



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: BK-23-02941764-0031  
and BK-23-02941767-0031 DATE: MAY 16, 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF SCOTCH & SODA CANADA INC.  
&  
IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF SCOTCH & SODA RETAIL CANADA INC.

BEFORE JUSTICE: STEELE

**PARTICIPANT INFORMATION**

**For Applicant, Moving Party:**

Name of Person Appearing	Name of Party	Contact Info
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**For Other:**

Name of Person Appearing	Name of Party	Contact Info
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**ENDORSEMENT OF JUSTICE STEELE:**

1. The Court heard two motions. The first motion was by Scotch & Soda Canada Inc. (“Wholesale”) and Scotch & Soda Retail Canada Inc. (“Retail”, and together with Wholesale, the “Companies”) for an order procedurally consolidating the two proceedings. Each of the Companies had commenced their respective proceeding by filing a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the “BIA”).
2. The second motion is for an order:
  - a) Extending the time for the Companies to file proposals pursuant to the BIA to July 22, 2023 (being 45 days from its current expiry of June 8, 2023);
  - b) Approving the Administration Charge and Director’s Charge;
  - c) Approving the consulting agreement between the Companies and Tiger Asset Solutions Canada, ULC dated as of May 11, 2023 and the transactions contemplated thereby;
  - d) Approving the proposed Sale Guidelines for the orderly liquidation of the Merchandise; and
  - e) Approving relief in connection with the *Wage Earner Protection Program Act* (“WEPPA”) for any employees whose employment with the Companies may be terminated as part of the NOI Proceedings.
3. The proposed orders are unopposed.

*Consolidation*

4. The Court’s jurisdiction to procedurally consolidate the two matters stems from Rule 6.01 of the *Rules of Civil Procedure* (“RCP”), which is incorporated into the bankruptcy context through Section 3 of the *Bankruptcy and Insolvency General Rules*.
5. Rule 6.01 of the RCP permits a Court to consolidate the proceedings where the two proceedings have (a) a question of law or fact in common; (b) the relief claimed arises out of the same transaction or occurrences; or (c) for any other reason the order should be made. Procedural consolidation is permitted in order to avoid “unnecessary costs or delay.”
6. At para. 31 of the Companies’ factum the Companies set out the reasons procedural consolidation is appropriate in this case. I note that the Proposal Trustee also believes that procedurally consolidating the proceedings is appropriate for the following reasons:
  - a. It will permit all applications to be brought before one justice, rather than having multiple proceedings. Additionally, the consolidation sought will allow the Companies to advance these proceedings in the most expedient and efficient manner for the benefit of stakeholders;
  - b. It will facilitate the orderly administration of these proceedings;
  - c. Creditor rights will not be affected by the procedural consolidation; and
  - d. It will reduce costs, including by filing materials in one proceedings only.
7. I am satisfied that procedurally consolidating the proceedings is appropriate.

### *Stay of Proceedings*

8. The Companies are seeking a broader stay of proceedings which is consistent with the provisions customarily granted in proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") requiring, subject to further Court Order, suppliers and service providers to continue to provide goods and services without disruption, provided that the payment of the goods by the Companies is in accordance with normal practice or such other practices as may be agreed upon by the supplier or service provider and each of the Companies and the Proposal Trustee.
9. This type of relief has been granted in the context of NOI proceedings, such as *Sanderson-Harold Company Limited c.o.b. as Paris Kitchens*, Estate/Court File No. 31-2835198 (SCJ – Commercial List) (Extension Order dated June 8, 2022) at paras. 3 and 4 [*Sanderson Harold, Extension Order*] and *Nilex Inc.*, Estate/Court File No.: 24-2878531 (Court of King's Bench Alberta) (Extension Order dated November 8, 2022) at paras. 3 and 4. This is consistent with the Supreme Court of Canada's decision in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 24, which highlighted the importance of harmonization between the BIA and the CCAA.
10. The Companies state that in order for them to have the greatest opportunity to successfully complete the store closing sale, and to contemporaneously consider options to continue their businesses, they need time to operate without disruption during these proceedings.
11. The Proposal Trustee is supportive of this relief and believes that expanding the scope of the stay of proceedings is appropriate as the continued operation of the Companies will assist it to achieve its objectives in these proceedings.
12. I am satisfied that the broader stay of proceedings sought is appropriate.

