

Court File No. BK-24-3082683-0032  
Estate File No. 32-3082683

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
NIAGARA FALLS CRAFT DISTILLERS LTD. OF THE CITY OF NIAGARA FALLS IN THE  
PROVINCE OF ONTARIO**

**FACTUM OF THE COMPANY  
(RE: STAY EXTENSION AND SALE PROCESS APPROVAL)**

July 25, 2024

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**TO: THE SERVICE LIST**

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## **PART I – OVERVIEW**

1. On May 21, 2024, Niagara Falls Craft Distillers Ltd. (the “**Company**”) filed a Notice of Intention to Make a Proposal (“**NOI**”) under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”). MNP Ltd. was appointed as proposal trustee under the BIA (in such capacity, the “**Proposal Trustee**”).<sup>1</sup>
2. This factum is filed in support of the Company’s motion to the Superior Court of Justice (the “**Court**”) seeking an Order in the form found at [Tab 3 of the Company’s Motion Record](#) (the “**SISP Approval Order**”) that, among other things:
  - a) extends the time to file a proposal pursuant to s. 50.4(9) of the BIA for 45 days, from August 5, 2024, up to and including September 19, 2024 (the “**Extended Stay Period**”); and
  - b) approves the sale and investment solicitation process (“**SISP**”), *nunc pro tunc*, in the form attached as Schedule “A” to the SISP Approval Order.
3. The Company’s requested relief is intended to preserve the going-concern operations of the Company while providing the Company the breathing room to maximize the value of the Company for its stakeholders through the implementation of the SISP.
4. The Proposal Trustee is supportive of the requested relief. The Company’s primary secured lender, Bank of Montreal (“**BMO**”), has advised it does not oppose the SISP.<sup>2</sup> As of the date of this factum, the Company has not been made aware of any opposition to the requested relief.

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<sup>1</sup> Affidavit of Andrew Murison sworn July 24, 2024, [para. 2](#), Motion Record of Niagara Falls Craft Distillers Ltd., Tab 2 (“**Murison Affidavit**”).

<sup>2</sup> Murison Affidavit, *supra*, [para. 39](#).

## **PART II – FACTS**

### **A. Background of the Company**

5. The Company is in the business of producing, manufacturing, and selling high-quality, craft spirits and liquors (the “**Business**”).<sup>3</sup> The Company’s Business includes three primary components:

- a) contract manufacturing: the Company is contracted by third parties as a consultant and facilitator in the creation, manufacturing, packaging, and distribution of beverage products. The third parties that are reliant on the Company’s manufacturing services include large corporate groups that own various well-known alcoholic beverage brands as well as small and medium-sized, local businesses.
- b) exclusive distilled spirits partner of Sysco Canada (“**Sysco**”): the Company is Sysco’s exclusive distilled spirit partner in Ontario. As such, the Company is part of Sysco’s Ontario distribution network and produces and provides promotional/product support of distilled spirits.
- c) manufacturing and selling its own products: true to its roots, the Company continues to develop, manufacture, sell, and distribute its own alcoholic and non-alcoholic beverage products, including Premium Rye Whisky, Premium Maple Whisky, Icebridge Vodka, Ridgeway Canadian Whisky, Lundy’s Lane 1814 London Dry Gin, Arcadia 1923 Filtered Rum, The JRNY Canadian Whisky, Avé Tequila, and Better Daze tequila sodas.<sup>4</sup>

6. The Company operates from leased premises located in Niagara Falls, Ontario. The

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<sup>3</sup> Murison Affidavit, *ibid*, [para. 7](#).

