

2024



Hfx. No. 538745

**SUPREME COURT OF NOVA SCOTIA**

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

**AND IN THE MATTER OF** an application of Blue Lobster Capital Limited ("**Blue Lobster Capital**"), 3284906 Nova Scotia Limited ("**328NSL**"), 3343533 Nova Scotia Limited ("**334NSL**") and 4318682 Nova Scotia Limited ("**431NSL**"), (the "**Applicants**")

**MEMORANDUM OF FACT AND LAW OF THE APPLICANTS**

**PART I: INTRODUCTION**

1. On 13 December 2024, the Applicants obtained CCAA protection from the Nova Scotia Supreme Court under an initial order ("**Initial Order**") providing relief including:
  - a. declaring the Applicants are debtor companies to which the CCAA applies;
  - b. granting an administration charge up to \$175,000.00 (the "**Administration Charge**");
  - c. granting a stay of proceedings until the comeback hearing on 20 December 2024 (the "**Comeback Hearing**");
  - d. appointing KSV Restructuring Inc. ("**KSV**" or the "**Monitor**") as Monitor of the Applicants in these proceedings (the "**CCAA Proceeding**"); and
  - e. authorized the Applicants and Monitor to pursue a refinance or sale process and perform a transaction, subject to Court approval, whereby the Applicants' obligations to the Royal Bank of Canada ("**RBC**") would be repaid in full (the "**Refinance Process**").
  
2. Since the Initial Order, the Applicants have coordinated with the Monitor and consulted with creditors and potential investors to develop a plan to stabilize their operations and proceed in a manner which will ensure maximum results under the CCAA.

3. In order to carry out the proposed plan, the Applicants are seeking an Amended and Restated Initial Order (“ARIO”) in its proposed form, to:
  - (i) extend the Stay Period by 75 days from 23 December 2024 to 08 March 2025;
  - (ii) maintain the Administration Charge up to \$175,000.00;
  - (iii) confirm the appointment of KSV as Monitor;
  - (iv) confirm that the Applicants and Monitor are authorized to pursue the Refinance Process and, subject to Court approval, perform a transaction in that regard; and
  - (v) provide any other relevant relief sought and deemed necessary by this Court.
  
4. The Applicants rely upon: (1) the Initial Affidavit of Kevin Alexander Rice (“Rice”) dated 27 November 2024; (2) the Supplemental Affidavit of Rice dated 17 December 2024; (3) the Monitor’s Pre-Filing Report dated 27 November 2024; (4) the Monitor’s Supplemental Pre-Filing Report dated 11 December 2024.

## **PART II: ISSUES AND LAW**

5. The Court must consider whether the Applicants should receive continued and additional CCAA protection pursuant to the ARIO in the form requested.
  - A. Extension of the Stay Period**
  
6. The Applicants were deemed eligible for CCAA protection, and this Court granted the Initial Order on 13 December 2024, including an initial Stay Period pending the Comeback Hearing returnable on 20 December 2024. The Applicants seek to continue under the CCAA and require an extension of the Stay Period until 08 March 2025.
  
7. Under s. 11.02 of the CCAA, a court may extend the stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

8. Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: “the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances”.
9. Orders made under s. 11 are appropriate where they support and accord with the objectives of the CCAA and other insolvency legislation in Canada. These include timely, efficient and impartial resolution of a debtor’s insolvency; preserving and maximizing the value of a debtor’s assets; ensuring fair and equitable treatment of claims; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.<sup>1</sup>
10. The Applicants submit that the continuation of these proceedings under the CCAA and the attendant relief sought, including the requested stay extension, is appropriate and preferable to any alternative, considering the competing interests of various stakeholders. No party has identified a viable wholistic alternative approach that could both preserve the Applicants’ business operations and the interests of stakeholders.
11. When the Applicants advanced the Initial Application, it was in the face of a competing application brought first by its senior creditor, RBC, seeking a court-appointed receivership. Ultimately, the Applicants and RBC agreed on a form of Initial Order under the CCAA which would allow, *inter alia*, the Applicants and Monitor to operate the Refinancing Process under CCAA protection.
12. The CCAA Proceeding has allowed the Applicants to stabilize their business operations and prevent interruption while consulting with the Monitor and engaging with potential alternative third-party lenders who are supportive of the CCAA Proceeding and recognize that the Applicants’ distressed situation was caused by a confluence of external factors resulting in liquidity constraints which do not dictate the present or future value and viability of their business.
13. Since the Initial Order was granted, RBC has not presented an alternative plan that accounts for interests beyond their own and has not indicated intention to oppose the ARIO. The Applicants remain confident that a court-appointed receivership or other creditor-driven process would destroy their ability to continue in business as a going

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<sup>1</sup> 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 [Applicants’ Book of Authorities, Tab 1]

concern and produce a suboptimal result as compared to the CCAA Proceeding.

