

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, 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

PART I: INTRODUCTION

1. This memorandum is filed in support of the Applicants' motion seeking an order for the approval of a Sales and Investment Solicitation Process substantially in the form and substance as set out in the Monitor's Third Report (the "**SISP**") and an extension of the stay of proceedings until 30 June 2025.

PART II: FACTS

2. On 13 December 2024, the Applicants obtained CCAA protection from the Nova Scotia Supreme Court under an initial order (the "**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) authorizing the Applicants and Monitor to pursue a refinance or sales process whereby the Applicants' obligations to the Royal Bank of Canada ("**RBC**") would be repaid in full (the "**Refinance Process**").

3. The Court subsequently granted an Amended and Restated Initial Order (the "ARIO"), which, among other things, extended the Stay Period to 08 March 2025.
4. The Applicants are currently seeking Court approval of the SISP and to extend the Stay Period up to and including 30 June 2025 to facilitate the SISP.

PART III: ISSUES

5. The issues to be decided are:
 - a) Should the SISP be approved?
 - b) Should the Stay Period be extended to 30 June 2025?

PART IV: LAW AND ARGUMENT

Approval of the SISP

6. The Applicants submit that the SISP accords with subsections 36(1) and (3) of the CCAA and the well-known test for court approval outlined in *Royal Bank of Canada v Soundair Corp.*¹
7. Subsections 36(1) and (3) of the CCAA read as follows:

"36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

...

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

¹ *Royal Bank of Canada v. Soundair Corporation*, [1991] OJ No 1137 (ONCA), paras 16 and 46 [Book of Authorities, Tab 1]

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.”

8. The *Soundair* test requires the Court to consider the following:

(a) whether the receiver [in this case, the Monitor] has made sufficient effort to get the best price and has not acted improvidently;

(b) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in working out the process.

9. *Soundair* indicates that there are important policy considerations weighing in favour of a Court giving deference to the recommendation of a receiver [in this case, the Monitor] and respect of their business judgment. As the Court of Appeal for Ontario put it in *Soundair*.

“If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in perception of receivers and in the perception of any others who might have occasion to deal with them... That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.”

10. The Monitor will confirm the SISP is commercially reasonable and will benefit the Applicants' creditors and stakeholders. There is no suggestion of improvidence.

11. The Applicants repeat the foregoing and submit that the relevant tests are met here and the SISP is supported by the Applicants and the Monitor as being in the best interest of all stakeholders. Therefore, the Applicants seek the Court's approval of the SISP.

Extension of the Stay Period

12. The Applicants seek to continue under the CCAA and to continue executing the SISP in the ordinary course, and as such require an extension of the Stay Period up to and including 30 June 2025.
13. Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms and reads as follows, “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.”
14. Orders made pursuant to section 11 of the CCAA are appropriate where they support and accord with the overall 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.²
15. Under s.11.02 of the CCAA, a court may rely on its broad discretion to extend a stay of proceedings previously granted to a debtor company, provided that: (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.
16. The Applicants have acted in good faith and with due diligence throughout the CCAA Proceeding and have actively cooperated with the Monitor and counsel. This will be confirmed by the Monitor.
17. The extension of the Stay Period until 30 June 2025 will allow the Applicants to continue operating in the ordinary course while the SISP is underway and avoid the potential expiry of the Stay Period. The potential expiry of the Stay Period during the SISP would be discouraging to potential bidders in the SISP and would be detrimental to the overall process of the SISP.
18. The Applicants respectfully submit that the continuation of the CCAA Proceeding remains preferable to any alternative option when considering the nature of the assets, the current stage of the process, and competing interests of various stakeholders. No party has identified a viable wholistic alternative approach that would better serve the interests of all stakeholders, and the other policy aims of the CCAA legislation.

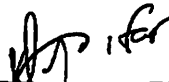
² 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 [Book of Authorities, Tab 2]

PART V: CONCLUSION

19. The Applicants submit that the SISP for which Court approval is requested meets the principles set out under Section 36 of the CCAA and satisfies the *Soundair* test. Therefore, the Applicants request the approval of the SISP.
20. The Applicants further submit that the Court has jurisdiction to extend the Stay Period until 30 June 2025, and that is appropriate to do so as the Applicants have acted with good faith and due diligence in actively seeking the SISP and taking other steps within the CCAA Proceeding.
21. The Applicants request an Order substantially in the form of the draft order that will be provided to the Court in advance of the hearing.

All of which is respectfully submitted.

Signed this 27th day of February, 2025.



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