<sup>4</sup> Murison Affidavit, *ibid*, [para. 7](#).

premises include an area for beverage manufacturing and packaging machines and equipment, an office space, a large warehouse, an outdoor storage area, and other facilities. The Company's location near the United States border facilitates access to the United States' economy, which is the predominant importer of Canadian spirits.<sup>5</sup>

7. To support its Business, the Company maintains relationships with numerous suppliers in Ontario, Canada, and internationally. The Company's suppliers include carefully selected, local producers who supply the Company with high-quality products.<sup>6</sup>

8. The Company also holds and maintains numerous certifications that have material value, including certifications from the Alcohol & Gaming Commission of Ontario, Canada Revenue Agency, Canada Food and Drug Agency, Hazard Analysis and Critical Control Points Canada, Pro-Cert, and the International Organization for Standardization.<sup>7</sup>

9. Since the Company's inception, the Company has contributed to the Ontario and Niagara Falls region through the payment of over \$6 million in salaries, remittances of over \$4.5 million in alcohol duties, the generation of \$1 million in sales taxes, and through expenditures of \$3 million to small local businesses on account of the supply of goods and services.<sup>8</sup>

## **B. The Company's Financial Difficulties Resulting in the NOI**

10. In and around September 2020, the Company began experiencing significant cash flow pressures due to numerous compounding factors including rising inflation and interest rates, operational inefficiencies created by a decline in the Company's contract manufacturing business, and the delisting of certain alcoholic products by the Liquor Control Board of Ontario.<sup>9</sup>

11. In and around November 2022, in an effort to address its cash flow challenges, the

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<sup>5</sup> Affidavit of Andrew Murison dated June 12, 2024 ("**June Murison Affidavit**"), [paras. 8](#) and [13](#), Exhibit C to the Murison Affidavit.

<sup>6</sup> June Murison Affidavit, *ibid*, [para. 11](#).

<sup>7</sup> June Murison Affidavit, *ibid*, [paras. 14-15](#).

<sup>8</sup> Murison Affidavit, *supra*, [para. 8](#).

<sup>9</sup> Murison Affidavit, *ibid*, [para. 9](#).

Company began expending significant funds to decrease costs and increase revenue by expanding its Business. In particular, the Company invested in developing a high-speed canning line (the “**Canning Line**”) and a corresponding expansion of its warehouse footprint. In order to fund the expansion, the Company relied upon a loan from ALNA Packaging Co., Ltd. (“**Alna**”). The Company has not yet realized the anticipated efficiencies from the expansion to offset the increased costs incurred in developing and maintaining the expanded operations. Accordingly, the Company’s expansion has added additional pressure on the Company’s cash flow.<sup>10</sup>

12. As a result of the mounting financial pressures, the Company was unable to make its debt service payment to its principal secured lender, Bank of Montreal (“**BMO**”). Accordingly, on May 9, 2024, BMO delivered a demand to the Company and issued a Notice of Intention to Enforce Security under section 244 of the BIA.<sup>11</sup>

13. In order to protect the going-concern nature of the Business, as well as develop a long-term solution to the Company’s liquidity challenges, the Company filed an NOI on May 21, 2024.<sup>12</sup>

### **C. The NOI Proceeding**

14. The purpose of the NOI proceeding is to restructure the Company’s balance sheet while maintaining going concern operations to preserve employment and supplier relationships and maximize recovery for stakeholders through the implementation of the SISP.<sup>13</sup>

15. On June 20, 2024, the Court extended the time for the Company to file a proposal by 45 days to August 5, 2024, and granted a first-ranking administration charge over the property of the Company in the maximum amount of \$125,000 to secure the fees and disbursements of counsel to the Company, the Proposal Trustee, and counsel to the Proposal Trustee incurred in connection with this NOI proceeding.<sup>14</sup>

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<sup>10</sup> Murison Affidavit, *ibid*, [paras. 10-11](#).

<sup>11</sup> Murison Affidavit, *ibid*, [para. 12](#).

<sup>12</sup> Murison Affidavit, *ibid*, [para. 13](#).

<sup>13</sup> Murison Affidavit, *ibid*, [para 14](#).

<sup>14</sup> Murison Affidavit, *ibid*, [para. 3](#).

