

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 by Blue Lobster Capital Limited, 3284906 Nova Scotia Limited, 3343533 Nova Scotia Limited and 4318682 Nova Scotia Limited (collectively, the "Applicants") for relief under s. 11 of the CCAA and other relief

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

**OVERVIEW:**

1. Unless otherwise defined, all capitalized terms herein have the meanings ascribed to them in the Application and supporting affidavit of Kevin Alexander Rice (the "Initial Affidavit").
2. Blue Lobster Capital is primarily a real estate investment company. It holds numerous properties (both residential and commercial) for rental purposes.
3. The other Applicants, 328NSL, 334NSL and 431NSL (collectively, the "NSL Companies") operate businesses relating to the manufacturing and sale of alcoholic beverages. 334NSL operates a winery under the name "Lost Bell Winery". 431NSL is engaged in the production and sale of cider under the name "Annapolis Cider Co". 328NSL is engaged in the production and sale of certain alcoholic beverages under the name "Nova Scotia Spirit Co".
4. The Applicants have enjoyed significant success to date but are experiencing cash flow issues for the reasons set out below and in the Initial Affidavit. The Applicants have taken numerous steps to increase efficiencies, improve operations, and free up liquidity to meet their debt obligations and other demands of their primary third-party secured lender, the Royal Bank of Canada ("RBC").
5. Although the Applicants have diligently cooperated with RBC since being referred to its Special Loans and Advisory Services ("SLAS") group in May 2023 due to alleged defaults, on 19 November 2024 RBC filed an application for a court-appointed receiver under the *Bankruptcy*

and Insolvency Act, R.S.C., 1985, c. B-3, as amended (the "**BIA**") and s.43(9) of the *Judicature Act* (the "**Receivership Motion**").

6. In consultation with their legal and financial advisors, the Applicants concluded that a court-appointed receivership under RBC's supervision is not in the best interests of their stakeholders and determined that protection under the **Companies' Creditors Arrangement Act**, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), is urgently needed to stabilize their business operations while more holistically beneficial options are explored.
7. Accordingly, the Applicants have filed a Memorandum of Fact and Law and supporting affidavits opposing the Receivership Motion. As a preliminary request, this response seeks an adjournment so that RBC's Receivership Motion may be heard either concurrently with the Applicants request for an Initial Order under the CCAA, or, preferably, alongside its request for an amended and restated Initial Order at the 10-day Comeback Hearing.
8. The Applicants are confident that their cash flow issues are a short-term impediment only and that they can successfully restructure under the CCAA and thereafter remain operational as a going concern. Conversely, a piece-meal sale of assets within a lender-driven receivership will compromise operations, greatly diminish the overall business value, damage the Applicants' reputation with their relationship partners and in the marketplace, and jeopardize the Applicants' ability to pursue their strategic and product development plans and prospects for long-term viability, thereby negatively impacting all stakeholders.
9. The Applicants have therefore filed for an Initial Order which:
  - (a) abridges the time for service of the Application and the materials filed in support thereof, and dispensing with further service thereof;
  - (b) declares that the Applicants are debtor companies to which the CCAA applies;
  - (c) appoints Bobby Kofman of the KSV Restructuring Inc. ("**KSV**" or the "**Proposed Monitor**") as the monitor of the Applicants in these proceedings (the "**CCAA Proceedings**");
  - (d) stays, for an initial period of ten (10) days (the "**Stay Period**"), all actions, suits or proceedings and remedies taken or that might be taken against or in respect of the Applicants, the Proposed Monitor, or the Applicants' directors and officers, or

affecting the Applicants' business or current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, except with the written consent of the Applicants and Proposed Monitor or otherwise permitted by law and with leave of this Court.

10. Prior to the expiry of the Stay Period under the Initial Order, the Applicants will bring a further motion for additional relief under the CCAA at the Comeback Hearing in the form of an amended and restated Initial Order ("**ARIO**").