### *Administration Charge*

13. The Companies seek an Administration Charge securing the fees and disbursements of counsel to the Companies, the Proposal Trustee and its counsel in the maximum amount of \$125,000 against Retail's property and \$125,000 against Wholesale's property.
14. Section 64.2 of the BIA provides the Court with authority to grant a charge over the debtor's property in order to secure the fees and expenses of professionals involved in the restructuring.
15. Canadian counsel to S&S Lender LLC, the only secured party, was consulted in connection with the motions and served.
16. Administration charges have been approved in other BIA proposal proceedings where the participation of insolvency professionals is necessary to ensure a successful restructuring under the BIA: *Mustang GP Ltd. (Re)*, 2015 ONSC 6562, at para. 33.
17. The Proposal Trustee supports the Administration Charge, and provides the following reasons for doing so (at 8.1 of the First Report):
  - a. It is a standard feature of Canadian restructuring proceedings;
  - b. It is required to protect the Administrative Professionals retained in these proceedings given the Companies' limited liquidity at this time;

- c. The Proposal Trustee and Cassels have each received nominal retainers of \$50,000;
- d. Subject to the completion of the foreclosure in the US, there are no secured creditors in these proceedings and accordingly, the recommended Court-ordered charges would be priming any such parties; and
- e. The Administrative Professionals in the proceedings require the protections resulting from the Administrative Charge.

18. I am satisfied that the Administration Charge sought is appropriate.

#### *Director's Charge*

19. The Companies seek a director's charge in favour of the directors and officers in the maximum amount of \$90,000 against Retail's property and \$70,000 against Wholesale's property.

20. Section 64.1 of the BIA authorizes the Court to grant a charge in connection with a director's indemnification.

21. Director's charges have been granted in other BIA proceedings where the Court has been of the view that the continued involvement of the remaining directors and officers was critical to the operations of the company during its proposal proceedings: *Re Colossus Minerals Inc.*, 2014 ONSC 514 at paras. 16 and 21. In *Colossus*, Justice Wilton-Siegel further noted that a director's charge was appropriate given that limitations and exclusions of the directors' and officers' insurance policies which created uncertainty as to coverage of all potential claims.

22. The Companies advise that the D&O policy that is presently in place is set to expire on July 1, 2023 and coverage is subject to several exclusions and limitations and there is potential for insufficient coverage in respect of potential director and officer liabilities. The Director's Charge would only cover amounts not covered by the insurance.

23. The remaining director is not prepared to continue as a director and officer of the Companies without the benefit of additional protection for post-filing liabilities. The Companies state that the continued involvement of this director is beneficial for the Companies and stakeholders and will reduce professional costs.

24. The Director's Charge is proposed to rank in priority to all other claims, other than the Administration Charge.

25. The Proposal Trustee is supportive of the proposed amount of the Director's Charge and states that it is of the view that it is reasonable in the circumstances.

26. I am satisfied that the Director's Charge sought is appropriate.

#### *Consulting Agreement and Sale Guidelines*

27. The Companies seek the Court's approval of (i) the consulting agreement with Tiger Asset Solutions Canada, ULC ("Tiger"), dated May 11, 2023 (the "Consulting Agreement"), pursuant to which Tiger is to assist the Companies to sell their inventory and FF&E and (ii) the Sale Guidelines attached to the approval order.

28. Courts have jurisdiction to approve a sale authorizing the liquidation of a debtor's assets in an insolvency proceeding and has frequently done this in retail liquidations: See for example, the

proceedings in respect of *Bed Bath & Beyond*, Court File No. CV-23-00694493-00CL (SCJ [Commercial List]), *Nordstrom*, Court File No. CV-23-00695619-00CL (SCJ [Commercial List]), *Danier Leather Inc.*, Estate File No.: 31-CL-2084381.