16. Since the Company was last before the Court on June 20, 2024, the Company has, among other things:

- a) continued to operate the Business in the normal course, with the oversight of the Proposal Trustee;
- b) developed the SISP with a view to canvassing the market for a transaction and developing a viable proposal;
- c) assisted the Proposal Trustee in implementing the SISP by meeting with potential bidders, providing documents for the virtual data room (“VDR”), and responding to due diligence questions;
- d) prepared and served termination letters for five employees;
- e) engaged with stakeholders, including BMO, Alna, and vendors, to build consensus on the steps contemplated in this restructuring proceeding;
- f) engaged with employees and customers to address any questions about the NOI proceeding; and
- g) with the assistance of the Proposal Trustee, continued to assess various restructuring options with a view to closing a transaction and developing a viable proposal.<sup>15</sup>

#### **D. The SISP**

17. In an effort to develop a long-term solution to the Company’s financial troubles, the Company determined that a sale and investment solicitation process is critical to developing a value-maximizing restructuring solution. Accordingly, the Company, in consultation with the Proposal Trustee, developed the SISP.<sup>16</sup>

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<sup>15</sup> Murison Affidavit, *ibid*, [paras. 15, 18](#), and [31](#).

<sup>16</sup> Murison Affidavit, *ibid*, [para. 18](#).

18. The goal of the SISP is to thoroughly canvass the market for a transaction, in the form of sale or investment transactions, that will maximize value for the benefit of all stakeholders. To fulfill this goal, the SISP is intended to widely expose the Company's Business to the market and provide a structured process for interested parties to perform due diligence and submit offers for a potential transaction.<sup>17</sup>

19. The SISP contemplates a 39-day, single phase sale process that will be managed the Proposal Trustee.<sup>18</sup>

20. The SISP was designed to commence on July 15, prior to this motion being heard by the Court. The Company, in consultation with the Proposal Trustee, determined that immediate commencement of the SISP was appropriate because:

- a) the Company is in the midst of its peak business activity and has the cash flow necessary to sustain the business through the proposed SISP; and
- b) by commencing the SISP before receiving Court approval, the Company was able to have a longer sale process (by approximately 15 days) than if the Company had to wait to commence the SISP after Court approval on July 30, 2024.<sup>19</sup>

21. The other key terms of the SISP are as follows:<sup>20</sup>

- a) **Commencement of the SISP:** the Proposal Trustee, with the assistance of the Company, will commence the SISP on July 15, 2024 by providing a list of known interested parties, including those who have already expressed an interest in the sale process, with a teaser detailing the opportunity (the "**Teaser Letter**") and a non-disclosure agreement ("**NDA**") to be executed by any interested parties. The Proposal Trustee may also publish a notice of the SISP in any publication it deems appropriate.

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<sup>17</sup> Murison Affidavit, *ibid*, [paras. 19-20](#).

<sup>18</sup> Murison Affidavit, *ibid*, [para. 21](#).

<sup>19</sup> Murison Affidavit, *ibid*, [paras. 25-26](#).

<sup>20</sup> Murison Affidavit, *ibid*, [paras. 21](#) and [24](#).