**FACTS:**

Applicants' Background and Business Profiles

11. The Applicants are related companies. Each of the Applicants are limited liability companies registered to do business in the Province of Nova Scotia.
12. Since its founding in late 2014, 328NSL (d.b.a. "**Nova Scotia Spirit Company**", and at times referred to as NS Spirits herein) has demonstrated remarkable growth and strategic expansion, quickly becoming a leader in the Nova Scotia alcoholic beverage industry since shipping its initial products in early 2015.
13. From 2015 to 2019, Nova Scotia Spirit Company had an extraordinary five-year streak of doubling its business annually in the spirits market which set a strong foundation for future success. It then expanded into the "ready to drink" ("**RTD**") market and launched its own vodka soda line in collaboration with the Nova Scotia Liquor Commission.
14. Following this, the Nova Scotia Spirit Company quickly became a market leader in RTD beverages, achieving significant distribution expansion across Atlantic Canada and into Ontario.
15. In 2021, Nova Scotia Spirit Company acquired Saint-Famille Winery and Annapolis Cider Company (now operating as the other two NSL Companies included in this filing). These acquisitions strengthened the Applicants' collective portfolio. Through their strategic efforts, Annapolis Cider Company has become the number one Nova Scotia-produced cider brand.

16. NS Spirits has continued to build on its successes, growing its team, expanding its manufacturing capacity, and consistently driving innovation in the beverage alcohol space. At present, NS Spirits is recognized as the number one producer of spirits, cider, and RTD beverages in Nova Scotia. Collectively, NS Spirit's achievements position the company as the second-largest producer of beverage alcohol products in Nova Scotia, where the Applicants currently employ approximately 100 people.
17. Further details regarding the Applicants' corporate structure, financial position, stakeholder interests, and economic contributions are outlined in the Initial Affidavit.

#### Applicants' Financial Circumstances

18. The Applicants began experiencing cash flow pressures in 2023. This was attributable to a combination of factors. In addition to the growth pains associated with their rapid expansion, associated capital injections, and difficulty refinancing thereafter, the Applicants faced Covid-19 related impacts on their supply chain, inflation conditions, and interest rate increases. The Applicants then also had their Chief Financial Officer suddenly go off on indefinite long-term leave due to injury in November 2023.
19. Although the Applicants are currently insolvent on a cash flow basis due to RBC's demands, they have enjoyed impressive commercial prosperity in both real estate investment and the alcoholic beverage sector since the inception of those respective businesses and have a healthy balance sheet despite their liquidity challenges.
20. At present, the Applicants' assets exceed their liabilities and future-looking projections indicate that an upward trend in growth and revenue will continue. As such, their prospects of remaining operational following a strategic reorganization are very high, provided that they are granted the opportunity to conduct a proper process under the CCAA which enables a refinancing of debt or strategic investment in exchange for equity in the business.

#### Dealings with RBC

21. As described in the Initial Affidavit, the Applicants' primary lender is RBC. The Companies were referred to SLAS in May 2023 and formally had their accounting team engage with RBC's team to comply with RBC's financial disclosure and regular reporting requests beginning in

November 2023.

22. On 07 February 2024, RBC, through its legal counsel, issued a demand for payment to each of the Applicants, together with Notices of Intention to Enforce a Security pursuant to s. 244 of the BIA (the “**Demands**”). RBC and the Applicants then entered into Forbearance Agreements for each of the Applicants on 26 February 2024 (the “**Forbearance Agreements**”), all of which had an expiry date of 26 April 2024 (the “**Forbearance Period**”).
23. During the Forbearance Period, RBC and the Applicants, largely through counsel, continued to discuss how they could pay down the RBC Debt, including both its operating lines and demand loans. The Applicants were wholly cooperative during this period and hired additional staff internally, along with retaining external consultants, in an effort to keep RBC apprised of the ongoing rehabilitation of the RBC debt.
24. After the Forbearance Period expired on 26 April 2024, the parties continued in an informal forbearance arrangement. Since that time, the Applicants have worked to pay down the RBC Debt, including by selling properties not subject to RBC’s security, and have had ongoing discussions with other third-party lenders with a view to restructuring their finances to take out the RBC Debt. The particulars of these efforts are outlined in the Initial Affidavit.
25. On 19 November 2024, the Applicants were unexpectedly served with RBC’s Receivership Motion. After consulting with legal and financial professional advisors, the Applicants decided to bring their own application for alternative relief under the CCAA. This Memorandum outlines the Applicants’ arguments in favour of that application.