29. Section 65.13 of the BIA permits the Court to authorize a disposition of a debtor's assets outside of the ordinary course. This section is applicable when a Court is considering approval of a liquidation sale, as is being requested here in accordance with the Consulting Agreement. Section 65.13 sets out the factors for the Court to consider, which include:
- a. Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
  - b. Whether the trustee approved the process leading to the proposed sale or disposition;
  - c. Whether the trustee 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.
30. The Companies address each of these factors at para. 54 of their factum.
31. The Sale Guidelines are based on those recently approved by the court in order retail liquidation proceedings, including *Nordstrom, Bed, Bath & Beyond* and *David's Bridal* proceedings. The Proposal Trustee states that the Sale Guidelines are acceptable to the Companies, Tiger and counsel for the *Cadillac Fairview Corporation Limited*, the landlord at three of the four retail locations.
32. The Proposal Trustee supports the retention of Tiger and recommends that the Court approve and authorize the Companies entering into the Consulting Agreement and approve the Sale Guidelines.
33. Tiger's fee is \$50,000. The Proposal Trustee notes that as the contemplated liquidation is a small sale, the professional fees associated with running an extensive process calling for proposals from several liquidators will exceed the benefit given Tiger's fee and the economics of this sale.
34. I approve the Consulting Agreement and Sale Guidelines and authorize the liquidation sale contemplated therein.

#### *WEPPA*

35. The Wage Earner Protection Program provides that eligible former employees may be entitled to payments in respect of outstanding eligible wages, including termination and severance pay, provided certain criteria are met. S. 5(1) of *WEPPA* provides that an individual is eligible if their employer is the subject of proceedings under Division I of Part III of the BIA and a Court determines under subsection (5) that the criteria prescribed by regulation are met.
36. Accordingly in order for access to this program to be available to former employees, a Court Order under section 5(5) of *WEPPA* is required. Section 5(5) of *WEPPA* provides that on application by any person in proceedings under Division I of Part III of the BIA, a Court may determine that a former employee meets the criteria prescribed by the Wage Earner Protection Program Regulations, SOR/2008-22 ("WEPPR"). Section 3.2 of the WEPPR provides that "a court may determine whether the former

employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations”.

37. The evidence is that if there is no purchaser for the Canadian business or a going-concern outcome, Retail will need to terminate the employment of some or all of its employees during these NOI proceedings. The only employees who would remain would be those who were needed to wind down the business operations. Accordingly, the WEPPR requirements would be met.
38. As noted in the Proposal Trustee’s First Report, if Retail is required to terminate its employees during the NOI proceeding, it would be appropriate to provide them with access to resources under the *WEPPA* for any unpaid termination and severance pay.
39. I note that similar relief has been granted in other insolvency proceedings, as noted at para. 60 of the Companies’ factum.
40. The Proposal Trustee is supportive of this relief.
41. I am satisfied that this Order is appropriate.

*Extension of Time for the Companies to file Proposals*

42. The Companies filed their NOIs on May 8, 2023. Under s. 50.4(8) of the BIA, the Companies are required to file proposals with the official receiver within 30 days (i.e., June 8, 2023) unless the Court grants an extension of time.
43. Under s. 50.4(9) of the BIA, prior to the expiry of the proposal period, a debtor may apply to the Court for an order extending the time to file a proposal to a maximum of 45 days. For the Court to grant an extension, the Court must be satisfied that:
  - a. The insolvent person has acted, and is acting, in good faith and with due diligence;
  - b. The insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
  - c. No creditor would be materially prejudiced if the extension being applied for were granted.
44. The Companies are each seeking a 45-day extension to July 22, 2023.
45. The Proposal Trustee supports the Companies’ request for an extension and cites the following reasons:
  - a. The Companies are acting in good faith and with due diligence;
  - b. The extension will enhance the likelihood of the Companies being able to make a viable proposal to their creditors;
  - c. The extension should not adversely affect or prejudice any group of creditors as the Companies are projected to have funding to pay post-filing services and supplies in the amounts contemplated by the Cash Flow Forecast; and
  - d. It will provide the Companies with the additional time they require to complete the store closing sale and to further consider their restructuring options.
46. I am satisfied that it is appropriate to grant the requested extension.
47. Orders to go in the form signed by me today, with immediate effect and without the necessity of formal issuance and entry.



