2023 01G
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act* R.S.C., 1985 c. B-3 as Amended (the "**BIA**");

AND IN THE MATTER OF the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended (the "**CCAA**"); and

AND IN THE MATTER OF an application of Big Erics Inc. ("**BEI**") and Terra Nova Old Port Foods Inc. ("**TNOPFI**

MEMORANDUM OF FACT AND LAW OF THE COMPANY

Court File Number(s):	24543 (Terra Nova Old Port Foods Inc.) 24544 (Big Erics Inc.)
Estate File Numbers.	51-2962147 (Terra Nova Old Port Foods Inc.) 51-2962148 (Big Erics Inc.)
Date of Filing of Document:	July 17, 2023
Name of Party Filing or Person:	Terra Nova Old Port Foods Inc. and Big Erics Inc. (together, the "**Applicants**")
Application to which Document being filed relates:	Application for the continuation of the BIA proposal proceedings of the Applicants under the CCAA;
Statement of Purpose in filing:	Memorandum of Fact and Law in respect of the relief sought in the Application
Court Sub-File Number, if any	N/A

RECONSTRUCT LLP
Solicitors for the Monitor
200 Bay St, Suite 2305
Toronto ON M5J 2J3

To the Service List attached hereto as Schedule "A"

1. The Applicants, Big Erics Inc. ("**BEI**") and Terra Nova Old Port Foods Inc. ("**TNOPFI**") are debtors having each filed Notices of Intention to Make a Proposal ("**NOI**") under Part III of the BIA.

2. The Applicants make this motion to continue the NOI proceedings under the CCAA. Grant Thornton Ltd. ("**GTL**") was appointed as proposal trustee and has consented to act as the proposed Monitor.

Continuation of BIA Proceedings under the CCAA

3. In considering whether to continue BIA proposal proceedings under the CCAA, Courts have held that a debtor is required to address the following issues:

   (a) provide evidence that the company has satisfied the sole statutory condition set out in section 11.6(a) of the CCAA that it has not filed a proposal under the BIA;

   (b) demonstrate that the proposed continuation would be consistent with the purposes of the CCAA; and,

   (c) provide evidence which serves as a reasonable surrogate for the information which section 10(2) of the CCAA requires accompany any initial application under the Act.

Reference: *(Re) Clothing for Modern Times Ltd.,* 2011 ONSC 7522 at para 11, *EncoreFX Inc. (Re)*, 2021 BCSC 750 at para 49; *(Re) Norcon Marine Services Ltd*., 2019 NLSC 238 at para 13; *(Re) Roman Catholic Episcopal Corporation of St. John's*, 2022 NLSC 81 at para 16.

4. In considering whether the proposed continuation is consistent with the purpose and intent of the CCAA, Courts have applied the factors from *Century Services Inc. v. Canada (Attorney General)* as articulated by Brown J. in *(Re) Clothing for Modem Times*:

(a) whether the proceeding permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;

(b) whether the proceeding provide a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;

(c) whether the proceeding avoids the social and economic losses resulting from liquidation of an insolvent company; and

(d) whether the proceeding creates conditions to preserve the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

Reference: *(Re) Clothing for Modern Times Ltd.,* 2011 ONSC 7522 at para 11, citing *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 6.

5. This Court has acknowledged that the threshold to bring a matter under the CCAA is low. In *Norcon, Or*sborn J. determined that a debtor need only demonstrate a "germ of a plan" to warrant continuation under the CCAA.

Reference: *(Re) Norcon Marine Services Ltd*., 2019 NLSC 238 at paras 15 to 16; *(Re) Roman Catholic Episcopal Corporation of St. John's*, 2022 NLSC 81 at paras 17 and 19.

6. Having a "germ of a plan" does not mean that a debtor must present a fully developed plan at an initial hearing, nor is a debtor required to have support of all its creditors. In *Edward Collins,* this Court found that a "germ of a plan" existed based on the company's intention to advance toward a refinancing and to continue performing its cash flow positive contracts.

Reference: *Edward Collins Contracting Limited (Re),* 2022 NLSC 149, at paras. 39, 71, 99 and 131.

7. The test for whether a company has a "germ of a plan" is no more onerous than to demonstrate that the debtor's plan, if successful, presents a reasonable possibility of restructuring.

Reference: *Edward Collins Contracting Limited (Re),* 2022 NLSC 149 at paras. 162 to 168.

