Court File Number:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

B E T W E E N

TEMISKAMING DEVELOPMENT FUND CORPORATION

Applicant

-and-

1793082 ONTARIO LTD. o/a K.D. Quality Pellets

Respondent

FACTUM OF THE APPLICANT

January 9, 2019

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I. NATURE OF THE APPLICATION

1. This is an application by Temiskaming Development Fund Corporation ("Temfund") for an order pursuant to Subsection 243(1) of the *Bankruptcy & Insolvency Act* (the "BIA") and Section 101 of the *Court of Justice Act* ("CJA") appointing Grant Thornton Limited ("GTL") as monitor in the interim (the "Monitor"), and thereafter, as receiver and manager (the "Receiver") over all of the property, assets and undertaking (the "Property") of 1793082 Ontario Ltd. o/a K.D. Quality Pellets (the "Debtor"), as it is necessary in order to preserve and protect the assets of the Debtor and the Security (as defined below).

2. Temfund is also seeking an order approving a proposed sale process by GTL (the "Sale Process"), if it is appointed as Receiver, in order for GTL to complete a sale of the right, title and interest, if any, in the inventory, manufacturing equipment, warehouse equipment, real property, books and records, and intellectual property including any Debtor-owned patents, web site, and customer lists, among other things, of the Debtor (collectively, the "Property").

3. Temfund submits that approving the Sale Process at the time of the Receiver's appointment is both just and convenient as it will minimize costs and maximize efficiency.

II. SUMMARY OF FACTS

4. The Debtor is an Ontario corporation which was incorporated in 2009 for the purpose of manufacturing and wholesaling wood pellets, which are sold to both residential and commercial customers, and are used for heat and power generation.

> **Affidavit of Dalton Potter, sworn January 8, 2019 ["Potter Affidavit"], Tab 2 of the Application Record, at para. 4.**

5. The Debtor owns a manufacturing facility that processes wood pellets, which is located at 999582 Highway 11 North, R.R. #2, in the town of New Liskeard, Ontario, postal code P0J 1P0 (the "Premises").

Potter Affidavit, Tab 2 of the Application Record, at para. 4.

6. Temfund holds a security interest over the Debtor pursuant to a General Security Agreement dated May 15, 2012 (the "GSA"), together with certain other security over the property of the Debtor including a first ranking mortgage over the Premises (the "Security"). The Security provides that Temfund has the right to appoint a private receiver or apply for a court-appointed receiver and that the enforcement of Temfund's remedies may be exercised independently or in combination.

Potter Affidavit, Tab 2 of the Application Record, at paras. 17-19.

7. Exclusive of any legal or professional costs incurred by Temfund in the enforcement of its Security, the Debtor is indebted to Temfund in the amount of $741,432.72 as of December 6, 2018.

Potter Affidavit, Tab 2 of the Application Record, at para. 7.

8. The Debtor has defaulted on its obligations to Temfund and demand was made on the Debtor on December 11, 2018. The defaults by the Debtor include, but are not limited to:

a. failing to repay an initial loan, as required;
b. failing to repay an additional bridge loan, as required;
c. failing to provide financial disclosures, as required; and
d. ceasing to carry on its business and operations.

Potter Affidavit, Tab 2 of the Application Record, at paras. 31, 37, 38, 43.

9. On October 1, 2018, Temfund engaged a third-party independent consultant (the "Consultant") to ascertain the financial and operational state of the Debtor, and the Debtor

agreed to cooperate with the Consultant. Upon attending the Premises, the Consultant reported that the Debtor's business ceased operations since January 2016 and has been completely inactive since then.

Potter Affidavit, Tab 2 of the Application Record, at paras. 31-35.

10. Based on information received, the Consultant further reported that:

a. the Debtor's HST and payroll source deductions are in significant arrears;
b. significant portions of the Debtor's financial records are missing;
c. there are discrepancies in the financial records that have been made available; and,
d. the Debtor has insufficient cash to operate.

Potter Affidavit, Tab 2 of the Application Record, at paras. 35, 36.

III. THE LAW

Appointment of Monitor

11. The appointment of a monitor is a matter of discretion. The Court has broad discretion under section 243(1) of the BIA, which includes the discretion to appoint a monitor where it is just and convenient in order to reasonably safeguard a creditor's interest in the property in which it holds security.

Great Atlantic & Pacific Co. of Canada Ltd. v. 1167970 Ontario Inc., **[2002] O.J. No. 3717 ["*Great Atlantic*"], Tab 1 of the Applicant's Book of Authorities ["Applicant's BOA"], at para. 10.**

Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

Section 101(1) of the Courts of Justice Act, R.S.O. 1990, Chapter C.43.

12. The powers of the monitor are also discretionary and should reflect what is desirable in the circumstances. These powers include:

a. having full access to the books, records and materials for the purposes of monitoring the Debtor's financial activities; and

b. supervisory power to monitor the Debtor's ongoing business with a view to being assured that the business is being carried on "in the ordinary course".

Great Atlantic, ibid.