## **LAW AND ARGUMENT:**

### The CCAA Applies to the Applicants

26. The Applicants are incorporated entities which are currently insolvent, i.e. have been unable to meet their obligations as they generally become due and have aggregate claims against them exceeding \$5,000,000.00. The Applicants are therefore debtor companies qualifying for CCAA relief (CCAA, s. 3):

**3 (1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is

prescribed.

#### Relief Requested is Reasonably Necessary

27. Pursuant to s. 11.001 of the CCAA, the relief sought on an initial application is limited to what is reasonably necessary to continue operations in the ordinary course during the initial stay period.
28. The Applicants have ensured that the relief requested in the Initial Order is limited to what is strictly necessary to protect their assets and maintain regular business operations pending the Comeback Hearing. The draft Initial Order does not include requests for debtor-in-possession financing or administration charges. The substantive relief requested is limited to the imposition of a 10-day initial Stay Period and the appointment of the Proposed Monitor.

#### A Stay of Proceedings is Appropriate

29. The CCAA is one of three principal insolvency statutes in Canada. Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have.<sup>1</sup>
30. Under the CCAA s. 11.02(1), a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than 10 days if the Court is satisfied that circumstances exist that make the order appropriate. Appropriateness is assessed by inquiring whether the stay of proceedings sought advances the policy objectives underlying the CCAA.<sup>2</sup>
31. As for the relevant policy objectives to consider, several courts have endorsed the following general statement of principles to be applied in considering an application for initial CCAA relief and the accompanying stay of proceedings.<sup>3</sup>
  - a. The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the court;
  - b. The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees;
  - c. During the stay period the CCAA is intended to prevent maneuvers for positioning

<sup>1</sup> *Edward Collins Contracting Limited (Re)*, 2022 NLSC 149 [TAB 1]

<sup>2</sup> *92354-9186 Quebec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, para 49 [TAB 2]

<sup>3</sup> *Humber Valley Resort Corp.*, 2008 NLTD 160, para 3 [TAB 3]

amongst the creditors of the company;

- d. The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure;
- e. The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the CCAA is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions; and
- f. The court has a broad discretion to apply these principles to the facts of a particular case.

32. In **9354-9186 Québec Inc. v. Callidus Capital Corp.** the Supreme Court of Canada stated that the CCAA generally prioritizes avoiding the social and economic losses resulting from liquidating an insolvent company, which is the intended outcome in this case, and proceeded to reiterate some of the relevant policy objectives to consider.<sup>4</sup> These were summarized in **Edward Collins Contracting Limited (Re)**<sup>5</sup> as follows:

- (a) providing for timely, efficient and impartial resolution of a debtor's insolvency;
- (b) preserving and maximizing the value of a debtor's assets;
- (c) ensuring fair and equitable treatment of the claims against a debtor;
- (d) protecting the public interest; and
- (e) balancing the costs and benefits of restructuring or liquidating the company.

33. The threshold for an initial order under s. 11.02(1) is low. The Applicants must satisfy the Court that the policy considerations noted above are generally met and that there is a "germ of a plan" that suggests a reasonable possibility of restructuring under the CCAA.<sup>6</sup> An applicant is not required to have a fully developed plan, nor are they required to have the support of all creditors.<sup>7</sup>

34. The Applicants submit that the evidence establishes there are appropriate circumstances to grant the Initial Order and that it must extend to all the Applicants as a result of their close

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<sup>4</sup> *Supra. n.2*; paras 39-42

<sup>5</sup> *Supra. n.1*; para 20

<sup>6</sup> **Norcon Marine Services Ltd.** (Re), 2019 NLSC 238, paras 14-16 [TAB 4]

<sup>7</sup> *Supra n.1*; para 39

relationship, cross collateralization, series of historical intercompany loans, and general mingling of cashflows. The Applicants intend to maintain separate accounts going forward.