8. The Applicants sought protection under the BIA two weeks ago, and since then have been operating in a manner so as to maximize revenues during the peak seasonal period. The Applicants are developing a formal sale and investment solicitation process as a continuation of pre-filing marketing efforts. The very reason for bringing these matters under the auspices of the CCAA are to advance those two goals.

9. As the proceeding unfolds, the success and challenges of the Applicants' strategy will undoubtedly become apparent, however there is nothing that should suggest to this Court that the Applicants' "germ" ought to be more developed at this early stage.

10. The Applicants meet the test for protection under the CCAA independently of this motion to convert. Under the CCAA, a debtor is insolvent if it meets the definition of "insolvent person" under the BIA, which in turn provides that a person is insolvent if: (i) they are unable to meet their obligations as they become due; (ii) they have ceased paying their current obligations in the ordinary course of business; or (iii) the aggregate of their property is not sufficient to enable payment of all obligations due and accruing due. The Applicants have already availed themselves of protection under the BIA, having met the test for insolvency thereunder.

Reference: BIA at s. 2.

11. The Applicants are affiliated companies within the meaning of Section 3(2) of the CCAA as they are controlled by the same shareholders. Further, they are companies to which the CCAA applies, having debt of more than $5 million. It is appropriate for them both to be granted protection under the CCAA.

Reference: CCAA at s. 3(1) and (2).

Approval of Priority Charges

12. In connection with these restructuring proceedings, the Applicant seeks a charge to secure professional fees (the "**Administration Charge**") and a charge to secure the post-fling liabilities of the Applicants' directors (the "**Directors' Charge**").

(a) *Administration Charge*

13. Section 11.52(1) of the CCAA grants this court jurisdiction to grant a priority charge over a debtor company's assets for professional fees and disbursements on notice to affected secured creditors. The Applicants would have been able to seek the same charge whether under the CCAA or BIA. Section 64.2(1) of the BIA provides parallel authority under that statute.

Reference: CCAA, s 11.52(1); BIA, s. 64.2(1).

14. In deciding whether to grant an administration charge, Courts have considered a number of factors including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair

and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.

Reference: *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54; *Lydian International Limited (Re),* 2019 ONSC 7473 at para 46*.*

The Administration Charge is warranted, given that the professionals benefitting from the charge will continue to assist the Applicants with their restructuring goals, perform unique functions without duplication, the quantum of the charge is fair and reasonable for proceedings of this size, complexity and nature, and the charge is supported by the Monitor.

(b) *Director's Charge*

15. Section 11.51 of the CCAA provides this Court with the express statutory jurisdiction to grant a charge in favour of directors of a company in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it. Section 64.1(1) of the BIA grants similar authority.

Reference: CCAA, s 11.51; BIA, s. 64.1(1).

16. In addition to the express requirements of the BIA, Courts also consider whether the Applicant could obtain adequate indemnification insurance for the directors and officers at a reasonable cost and directed that a charge in favour of directors does not apply to obligations incurred by a director or officer as a result of their gross negligence or wilful misconduct.

Reference: *Laurentian University of Sudbury*, 2021 ONSC 1098 at para 81; *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234 at para 98.

17. The Applicants' ordinary course operations give rise to potential director liability in respect of employee obligations, HST remittances and source deduction remittances. The Directors' Charge is reasonably necessary to indemnify the directors and to give them certainty as to their personal liability in these proceedings.

Approval of a Key Employee Retention Plan

18. The Applicants seek approval of a key employee retention plan ("**KERP**") to incentivize continued engagement of key employees critical to the continuation of the going-concern business. Courts have relied on the broad jurisdiction afforded by section 11 the CCAA to approve KERPs in keeping with the purpose and intent of the CCAA, and particularly where the retention of certain employees is critical to a successful restructuring.

Reference: *U.S. Steel Canada Inc (Re)*, 2014 ONSC 6145 at para 27; *Essar Steel Algoma Inc (Re)*, 2015 ONSC 7656 at para 10; *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980 at paras 29, 57; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 at paras 62 to 68; *Timminco Ltd. (Re)*, 2012 ONSC 506 at para 72.

19. In *Aralez*, the Court distilled the factors to be considered in granting a KERP into three criteria, summarized below:

(a) Arm's length safeguards – whether there has been arm's length input into the design, scope and implementation of the program. Where there are potential conflicts, it is important that the Monitor be involved;

(b) Necessity: whether the employee interests are such that a KERP is necessary to maintain engagement;

(c) Reasonableness of Design: whether the targets and incentives of the program are aligned with the goals of the restructuring.