13. A monitor has less power than that of a receiver yet has the ability to safeguard the Debtor's property. The appointment of a monitor can be interpreted as an alternative to appointing an interim receiver.

Great Atlantic, ibid.

14. The application to appoint a receiver must be brought in good faith. However, there must be clear evidence that the applicant is acting in bad faith for the application to fail.

***Nash v CIBC Trust Corp.* [1996] O.J. No. 3940 ["*Nash*"], Tab 2 of the Applicant's BOA, at paras. 28 and 29.**

15. Temfund respectfully submits that it is a reasonable measure to seek the appointment of a Monitor on an *ex parte* basis. The appointment of a Monitor would vitiate any concern that the Debtor is taking steps that could jeopardize the security, such as selling the secured assets of its business. Given the revelations of the Consultant's report, it is clear that Temfund does not have a full appreciation of the value of its Security, and there is immediate concern that without having a Monitor appointed, there is a risk that the Security could be sold or dissipated without Temfund's knowledge. The Monitor is poised to report back to the Court on any malicious activity that occurs in an interim period.

***Bank of Montreal v. Dedicated National Pharmacies Inc.,* 2011 ONSC 346, Tab 3 of the Applicant's BOA, at para. 2.**

Appointment of Receiver

16. The appointment of a receiver is a matter of discretion. The test is whether an appointment is "just or convenient" having regard to all the circumstances but in particular the nature of the property and rights of all parties in relation thereto

> ***Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen. Div.)) ["*Freure Village*"], Tab 4 of the Applicant's BOA at para. 14.**

> ***First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 NSSC 235 ["*First National Financial GP Corporation*"], Tab 5 of the Applicant's BOA at para 10.**

17. While the appointment of a receiver is an extraordinary remedy, the "extraordinary" nature of the remedy is less important when a security instrument provides for the appointment of a receiver. In such cases, the determination of whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the Court appoint a receiver. A default under secured loan agreements provides ample justification for appointment of a receiver.

> ***First National Financial GP Corporation, ibid.*, Tab 5 of the Applicant's BOA at para. 12.**

18. A creditor is not required to establish that irreparable harm would result from failure to appoint a receiver, and the fact that the appointment of a receiver will cause hardship to the debtor through the loss or control of its assets is not grounds to refuse the appointment.

> ***Freure Village, supra.*, Tab 4 of the Applicant's BOA at para. 10.**

19. It is respectfully submitted that a receiver should be appointed over the Property of the Debtor for the following reasons:

a. the Debtor has defaulted on its obligations to Temfund;

b. Temfund holds Security over the Property;

c. the GSA provides for the appointment of a receiver;

d. a Court-appointed receiver would be best positioned to ensure that the rights of all stakeholders are protected;

e. the Debtor is insolvent;

f. it is in the interest of the parties to have this Honourable Court appoint a receiver to allow for the orderly realized on the Property; and

g. given all of the foregoing, convenience and justice favour the appointment of a receiver.

Approval of Sales Process

20. The Court has jurisdiction to approve a sale of the Debtor's property in advance, notably when such a sale is in the best interest of the stakeholders generally. In determining whether to approve the proposed sales process, the Court should give weight to the recommendation of a monitor or receiver, who is a court-appointed officer experienced in the insolvency field.

> ***Bloom Lake, g.p.l., Re*, 2015 QCCS 1920 ["*Bloom Lake*"], Tab 6 of the Appellant's BOA, at par. 27-28.**

21. In determining whether to approve a sale process, the Court normally defers to the business judgment rule properly exercised by a monitor or receiver, and will not interfere with the exercise of this commercial and business judgment where the marketing and sale process is fair, reasonable, transparent, and efficient. By authorizing a sale process in advance, the Court helps ensure that the entire process is fair.

> ***Bloom Lake*, ibid., Tab 6 of the Applicant's BOA, at paras. 28-29.**

22. The proposed report of GTL, if appointed as receiver, outlines a transparent and fair marketing and sale process. GTL has substantial expertise in the insolvency field, and approving the sale process outlined in its report would be efficient, fair, reasonable, and would manage time and expenses incurred.

IV. RELIEF REQUESTED

23. Temfund seeks an Order appointing a monitor in the interim, and thereafter a receiver, over the Property of the Debtor and approval of the sale process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of January, 2019.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Great Atlantic & Pacific Co. of Canada Ltd. v. 1167970 Ontario Inc.,* [2002] O.J. No. 3717

2. *Nash v CIBC Trust Corp.* [1996] O.J. No. 394

3. *Bank of Montreal v. Dedicated National Pharmacies Inc.,* 2011 ONSC 346

4. *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen. Div.))

5. *First National Financial GP Corporation v. 3291735 Nova Scotia Limited,* 2018 NSSC 235

6. *Bloom Lake, g.p.l., Re,* 2015 QCCS 1920

SCHEDULE "B"
TEXTS OF STATUTES, REGULATIONS & BY LAWS

1. Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3:

   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.

2. Section 101(1) of the Courts of Justice Act, R.S.O. 1990, Chapter C.43:

   In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

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PROCEEDING COMMENCED AT TORONTO

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