35. The Stay Period will allow the Applicants to maintain their status quo business operations while they gain the breathing room necessary to ensure that they survive their liquidity challenges and remain in an operational state. This is an outcome which will maximize value for all stakeholders.
36. The Applicants' current plan, which far exceeds the 'germ of a plan' threshold, is detailed in the Initial Affidavit. In short, the Applicants had been actively engaged in planning a refinancing at the time that RBC filed its Receivership Motion. Since being served with the Receivership Motion, the Applicants have confirmed with their prospective lenders that they are 'still at the table' and interested in pursuing refinancing discussions. The Applicants anticipate continuing these discussions under the CCAA protection with the Proposed Monitor acting as a consultant and intermediary.
37. Aside from RBC, the Applicants have no other major lenders that will be prejudiced by CCAA relief or who are anticipated to object to the Initial Order or future orders thereunder.

#### Competing Receivership Motion

38. The Applicants understand that RBC will oppose their application for an Initial Order under the CCAA and argue that the Court should instead approve a BIA s. 243 court-ordered receivership led by RBC and its advisor, EY, as set out in the Receivership Motion.
39. As outlined in the Applicants' response to the Receivership Motion, a court-appointed receivership in this case does not meet the "just and convenient" test applicable under BIA s. 243. To the contrary, it is wholly unnecessary and unjustifiable in the circumstances.
40. Few of the considerations that favour a party succeeding on a receivership motion in the face of a competing CCAA are applicable here, and they certainly do not outweigh the factors that weigh in favour of the Initial Order.<sup>8</sup> The relative potential prejudice to the parties is grossly disproportionate. There is no risk of irreparable harm, or even appreciable harm, to RBC if their Receivership Motion is denied, whereas irreparable harm to the Applicants business

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<sup>8</sup> Should I CCAA Stay or Should I BIA Go: A Review and Analysis of Judicial Treatment of Competing CCAA and BIA Applications, ARIL Society Inc., Annual Review of Insolvency Law, vol 21 [TAB 5]



operations is virtually guaranteed if the Receivership Motion is granted.

41. The order requested in RBC's Receivership Motion contemplates that its receiver will assume responsibility for the Applicants' management and pursue a liquidation of assets. In such a scenario, the Applicants' public reputation and business relationships will be damaged, their operations will be severely compromised, and they will likely cease to remain viable as going concern operations within the foreseeable future.
42. RBC did not demonstrate in its filing that there has been erosion of its security to date, nor did it attempt to prove that preservation and protection of assets are valid considerations. To the extent that RBC intimated that such concerns would be allayed by a receivership, they did so without making any effort to substantiate the existence of those concerns in the first place. Furthermore, the Proposed Monitor will act within the CCAA Proceeding to ensure that all assets, including that subject to RBC's security, are maintained in good condition.
43. There is also no suggestion that the Applicants' management team have acted in bad faith or otherwise in such a manner that they should not continue to operate the business while restructuring. RBC's submissions regarding management 'conduct' revolve around RBC's impatience with perceived difficulty or delays in getting information from the Applicants, but there is no indication this was in willful disregard of their obligations as a debtor. To the contrary, the Applicants implemented numerous measures to address RBC's concerns after they were placed into the SLAS group, and their internal financial team has since worked diligently with their accountants at Grant Thornton to comply with RBC's various disclosure requests and to meet their bi-weekly and monthly reporting demands.
44. Under a CCAA Proceeding, the Proposed Monitor's review of operations and regular reporting will provide RBC with increased visibility into the Applicants' financial status and restructuring efforts. RBC would also have the opportunity to provide input into any proposed sales or investment process and to be heard by the Court on the approval of any asset sale.
45. The Applicants' issue has been a short-term liquidity challenge. On a balance sheet basis, their net assets exceed liabilities using appraised and assessed values of land and buildings, and they continue to operate profitably despite their significant and capital-intensive growth over a relatively short period. RBC's 'impatience' does not justify the extraordinary remedy that they are seeking, and it certainly does not outweigh all other competing interests that must

be considered on an application for relief under s. 11.001 of the CCAA.