Reference: *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para 30.

(d) Approval of the Monitor: in this case the KERP and the amount of the KERP Charge was formulated by the Applicants under the oversight of the proposed Monitor. The quantum of the KERP is modest in comparison to the outstanding liabilities of the corporation. The proposed Monitor has stated that the KERP is reasonable in the circumstances and has recommended the approval of the KERP.

(e) Likelihood of Employee Departures: the Applicants believe that the key employees benefitting from the KERP are flight risks if not incentivized to remain employed with the Applicants.

(f) Are Beneficiaries of KERP Critical to a Successful Restructuring: the Applicants' value is in their going concern operations, which include customer, supplier and vendor networks throughout the Atlantic provinces and beyond, which were developed over their long history. The networks are maintained by key personnel and the Applicants cannot easily recreate those networks if destroyed as a result of the departure of key employees. Further, it is crucial that those networks remain intact during a SISP and during the peak seasonal period in order for the Applicants to maximize revenues. It is critical, therefore, that employees remain employed to enhance the prospects of a successful restructuring for the benefit of all stakeholders.

(g) Ease of Replacing Departing Employees: given the Applicants' customer and supplier networks were built over decades, there is little prospect of rebuilding those networks within the relatively short timelines of an insolvency proceeding.

(h) Business Judgement of the Applicant: The Applicants have exercised their business judgment in consultation with the proposed Monitor in formulating the KERP. It is the Applicants' view that the KERP is necessary to preserve value for stakeholders.

Reference: *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para 29; *Just Energy Group Inc. et al*., 2021 ONSC 7630 at paras 8 to16.

Sealing of Confidential Information

20. The Applicants and proposed Monitor have filed confidential information, including draft financial statements as well as employee positions and salary information for the purposes of the KERP. The Applicants seek a sealing order to seal such confidential information from the public record, pending further Order of the Court.

21. The Court may order that documents be treated as confidential, sealed and not form part of the public record if necessary to prevent a serious risk to an important interest, including a commercial interest and alternative measures would not prevent the risk; and where the salutary effects of the confidentiality request outweigh the deleterious effects.

Reference: *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 at para. 53.

22. In *Sherman Estate* held that a person seeking a sealing order must establish risk to an important interest of the public, (b) the sealing order is necessary to prevent the risk; and (c) the benefits of the request outweigh the negatives as a matter of proportionality.

Reference: *Sherman Estate v. Donovan,* 2021 SCC 25 at para. 3.

23. Sealing orders are regularly granted in the context of CCAA proceedings to protect the integrity of the court process. With respect to the draft financial statements, disclosure may impact the marketing and sale process; and with respect to employee information, employees have a reasonable expectation that their names and salary information will be kept confidential.

24. The Applicants respectfully request that this Court grant the Order sought continuing the BIA proceedings under the CCAA and granting the other relief sought.

All of which is respectfully submitted.

DATED at St. John's, Newfoundland, this 17th day of July 2023.

RECONSTRUCT LLP

SHARON KOUR
Solicitors for the Applicants
200 Bay St, Suite 2305
Toronto, ON M5J 2J3
skour@reconllp.com

LIST OF AUTHORITIES

1. *(Re) Clothing for Modern Times Ltd.*, 2011 ONSC 7522;
2. *(Re) EncoreFX Inc.*, 2021 BCSC 750;
3. *(Re) Norcon Marine Services Ltd.*, 2019 NLSC 238;
4. *Roman Catholic Episcopal Corporation of St. John's (Re),* 2022 NLSC 81;
5. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60;
6. *Edward Collins Contracting Limited (Re),* 2022 NLSC 149;
7. *Canwest Publishing Inc. / Publications CanWest Inc., Re*, 2010 ONSC 222;
8. *Lydian International Limited (Re),* 2019 ONSC 7473;
9. *Laurentian University of Sudbury*, 2021 ONSC 1098;
10. *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234;
11. *U.S. Steel Canada Inc (Re)*, 2014 ONSC 6145;
12. *Essar Steel Algoma Inc (Re)*, 2015 ONSC 7656;
13. *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980;
14. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586;
15. *Timminco Ltd. (Re)*, 2012 ONSC 506;
16. *Just Energy Group Inc. et al.*, 2021 ONSC 7630;

17. *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41;

18. *Sherman Estate v. Donovan,* 2021 SCC 25.