking an interim order for confidentiality until the conclusion of the motion.

Notice of the motion will be provided to media through the Court's online form and proof of same will be filed with the Court before the hearing of the motion.

The proper approach to a motion under Rule 85.04 is set out by our Court of Appeal in *Canadian Financial Wellness Group v. Resolve Business Outsourcing*, 2014 NSCA 98:

[24] The judge's discretion under Rule 85.04(1) is to be exercised in accordance with the open courts principle ...

...

[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.

[Book of Authorities, Tab 1]

Deloitte submits that an order for confidentiality is necessary to protect the realizable value of the assets. If bidding information is not kept confidential and in the unlikely event that the proposed sales to MacAdam/NSPI do not close that information will be available to future bidders and the integrity of the bidding process will be affected and likely result in much lower offers.

Deloitte proposes that the order for confidentiality be in place for a period of six (6) months. Although Deloitte intends to close the sales to MacAdam/NSPI immediately, this timeframe will allow for any unforeseen circumstances that may delay closing. The time-limited nature of the order will decrease any deleterious effects to the public interest.

The proposed order maintains the integrity of the Court process for realization and we submit it is the least intrusive means to do so.

III. Conclusion

We respectfully request that the Court grant Deloitte's motion to abridge the time for service, approve the sales to NSPI/MacAdam and grant the confidentiality order.

All of which is respectfully submitted.

Yours truly,

WICKWIRE HOLM



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MD/
Encl.

cc : client
The Service List