



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00730212-00CL

HEARING DATE: DECEMBER 19, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF CHESSWOOD GROUP LIMITED ET AL

BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE KIMMEL:

The Motion

- [1] FTI Consulting Canada Inc. was appointed as monitor of the CCAA Parties (in such capacity, the "Monitor") pursuant to the initial order made October 29, 2024 and amended and restated on November 7, 2024. The Monitor was granted expanded powers to conduct and control the financial affairs and operations of the CCAA Parties pursuant to these orders.
- [2] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Monitor's factum filed for this motion dated December 18, 2024.
- [3] The Monitor originally scheduled a one-hour motion returnable on December 19, 2024 for:
- a. an order (the "SISP Approval Order") approving the proposed sales and investment solicitation process (the "Proposed SISP") for the business and assets of the CCAA Parties; and
 - b. an order (the "KERP Approval Order"): (i) approving the proposed key employee retention plan (the "Proposed KERP"); (ii) granting a third-ranking charge (the "KERP Charge") over the property of the CCAA Parties in favour of the Key Employees (as defined below); and (iii) sealing the Confidential KERP Appendix (as defined below).
- [4] As a result of an unsolicited offer received by the Monitor on November 20, 2024 to acquire the Rifco Entities, which was ultimately accepted subject to Court approval, the Monitor's motions for the SISP Approval and KERP Approval Orders were revised to exclude those entities/assets and a motion was added to seek an order (the "ARVO"): (i) approving the

sale by Chesswood Group Limited ("Chesswood") all of the issued and outstanding shares of Rifco Inc. (the "Purchased Shares") to Vault Auto Finance Corporation ("Vault") through a reverse vesting transaction (the "Rifco Transaction"); (ii) removing the Rifco Entities from these CCAA proceedings; (iii) adding a newly incorporated affiliate of Chesswood ("Residual Co." and, together with the CCAA Parties other than the Rifco Entities, the "Remaining CCAA Parties") as a party subject to these CCAA proceedings; and (iv) approving the Releases (as defined below) related to the Rifco Transaction.

[5] The Monitor was planning to complete the Rifco Transaction before the end of 2024 while at the same time pursuing the SISP and to continue to work toward a sale of the remaining CCAA Parties that are not part of the Rifco Transaction.

[6] The AVRO motion relating to the Rifco Transaction was adjourned to allow the parties to file additional material for the court's consideration, if they intend to proceed with that or any other transaction relating to the Rifco Entities. The parties shall contact the Commercial List scheduling office in the normal course to reschedule the AVRO or any other motion relating to the Rifco Entities when they are ready to proceed.

[7] In the meantime, the Monitor considers the SISP Approval Order and KERP Approval Order to both be crucial to pursuing any successful sale of the Remaining CCAA Parties' assets or business. The CCAA Parties are still under financial strain. The Remaining CCAA Parties have a significant burn rate and are not generating sufficient revenue to cover operating expenses.

[8] The Proposed SISP will allow for a fair and reasonable process to canvass the market for any interest in the Remaining CCAA Parties' business and assets on a going-concern basis in order to maximize value for the benefit of all stakeholders. The proposed single-phase process is necessary in light of, among other things, the Remaining CCAA Parties' liquidity issues. The KERP Approval Order will likewise support the retention of employees that are critical for a successful SISP.

The SISP

[9] The DIP Term Sheet includes a December 16, 2024, milestone date by which the CCAA Parties must provide a plan regarding one or more SISPs in respect of the business or property of the CCAA Parties or other wind-down options of the CCAA Parties to the DIP Agent. Such SISP(s) must be acceptable to the DIP Lender in all respects. Since November 6, 2024, the CCAA Parties and the Monitor, in consultation with the DIP Lenders, have worked diligently towards establishing the terms of one or more SISPs. The Proposed SISP to be approved by the SISP Approval Order has been consented to by the DIP Agent on behalf of all of the DIP Lenders.

[10] Given the extensive marketing efforts that were undertaken prior to the CCAA filing, and the continuing financial strain that the CCAA Parties are under, the Proposed SISP contemplates a single-phase process intended to solicit interest in one or more sales or partial sales, or an investment or similar transaction, in respect of the Remaining CCAA Parties' property or business.

[11] The court in *Nortel Networks Corp. (Re)*, 2009 CanLII 39492 (ONSC) at paras. 48-49, identified a number of factors that should be considered in determining whether to authorize a sale process. These factors remain applicable in determining whether a sale process should be approved even after the 2009 amendments to the CCAA: *Brainhunter Inc. (Re)*. 2009 CanLII 72333 (ONSC) at paras. 15-17. The applicable factors set out in s. 36(3) of the CCAA, relative to the approval of an eventual transaction, are relevant considerations in approving a sale process. See *Brainhunter*, at paras. 16 -17.

[12] These factors are satisfied in respect of the Proposed SISP for the reasons set out in paragraph 42 of the Monitor's factum, supported by the Monitor's Second Report dated December 14, 2024 (the "Second Report").

[13] A successful outcome to the SISP process would benefit the whole "economic community". None of Chesswood Group's creditors are objecting to it. The Monitor is not aware of any stakeholders that would be prejudiced by the Proposed SISP. No viable alternative to the proposed sale process has been identified.

[14] The timelines under the SISP are expedited, but they reflect the available cashflow and interim financing needs. The Applicants, the Monitor and the DIP Lender are of the view that the SISP's timelines provide enough time to adequately canvass the market. The Monitor is of the view that the Proposed SISP represents a reasonable balance between the Company's circumstances and the time required to solicit and complete a sale or investment transaction. Should more time be required, various deadlines may be amended by the Monitor with the prior written consent of the DIP Lenders, acting reasonably. The Proposed SISP retains some flexibility, including by providing the ability to seek approval of a stalking horse bid, should one emerge.