14. Under the ARIO, the Applicants can continue working with the Monitor and can continue discussions with other potential lenders within the Refinancing Process with the goal of simultaneously satisfying RBC's debt and addressing the Applicants' liquidity issues, while also minimizing the negative collateral impacts that would clearly result from a receivership.
15. There is no legitimate risk that the value of the Applicants' assets will deteriorate during the CCAA Proceeding if the proposed ARIO is granted and the Applicants continue with business as usual. As outlined in the Initial Affidavit, RBC faces virtually no risk of deterioration in recovery on their security, and delay in repayment will be compensated pursuant to their respective contractual interest terms.
16. There are no allegations of financial irregularities or of self-dealing here that would weigh against continuing within a debtor-driven CCAA process. In this sense, this case is distinguishable from the 2020 Ontario decision in ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.***<sup>2</sup>, where the Court declined to grant a CCAA over a receivership due to undisputed allegations of improper financial practices and the fact that the debtors were not capable of obtaining new financing. In the present instance, the Initial Affidavit outlined material evidence of new financing prospects, and the Monitor confirms that current management has been acting appropriately, in good faith, and with due diligence.
17. Another factor underlying the *BCIMC* decision (and various other cases where CCAA proceedings were rejected in favour of an alternative approach), was the debtor's lack of a "concrete plan" to maximize value versus non-CCAA alternatives. The "plan" in this case, as previously presented in the Initial Order application and authorized under the Refinancing Process provision of the Initial Order, may not be defined in granular detail but is currently viewed by the Applicants and Monitor as likely to produce a successful outcome. If this assessment changes, the Applicants will return to Court.
18. In ***Re Roman Catholic Episcopal Corporation of St. John's***<sup>3</sup>, the Court found that the debtor's positive behaviour supported its application to transfer from a proceeding

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<sup>2</sup> ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.***, 2020 ONSC 1953 [Applicants' Book of Authorities, Tab 2]

<sup>3</sup> ***Re Roman Catholic Episcopal Corporation of St. John's***, 2022 NLSC 81 [Applicants' Book of Authorities, Tab 3]

under the BIA to the CCAA *despite* opposition from its major creditor and a group of tort claimants proposing a receivership or proposal under the BIA instead. The Court found that the debtor was fully committed to maximizing value for its creditors and that there was no concern with the current management of the debtor. Also, the Court was unconvinced that costs would be materially greater under the CCAA vs. a similar approach being taken under the BIA. Similarly in this case, the Applicants are focused on maintaining the business value and maximizing the interests of all stakeholders, and there is no evidence that costs will be greater under the CCAA than in a receivership.

19. As to the other requirements of CCAA 11.02, as noted above the Monitor has confirmed that the Applicants have acted in good faith and with due diligence since filing for CCAA protection. This is not a case where the debtors have squandered their time. In particular, the Applicants, working closely with the Monitor, have taken the following steps:
  - a. consulting with RBC and pursuing options to satisfy RBC's debt and resolve the Applicants' liquidity issues within the Refinancing Process;
  - b. further assessing the options available under the CCAA; and
  - c. other measures as outlined in the Monitor's Supplemental Pre-Filing Report.
20. The Applicants submit that, in the circumstances of this case, it is appropriate and in the best interests of all stakeholders for this Court to issue an order extending the CCAA Stay Period through to 08 March 2025.

#### **B. Administration Charge is Necessary and Appropriate**

21. The Applicants seek to include in the ARIO an Administration Charge securing the fees of their professional advisors in the same amount as granted pursuant to the Initial Order, being to a maximum amount of \$175,000.00.
22. Section 11.52 of the CCAA authorizes this Court to grant a priority charge in respect of professional fees and disbursements on notice to affected secured creditors.
23. In *Canwest Publishing Inc.*,<sup>4</sup> Pepall J. set out the following non-exhaustive factors that

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<sup>4</sup> *Canwest Publishing Inc.*, 2010 ONSC 222, at para 54 [Applicants' Book of Authorities, Tab 4]

a court may consider in respect of an administration charge:

- 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.

24. The Administration Charge requested in this case is necessary and appropriate in the circumstances as:

- a) The continuing assistance of qualified professionals is necessary;
- b) The Monitor, its legal counsel, and the Applicants' counsel have contributed and will continue to contribute to this process;
- c) There is no evidence of duplication of roles; and
- d) The quantum of the proposed Administration Charge is reasonable, as reflected in the Cash Flow Statement and Monitor's Reports.

25. As noted above and discussed in the Monitor's Reports and other materials filed herein, the value of assets within the Applicants' estates exceeds their secured debt by a comfortable margin. As such, there should be limited concern around the authorization of the requested Administration Charge.

### **C. Refinancing Process**

26. The Initial Order stipulated that the Monitor and Applicants would be empowered and authorized to pursue the Refinancing Process as follows:

Refinance or Sale Process:

31. That the Applicants with the assistance of the Monitor are hereby authorized and empowered to take such steps as are deemed necessary or desirable to, subject the approval of this Court, carry out and perform a refinancing transaction whereby the Applicants' obligations to RBC (as they exist at the time of any repayment, including all accrued interest, professional costs and other costs) are repaid in full, or such other

transaction satisfactory to RBC (the "**Refinancing Process**"), and in so doing the Monitor shall incur no liability or obligation as a result of assisting the Applicants with the Refinancing Process or in carrying out the other provisions of this Order, save and except for gross negligence or willful misconduct on its part. Any payments made by the Applicants pursuant to this paragraph and any Order of this Court do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law and shall be received by RBC free and clear of the claims of other creditor of the Applicants.

27. The Applicants respectfully submit that it is appropriate and necessary for this Court to continue to empower and authorize the Applicants and Monitor acting within this CCAA Proceeding to proceed with the Refinancing Process as outlined above. As such, the Applicants have included this clause in the proposed ARIO.

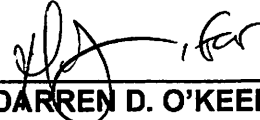
### **PART III: CONCLUSION AND RELIEF SOUGHT**

28. The Applicants submit that this CCAA Proceeding remains the best solution available to stabilize the Applicants' operational and financial situation and allow them to maximize value for stakeholders, satisfy their secured creditor, and continue as a going concern. The Applicants submit that they have met the requirements of appropriateness, good faith, and due diligence. The Monitor supports the Applicants' position and requested relief.
29. The Applicants therefore seek the ARIO pursuant to the CCAA substantially in the form presented.

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All of which is respectfully submitted.

Signed December 17, 2024



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