- b) **Due Diligence:** parties who execute an NDA and provide the Proposal Trustee with financial disclosure that allows it, in consultation with the Company, to make a reasonable determination as to the party's financial and other capabilities to complete a transaction, will be granted access to the VDR to perform due diligence.
- c) **Bid Deadline:** all interested parties must submit a bid by no later than 5:00 p.m. (Toronto time) on August 23, 2024 (the "**Bid Deadline**").
- d) **Review of Bids:** the Proposal Trustee, in consultation with the Company, will review all bids to determine if it is a bid that meets the qualifying criteria in the SISP ("**Qualified Bid**"). To be a Qualified Bid, it must, among other things:
- i. be submitted on or before the Bid Deadline;
  - ii. identify the bidder and fully disclose any entities and/or individuals that control the bidder, and/or the beneficial owner (if any) with the power, directly or indirectly, to direct the management and policies of the bidder;
  - iii. if the bid is structured in the form of an asset purchase, include a duly authorized and executed binding transaction agreement, including all exhibits and schedules contemplated thereby, together with a blackline against the template Asset Purchase Agreement (which shall be posted in Word format in the VDR), describing the terms and conditions of the proposed transaction, including any liabilities proposed to be assumed, the purchase price, the structure and financing of the proposed transaction, and any regulatory or other third-party approvals required;
  - iv. if the bid is structured in a form other than an asset purchase (for example, an investment or share purchase), include a duly authorized and executed, definitive transaction agreement, containing the detailed terms and conditions

of the proposed transaction, including the Business or the assets proposed to be acquired, the obligations and liabilities to be assumed/excluded, the detailed structure of the transaction, the final purchase price or investment amount, and any other key economic terms expressed in Canadian dollars, together with all exhibits and schedules thereto, all applicable ancillary agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements), and the proposed form of order(s) for the Court to consider in the motion to approve the transaction;

- v. provide specific statements concerning the intended treatment of employees, suppliers, customers, existing agreements and contracts, or any other stakeholder which the Proposal Trustee requests the potential bidder to specifically address;
- vi. state it is not conditional upon any condition or contingency relating to due diligence, financing, bid protections, or any other material conditions precedent to the bidder's obligation to complete the transaction;
- vii. include a non-refundable cash deposit ("**Deposit**") in the form of a wire transfer to an account to be specified by the Proposal Trustee in the amount of not less than ten percent (10%) of the final purchase price, consideration or investment amount. This deposit shall be retained by the Proposal Trustee in a non-interest bearing trust account in accordance with this SISP. The Deposit will be returned to any bidder whose bid is not chosen as a Successful Bid as soon as reasonably practical after closing of the Successful Bid(s);
- viii. if the bid includes the purchase of the Canning Line, include an allocation of value to the Canning Line and the other collateral of Alna as identified in the Acknowledgement and Confirmation dated July 25, 2022, from BMO to Alna

(which document will be uploaded to the VDR), and an allocation of value to the balance of the assets being bid on;

- ix. include a description of any regulatory or other third-party approvals required to complete the proposed transaction, and the time within which the potential bidder expects to receive such regulatory and/or third-party approvals, and those actions the potential bidder will take to ensure receipt of such approvals as promptly as possible;
- x. include a statement that the potential bidder will bear its own costs and expenses (including all legal and advisor fees) in connection with the proposed transaction; and
- xi. include such other information as may be reasonably requested by the Company or Proposal Trustee.

e) **Selection of the Highest or Otherwise Best Bid (“Successful Bid”)**: the Proposal Trustee, in consultation with the Company, will review and evaluate each Qualified Bid, based upon several factors specified in the SISP. Within 5 business days of the Bid Deadline, the Company in consultation with the Proposal Trustee, will designate the highest or otherwise best bid(s) as the Successful Bid.

f) **Court Approval of a Successful Bid**: the Company will seek this Court’s approval of the Successful Bid as soon as possible after designating the Successful Bid subject to the Court’s availability and service of materials in accordance with the applicable rules of civil procedure.

g) **Closing of the Transaction Contemplated in the Successful Bid**: the transaction will close as soon as possible after Court approval and by no later than September 15, 2024, except as may be agreed to in writing by the parties.

