



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: BK-23-02978830-0031;
CV-23-00707052-00CL
CV-23-00707205-00CL

DATE: 6 October 2023

NO. ON LIST: 6

TITLE OF PROCEEDING: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE BANKRUPTCY AND INSOLVENCY ACT OF WHYTE'S FOODS INC.

WELLS FARGO CAPITAL FINANCE CORPORATION CANADA V.
WHYTE'S FOODS INC. AND OTHERS

FARM CREDIT CANADA V. WHYTE'S FOODS INC. and others

BEFORE JUSTICE: MR JUSTICE CAVANAGH

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE CAVANAGH:

On August 23, 2023, Whyte's Foods Inc. (the "Company") filed a notice of intention to make a proposal pursuant to section 50.1(1) of the *Bankruptcy and Insolvency Act*. Alvarez & Marsal Canada Inc. was appointed as the Proposal Trustee.

On August 31, 2023, this Court granted the Initial Order which, among other things: (a) approved the SISP, and authorized and directed the Company's financial advisor and the Proposal Trustee, in consultation with the Company, to conduct the SISP; and (b) extended the time for the Applicant to file a proposal, and the corresponding stay of proceedings, until and including October 10, 2023.

The Company moves for an order (a) approving the sale transaction contemplated by an Agreement of Purchase and Sale dated September 29, 2023 (the "St. Louis Purchase Agreement") between the Company and 9498-8995 Québec Inc. and 9498-8938 Québec Inc. (collectively, the Purchasers") and vesting in the Purchasers all of the

Company's right, title and interest in and to the Purchased Assets (as defined in the St. Louis Purchase Agreement), and (b) extending the time for the Company to file a proposal, and the corresponding stay of proceedings, until and including October 13, 2023.

The factual background to this motion is set out in the initial affidavit of Elizabeth Kawaja and the affidavit of Elizabeth Kawaja sworn October 2, 2023. This factual background is summarized in the Company's factum at paragraphs 6-31.

This Court has jurisdiction to approve a sale of assets outside of the ordinary course of business pursuant to section 65.13 of the BIA. Subsection 65.13 (4) of the BIA provides a non-exhaustive list of factors for the Court to consider in determining whether to approve a sale under section 65.13. These factors correspond to the principles set out in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (Ont. C.A.). See *Harte Gold Corp. (Re)*, 2022 ONSC 653, at para. 21.

I am satisfied that based on the criteria in subsection 65.13 (4) and the *Soundair* principles, considered in the context of the circumstances confronting the Company and the proposed transaction, that the proposed transaction should be approved. In this regard, I accept the submissions made on behalf of the Company at paragraph 38 of its factum.

Section 50.4(9) of the BIA provides for an extension of the time to file a proposal and the corresponding stay of proceedings on an application by the insolvent person. The Court may grant such an extension if it is satisfied that (a) the insolvent person has acted, and is acting, in good faith and with due diligence; (b) insolvent person would likely to 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. It has been held that an extension may be granted where it is necessary for a sale process to be completed. See, for example, *Mustang GP Ltd. (Re)*, 2015 ONSC 6562, at para. 41.

I am satisfied that the Company has acted in good faith and with due diligence and that the extension will allow the Company to implement the St. Louis transaction. There is no known prejudice that will be suffered by any creditors or other stakeholders by the proposed extension which is necessary to give effect to the SISP. I am satisfied that the requested extension until October 13, 2023 should be granted.

The Company requests an order sealing Confidential Appendix "1" to the Second Report of the Proposal Trustee which contains a summary of the economic terms of the bids received pursuant to the SISP. I am satisfied that this document contains commercially sensitive information that may, if the St. Louis transaction fails to close or if future transactions are brought forward to the Court for approval, affect the integrity of any future sale of the assets and/or business of the Company. In the circumstances, I am satisfied that the tests for a sealing order set out in *Sherman Estate v. Donovan*, 2021 SCC 25, at paras. 38 and 43, are satisfied.

In addition to the Company's motion, there are two separate applications before me brought by secured creditors of the Company.

Farm Credit Canada makes an application for an order appointing FTI Consulting Canada Inc. as receiver and manager, without security, over the property, assets and undertakings that constitute the "Non-Trade Personal Property" of the Company and other respondents who are guarantors of the obligations of the Company to FCC.

Wells Fargo Capital Finance Corporation Canada makes an application for an order appointing Ernst & Young Inc. as receiver, without security, of those assets that constitute Trade Personal Property (as defined in the affidavit of Carmela Massari sworn October 3, 2023) of the Company, Maison Gourmet Inc. (together, "Co-Borrowers"), Triak Capital Inc. and Mario Saroli Sales Inc. ("Guarantors").

I have reviewed the application materials in respect of each application and heard submissions from counsel. In respect of each application, I am satisfied that it is just and convenient for a receiver to be appointed. In this respect, I accept the submissions made on behalf of FCC at paragraphs 19-28 of its factum. I accept the submissions made on behalf of Wells Fargo at paragraphs 32-41 of its factum. The respondents in each application do not oppose the requested Orders.

In the NOI proceeding, Wells Fargo moves for an order that, effective upon the filing with the Court of the Proposal Trustee's Certificate (as defined in the St. Louis Sale Approval and Extension Order that I am issuing today) (a) the period in which a proposal is to be filed with the Official Receiver shall terminate pursuant to section 50.4 (11) of the BIA; and (b) Ernst & Young Inc. shall be appointed as trustee in these proceedings in lieu of Alvarez & Marsal Canada Inc. pursuant to section 57.1 of the BIA. On this motion, a request is made for releases of the Proposal Trustee and its legal counsel save and except for any gross negligence or wilful misconduct. The requested order provides for certain transition matters that will facilitate the orderly termination of the NOI proceedings and the commencement of the receivership proceedings. I am satisfied that the requested order should be made.

Orders to issue in forms of Orders signed by me today.