46. The Applicants submit that all relevant considerations militate in favour of granting the Initial Order. This will provide the maximum chance of preserving the Applicants' operations as a going concern and thus satisfies the remedial policy aspirations underlying the federal insolvency statutes, whereas the relief sought in the Receivership Motion would undermine those ends.
47. Even if the Court is not inclined to dismiss RBC's Receivership Motion outright, the Applicants submit that a measured and practical approach would be for the Court to adjourn the Receivership Motion, grant an Initial Order, and have RBC advance its Receivership Motion at the Comeback Hearing. At that time, the two competing go-forward approaches could be more thoroughly argued and their respective merits more carefully considered.

#### KSV Should be Appointed Monitor

48. Subsection 11.7(1) of the CCAA requires a court, when granting an initial order, to appoint a person to monitor the business and financial affairs of the applicant company.
49. KSV is a "trustee" within the meaning of section 2 of the BIA and is not subject to any of the restrictions on who may be appointed as Monitor set out in s. 11.7(2) of the CCAA.
50. KSV has consented to act as Monitor for the Applicants, subject to his Court's approval.
51. KSV has extensive experience in matters of this nature, including both going concern and liquidation proceedings in the CCAA, and is therefore well-suited to this mandate.
52. The Applicants believe that it is in their best interests that KSV be appointed as Monitor.

#### **CONCLUSION:**

53. The Applicants are confident that their business operations can be successfully restructured to remain as a going concern, and in fact they had been actively working to resolve their cashflow issues throughout 2024. At this time, however, RBC's Receivership Motion has left the Applicants with little choice but to seek CCAA protection.
54. Dealing with the Applicants' insolvency by forcing them into an RBC-led receivership designed


to facilitate a piecemeal liquidation of their assets is not practical. While this will surely see RBC repaid, it will dramatically diminish the collective value of the Applicants' businesses, cripple their ability to operate going forward, and prejudice other creditors and the broader group of stakeholders, including the Applicants' employees.

55. An Initial Order will allow the Applicants breathing room to stabilize and remain in control of their businesses while they review operational and financial restructuring options with the Proposed Monitor. Within a CCAA Proceeding, the Applicants intend to restore a positive cash flow balance, ensure long-term viability, and continue along their current growth trajectory. This outcome is best for all stakeholders, does not unduly prejudice RBC or any other party, and best fulfils the federal policy aims that the CCAA seeks to achieve.
56. The Applicants are seeking only what is reasonable and necessary in the circumstances. At the s. 11.02 Comeback Hearing, the Applicants will update the Court on the status and timing of the proposed ISP, will establish that they have been acting in good faith and with due diligence, as required by s. 11.02(3), and will seek an extension, along with such other reasonable and necessary relief as determined in consultation with the Proposed Monitor.

#### Relief Sought

57. The Applicants request an order:
- (a) in the form of the draft Initial Order filed with this application; and
  - (b) for such further and other relief as counsel may advise and this Court deems just.

**DATED** at St. John's, Newfoundland and Labrador, 26 November 2024.



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**DARREN D. O'KEEFE**  
O'KEEFE & SULLIVAN  
Counsel for the Company  
80 Elizabeth Avenue, Suite 202  
St. John's, NL, A1A 1W7  
dokeefe@okeefesullivan.com



**MARC DUNNING**  
BURCHELL WICKWIRE  
BRYSON LLP.  
Local Counsel for the Company  
1800 - 1801 Hollis Street,  
Halifax, NS B3J 3N4  
mdunning@bwblp.ca

**TO:** Service List attached hereto as **SCHEDULE "A"**