22. The SISP provides that the Proposal Trustee may extend the SISP deadlines by up to two

weeks without Court approval. The ability to extend deadlines provides the Proposal Trustee and the Company with the necessary flexibility to maximize the success of the SISP.<sup>21</sup>

### ***Commencement of the SISP***

23. In accordance with the terms of the SISP, the Proposal Trustee commenced the SISP on July 15, 2024 by sending the Teaser Letter to the list of potential bidders.<sup>22</sup>

24. The Company has been working cooperatively with the Proposal Trustee in the implementation of the SISP including responding to due diligence requests and disclosing documents.<sup>23</sup>

### **PART III – ISSUES**

25. The issues before this Court are whether the Court should:

- a) extend the time to file a proposal for 45 days pursuant to section 50.4(9) of the BIA; and
- b) approve the SISP.

### **PART IV – LAW & ARGUMENT**

#### **A. The Court Should Approve the Stay Extension**

26. The current stay of proceedings is set to expire at the end of the day on August 5, 2024. Despite diligent efforts, the Company is not yet in a position to deliver a proposal to its creditors. Accordingly, the Company seeks a 45-day extension of the time to file a proposal to enable it to continue its restructuring efforts, implement the SISP, and avoid a deemed bankruptcy.<sup>24</sup>

27. Pursuant to section 50.4(9) of the BIA, the Court has the authority to extend the period for filing a proposal and the stay of proceedings for a period of 45 days where it is satisfied that:

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<sup>21</sup> Murison Affidavit, *ibid*, [para. 22](#).

<sup>22</sup> Murison Affidavit, *ibid*, [para. 27](#).

<sup>23</sup> Murison Affidavit, *ibid*, [para. 28](#).

<sup>24</sup> Murison Affidavit, *ibid*, [para. 30](#).

- 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 (collectively, the “**Section 50.4(9) Factors**”).<sup>25</sup>

28. The Company submits that each of the Section 50.4(9) Factors are met in this case.

i. **The Company has acted in good faith and with due diligence**

29. In *Re H&H Fisheries Limited*, the court noted that “the converse of good faith is bad faith, and bad faith requires some motivation or conduct which is unacceptable”.<sup>26</sup> In this case, there is no evidence that the Company has acted with bad faith or conducted itself in an unacceptable manner.

30. In contrast, the Company has submitted evidence, including the comments of the Proposal Trustee in the Second Report, which confirms that the Company has acted in good faith and with due diligence since the Company’s first stay extension on June 20, 2024.<sup>27</sup> Specifically, the Company has taken numerous steps to implement a restructuring that will result in its Business emerging as a going concern including:

- a) with the assistance of the Proposal Trustee and the Company’s legal advisors, continuing to analyze its restructuring options for the benefit of the Company’s stakeholders, including its customers, suppliers and employees;
- b) developing the SISP with a view to canvassing the market for a transaction and developing a viable proposal;

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<sup>25</sup> *BIA*, [s. 50.4\(9\)](#). See for example, *Colossus Minerals Inc. (Re)*, 2014 ONSC 514, [paras. 37-43](#); *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 at [para. 41](#); *Chester Basin Seafood Group Inc (re)*, 2023 NSSC 388, [paras. 14](#) and [20-21](#).

<sup>26</sup> *Re H&H Fisheries Limited*, 2005 NSSC 346 (“**H&H Fisheries**”), [para 17](#).

<sup>27</sup> Second Report of the Proposal Trustee, to be filed.

- c) assisting the Proposal Trustee in implementing the SISP by meeting with potential bidders, providing documents for the VDR, and responding to due diligence questions; and
- d) engaging in discussions with its stakeholders, including BMO, Alna, and vendors, to build consensus on the next steps in the NOI proceeding.<sup>28</sup>

31. Throughout the Extended Stay Period, the Company intends to continue to act with good faith and with due diligence by, among other things, continuing to operate in the normal course and assisting the Proposal Trustee in implementing the SISP for the purpose of maximizing the realization of the Business for the benefit of creditors and stakeholders.<sup>29</sup>

**ii. The Company will be likely to make a viable proposal**

32. The test for whether an insolvent person would likely be able to make a viable proposal if granted an extension is whether the insolvent person might (not certainly will) be able to present a proposal that seems reasonable on its face to a reasonable creditor.<sup>30</sup>

33. The Company submits that the evidence before the Court satisfies this requirement. The Company has advised it will use the extension of the time to maximize realization for its creditors and stakeholders by preserving the going concern nature of the enterprise while implementing a SISP.<sup>31</sup>

34. If the SISP results in a transaction, such a transaction may be the foundation of a possible proposal for the benefit of its general body of creditors. In contrast, without the granting of the Extended Stay Period, the Company will be deemed bankrupt and be unable to file a proposal for the benefit of its creditors.