[15] The Monitor was involved in the development of the SISP and supports its approval. The Proposed SISP is intended to provide a fair and transparent process to be conducted in a manner so as to give interested parties fair and equal access to participate. The SISP is approved.

The KERP and Sealing of Confidential Appendix B to the Second Report

[16] The Monitor, in consultation with the CCAA Parties, has developed the Proposed KERP to facilitate and encourage the continued participation of certain senior management and key employees of the Remaining CCAA Parties who are required to guide the business through these CCAA proceedings and preserve value for stakeholders (the "Key Employees"). The

Proposed KERP includes a maximum amount of US\$2,000,000 and two payments. The amounts contemplated under the Proposed KERP are to be secured by the KERP Charge, which is subordinate only to the Administration Charge and the DIP Charge and only applies to the Remaining CCAA Parties.

[17] The court's discretion to approve the KERP falls under s. 11 of the CCAA. While the factors considered in granting a KERP vary from case to case, the factors that are generally present, and are present in this case, include the employee's importance to the restructuring process and the monitor's involvement in the development of and support for the KERP: see *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586, citing *Walter Energy Canada Holdings Inc. (Re)*, 2016 BCSC 107, at paras. 58-59. Underlying these considerations are three criteria: examining the presence of arm's length safeguards, the necessity of the KERP, and the reasonableness of its design (see *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at paras. 29-30; MEC at para. 69).

[18] These and other factors established in this case that support the granting of the Proposed KERP and associated KERP Charge are outlined in paragraph 45 of the Monitor's factum.

[19] The Applicants and the Monitor believe that the KERP and the KERP Charge create sufficient and appropriate incentives to achieve the KERP's purpose, which is to ensure stability in the Applicants' management. The DIP Lender also has reviewed and approved the KERP.

[20] The court considers the KERP and KERP Charge to be fair, reasonable and necessary in the circumstances. They are approved.

[21] Appendix "B" to the Second Report contains a table listing the Key Employees, their current annual salaries, and their total additional compensation contemplated under the Proposed KERP (the "Confidential KERP Appendix"). They have not consented to their personal financial information being made public. There is no apparent benefit or reason at this time to disclose that confidential information publicly.

[22] The proposed KERP Approval Order includes a provision sealing the Confidential KERP Appendix pursuant to section 137(2) of the *Courts of Justice Act*, such that it does not form part of the public court record pending further order of the court.

[23] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 SCR 75, at para 38. Preservation of this type of personal financial information in the context of a KERP has been recognized as meeting the requirements of the test for sealing court documents: see for example, *Just Energy Group Inc. et al.*, 2021 ONSC 7630, at paras. 27-29.

[24] The interests to be balanced under the *Sherman Estate* test include the important public interest of court openness, the necessity of the order to prevent identified risks to private interests that cannot be prevented through other measures, and the proportionality of the benefits and negative effects of granting the order. In this case, the balancing of these interests favours granting the sealing order over the Confidential KERP Appendix:

- a. The public interest: In addition to the recognized public interest in maintaining the openness of the court, is also a recognized public interest both in maximizing recovery in an insolvency, and in protecting employees from the disclosure of private and personal information: see *Body Shop Canada Ltd. (Re)* (15 April 2024), Toronto BK-24-03050418-0031 (ONSC) (Endorsement), at para. 28 (decided in the BIA context, but discussing CCAA cases), citing *Re Danier Leather*, 2016 ONSC 1044 at paras. 77 and 84. CCAA courts have accordingly approved sealing orders in respect of a KERP where the order is required to protect commercially sensitive and confidential information relating to the employees of a debtor: see e.g., *Ted Baker Canada Inc. et al v. Yorkdale Shopping Centre Holdings Inc.* (3 May 2024), Toronto CV- 24-00718993-00CL (ONSC) (Endorsement), at para. 20; *Mastermind GP Inc. (Re)*, (30 November 2023), Toronto CV-23-00710259-00CL (ONSC) (Endorsement), at paras. 35-36; *Body Shop*, at paras. 27-30.
- b. The Confidential KERP Appendix contains commercially sensitive and personal information related to the Key Employees, which, if disclosed, could harm both the privacy interests of the Key Employees and the CCAA Parties' commercial interests.
- c. The Monitor is of the view that disclosure to the public at large serves no significant public interest.
- d. There is no reasonable alternative to the sealing order that would protect the commercial and privacy interests of the CCAA Parties and the individual Key Employees.
- e. As public disclosure of the information contained in the Confidential KERP Appendix would not assist the CCAA Parties' stakeholders in any way, protecting the privacy interests of the Key Employees far outweigh any negative effects. The salutary benefits of the sealing request outweigh any deleterious effects.

[25] The proposed sealing order is limited to this one page Confidential KERP Appendix so as to minimally intrude upon the public interest in the openness of our courts. Further, the order allows for the possibility of unsealing upon further order of the court. CCAA courts have approved sealing orders where the information over which confidentiality is sought to be maintained is "discrete, proportional, and limited." See: *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753 at para. 63. The proposed sealing order fulfils these criteria, as it applies only to the Key Employees.

[26] The Monitor is directed to ensure that the Confidential KERP Appendix is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that it can be physically sealed, and to apply for an unsealing order at the appropriate time.

Orders

[27] The SISP Approval Order and KERP Approval Orders dated December 19, 2024 and signed by me that day are granted and may be issued, but they shall have immediate effect without the necessity of formal issuance and entry. The Monitor may come back to seek amendments to the SISP Order and the KERP Order to include the Rifco Entities that have been excluded, if deemed appropriate.

A handwritten signature in cursive script, appearing to read "Kimmel J.", written in dark ink.

KIMMEL J.

December 20, 2024