CITATION: NFC Acquisition GP Inc. (Re), 2012 ONSC 1244
COURT FILES NOS.: CV-12-9554-00CL and CV-12-9616-00CL
DATE: 20120222

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

Court File No: CV-12-9554-00CL

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp.

AND RE:

Court File No: CV-12-9616-00CL

Bank of Montreal, Applicant

AND:

NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P., Respondents

BEFORE: D. M. Brown J.

COUNSEL: E. Lamek and C. Fell, for the Monitor and proposed Receiver, FTI Consulting Canada Inc.

C. Prophet and F. Lamie, for the Applicant, Bank of Montreal

D. Bish and A. Slavens, for the NFC Debtors

P. Osborne and B. Gray, for certain Directors of the Debtors

D. Bulas, for Edgestone Capital

H. Chaiton, for Westco MultiTemp Distribution Centres Inc.

HEARD: February 22, 2012

REASONS FOR DECISION

I. Motion to lift a *CCAA* stay to appoint a receiver

[1] The Bank of Montreal, the senior secured creditor of the debtor respondents, NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P. (the "Debtors"), moves for an order lifting the stay of proceedings in

the *CCAA* matter (CV-12-9554-00CL) to permit it to apply to appoint FTI Consulting Canada Inc. as receiver of all of the property, assets and undertaking of the Debtors.

II. Background events

[2] NFC produces ground and formed meats and held a 40% market share of the market for frozen burgers sold in grocery stores. On January 17, 2012 Morawetz J. made an Initial Order under the *CCAA* in respect of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp. (the "NFC Entities"). Two features of the Initial Order are of particular relevance to this motion. First, the Court approved a sale process in respect of the NFC Entities. Second, under the terms of the approved DIP facility, the availability of additional commitments under the facility beyond the initial $3.5 million was tied to the success of the sales process – if a Sales Process Default occurred, there would be no further availability of funds under the DIP Facility.

[3] The Monitor, FTI Consulting Canada Inc., has filed a Third Report dated February 21, 2012 describing the results of the sales process. Three final offers were received by the February 13, 2012 deadline. The Monitor then worked with NFC management to refine the terms of two bids.

[4] On February 13 a Major Customer of NFC advised the company that it had one day to match a competitive bid from another supplier of certain products which had proposed to reduce its prices to the Major Customer. The Monitor informed the two final bidders of this development. Between February 13 and 20 discussions took place amongst the Monitor, NFC, the two final bidders and the Major Customer to ascertain whether a transaction could be structured that would result in a going concern sale of the NFC Saskatoon production facility, or possibly both NFC production facilities.

[5] Under the terms of the Sales Process NFC had until the close of business on February 17 to put forward to BMO, in its capacity as DIP Lender, a form of agreement of purchase and sale so that the bank could determine whether it would make further advances under the DIP Facility.

[6] On February 17 one of the two final bidders withdrew from the sales process. The remaining bidder was prepared to proceed with an amended offer, but one which would require the DIP Lender to advance the remaining $7 million in the DIP Facility.

[7] On Monday, February 20 BMO delivered a notice that a Sales Process Default had occurred under the DIP Facility. Further funding was no longer available to the Debtors. That evening the Board of NFC resigned *en masse*. Management posted notices at the Debtors' facilities advising the employees that no work would be available for them the next day, Tuesday, February 21. That has led the Monitor to make the following recommendation:

> In light of the delivery of the Default Notice by BMO, the resignation of the NFC Board of Directors and management, the lack of funding for NFC's business and the perishable nature of NFC's inventory, the Monitor is of the view that it is vital to have an immediate and orderly shut-down of the NFC manufacturing operations and a swift transition to a court-appointed receivership of the assets of NFC. The Monitor is hopeful that a buyer for the closed NFC manufacturing faculties can be quickly identified among the parties

that participated in the Transaction Process, and that the manufacturing facilities can be sold on a turn-key basis in a short period of time, rather than liquidated.

The Monitor has prepared a cash flow projection for the conduct of a shut-down receivership for the assets of NFC, which would be funded pursuant to Receiver's Certificates. BMO has agreed to fund such Receiver Certificate amounts on a basis and priority consistent with the existing DIP Facility and DIP Charge.

[8] As of February 20, 2012 the Debtors owed BMO approximately $24.5 million. BMO is the senior secured creditor and the DIP Lender. The priority position of the BMO is not in dispute.

[9] BMO applies for a lifting of the stay in the *CCAA* proceeding and the appointment of a receiver over the Debtors to secure the property and assets of the Debtors, including the perishable food inventory, and to proceed with an orderly realization and maximization of the value of the Debtors' assets. Paragraph 36(b) of the Initial Order provided that upon the occurrence of an event of default under the Definitive Documents, BMO, as DIP Lender, could apply to the court for the appointment of a receiver. A Sale Process Default is a Specified Event of Default, and BMO gave notice of such a default this past Monday.

[10] FTI has consented to act as receiver of the Debtors.

II. Analysis

[11] In *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (S.C.J.) Pepall J. summarized the principles which should guide a court when facing a request to lift a stay of proceedings under the *CCAA*:

> 32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.
>
> 33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.* and Professor McLaren has added three more since then. They are:
>
> 1. When the plan is likely to fail.
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

[12] Turning to the present case, BMO gave notice of its motion by e-mail yesterday to those on the Service List in the *CCAA* proceedings. Under the circumstances such short notice was necessary, and I validate the short service.

[13] No party has appeared to oppose the motions to lift the stay and appoint a receiver. The Monitor supports the lifting of the stay and the appointment of a receiver. The Monitor also advised that the Saskatoon local of the employees' union does not oppose the orders sought.

[14] Quite frankly, on the evidence before me, I see no other alternative than appointing a receiver. The Sales Process has fallen apart as a result of the inability to work out an arrangement with the Major Customer. Consistent with the terms of the DIP Facility approved in the Initial Order, BMO, as DIP Lender, has declined to make further advances and has served a notice of Sales Process Default. As a result, the Debtors have no access to further working funds.

[15] The Board of the Debtors resigned *en masse* two days ago; the Debtors are rudderless, reducing the prospects of a viable proposal in the *CCAA* process down to nil. The Monitor advises that management instructed employees not to report to work yesterday, so the Debtors are not carrying on any business at the moment. A significant inventory of meat products sits in the Saskatoon facility, although the Monitor advises that any fresh meat either has been shipped out or frozen. In a very real sense the Debtors have ceased carrying on business as a going concern.

[16] The appointment of a receiver is required to stabilize this situation for the benefit of all stakeholders of the Debtors.

[17] BMO has filed a draft receivership order which contains some amendments to the Commercial List Model Receivership Order. I reviewed the proposed amendments with counsel in open court and heard submissions and explanations on some of the proposed changes. No party opposes the proposed draft receivership order. BMO and the receiver clarified that with respect to paragraphs 24 and 26 of the proposed order, the receiver will be bound by the terms of the February 7, 2012 letter from the Monitor to Westco which was placed before the court on the motion to obtain the February 16, 2012 extension order. BMO and the receiver confirmed, at the request of Debtors' counsel, that the orders sought would not terminate the existing *CCAA* proceedings.

[18] In sum, I conclude that the pressing circumstances in which the Debtors find themselves make it just and reasonable to appoint a receiver over them. I therefore grant BMO's motion to lift the stay of proceedings in the *CCAA* matter, and I grant the Bank's motion to appoint FTI Consulting as receiver over the Debtors. I have signed the draft orders submitted by BMO.

D. M. Brown J.

Date: February 22, 2012