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<sup>28</sup> Murison Affidavit, *supra*, [para. 31](#).

<sup>29</sup> Murison Affidavit, *ibid*, [para. 34](#).

<sup>30</sup> *H&H Fisheries*, *supra*, [para. 22](#); *Nautican v. Dumont*, 2020 PESC 15, [paras 16-17](#); *Andover Mining Corp. (Re)*, 2013 BCSC 1833, [para 35](#).

<sup>31</sup> Murison Affidavit, *supra*, [para. 34](#).

**iii. No creditor is materially prejudiced**

35. In considering this factor, courts consider whether there is a significant concern that would be unreasonable for a creditor to accept.<sup>32</sup>

36. The Company submits that there is no evidence of any material prejudice to any creditor if the requested extension is granted.<sup>33</sup> No additional financing is required for the Company to operate over the Extended Stay Period.<sup>34</sup> The extension of the stay will assist in the likelihood of a greater net recovery to creditors by allowing the Company to continue its Business as a going concern and implement the SISP.

37. Conversely, if the extension is not granted, the Company will be deemed to have made an assignment in bankruptcy and its efforts to successfully restructure its Business will be terminated. In such circumstances, the Company would suffer an irreparable destruction of value, to the detriment of its creditors, given the Company's primary assets - in supplier and customer relationships, licenses and certifications, accounts receivable, and goodwill - requires an operating Business to retain its value.<sup>35</sup>

**B. The Court Should Approve the SISP**

38. Pursuant to subsection 65.13 of the BIA, the Court is authorized to approve a sale of assets in a proposal proceeding under the BIA.<sup>36</sup>

39. Though this section only addresses the approval of the sale of assets rather than approval of a sale process, the non-exhaustive factors set out in subsection 65.13(4) of BIA provide useful guidance for this Court to consider in determining whether to approve a sale process:

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<sup>32</sup> *H&H Fisheries, supra, para. 37.*

<sup>33</sup> *Murison Affidavit, supra, para. 36.*

<sup>34</sup> *Murison Affidavit, ibid, para. 35.*

<sup>35</sup> *Murison Affidavit, ibid, para.33.*

<sup>36</sup> BIA, [s. 65.13\(1\)](#).

- (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.<sup>37</sup>

40. In *Nortel Networks Inc. (Re)*,<sup>38</sup> the Court stated that there are four factors to be considered in determining if a proposed sale process should be approved: (a) Is a sale transaction warranted at this time?; (b) Will the sale benefit the whole 'economic community? (c) Do any of the debtors' creditors have a bona fide reason to object to the sale of the business?; and (d) Is there a better alternative?<sup>39</sup>

41. While *Nortel* was decided in the context of a proceeding under the *Companies' Creditors Arrangement Act*, Courts have applied the same criteria in the context of approving a sale process in an NOI proceeding under the BIA.<sup>40</sup>

42. Courts have exercised their authority under s. 65.13 of the BIA to approve sale processes

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<sup>37</sup> BIA, [ss. 65.13\(4\)](#). See for example, *Datataxbusiness Services Limited v KPMG Inc*, [Endorsement of Cavanagh J.](#) (17 Aug 2023); *Danier Leather Inc. (Re)*, 2016 ONSC 1044, [para. 21](#).

<sup>38</sup> [2009 CanLII 39492 \(ON SC\)](#) [Morawetz J.] ("**Nortel**").

<sup>39</sup> *Nortel*, *ibid*, [para. 49](#).

<sup>40</sup> See for example *Mustang*, *supra*, [paras. 37-38](#); *Datataxbusiness Services Limited v KPMG Inc*, [Endorsement of Cavanagh J.](#) (17 Aug 2023).



that were commenced and already underway prior to receiving approval from the Court.<sup>41</sup>

43. The above-noted factors support the approval of the SISP. The Company is suffering an acute liquidity crisis. The Company requires a long-term solution in the form of a transaction. Without such a transaction, the Company may be forced to cease operations to the detriment of its stakeholders including its over 35 employees, customers, and suppliers.<sup>42</sup> There is no alternative to successfully restructure the Business without completing a transaction.

44. A going concern sale or investment transaction is necessary to preserve and maximize the value of the Company for the benefit of the whole 'economic community'. In particular, a shut down of operations or piecemeal liquidation process would result in an immediate and irreparable destruction of value of the Business given the Company's primary assets - in supplier and customer relationships, licenses and certifications, accounts receivable, and goodwill - requires an operating Business to retain its value.<sup>43</sup>

45. The Company has taken preliminary steps to conduct the SISP. Based on the progress of the SISP to-date, the Company is optimistic that the SISP is likely to result in a viable and value-maximizing transaction.<sup>44</sup>

46. The Company developed the SISP, in consultation with the Proposal Trustee, in accordance with prevailing sale process terms often used in insolvency matters. The SISP is a fair, transparent, and reasonable process to find a value-maximizing transaction. It will be implemented and supervised by the Proposal Trustee as an officer of this Court to ensure all bidders are treated in a fair and even-handed manner.<sup>45</sup>

47. The timeline of the SISP is reasonable as it balances the limitations of the Company's

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<sup>41</sup> See for example *In the Matter of the Proposal of FT ENE Canada Inc.*, [the Order of Justice Penny dated March 28, 2019](#) and the corresponding [Endorsement](#).

<sup>42</sup> Murison Affidavit, *supra*, [paras. 18, 37](#) and [40](#).

<sup>43</sup> Murison Affidavit, *ibid*, [para.33](#).

<sup>44</sup> Murison Affidavit, *ibid*, [para. 29](#).

<sup>45</sup> Murison Affidavit, *ibid*, [para. 20](#).

financial position with the need for sufficient flexibility to allow interested parties a reasonable opportunity to formulate and submit bids to maximize the success of the SISP. The timeline also takes into account the seasonality of the business and the fact that the Company's activity and margins are higher during the summer months.<sup>46</sup>

48. The Proposal Trustee is also supportive of the SISP.<sup>47</sup>

#### **PART V – RELIEF REQUESTED**

49. Based on the foregoing, the Company respectfully requests that this Court grant the proposed form of SISP Approval Order found at Tab 3 of the Company's Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25<sup>th</sup> DAY OF JULY, 2024.**



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**JESSICA WUTHMANN  
RECONSTRUCT LLP**

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<sup>46</sup> Murison Affidavit, *ibid*, [paras. 22-23](#).

<sup>47</sup> Murison Affidavit, *ibid*, [para. 38](#).

## **SCHEDULE "A"**

### **List of Authorities**

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| 1. <a href="#"><u>Colossus Minerals Inc. (Re)</u></a> , 2014 ONSC 514  |
| 2. <a href="#"><u>Re Mustang GP Ltd</u></a> , 2015 ONSC 6562   |
| 3. <a href="#"><u>Chester Basin Seafood Group Inc. (Re)</u></a> , 2023 NSSC 388  |
| 4. <a href="#"><u>Re H&amp;H Fisheries Limited</u></a> , 2005 NSSC 346   |
| 5. <a href="#"><u>Nautican v. Dumont</u></a> , 2020 PESC 15  |
| 6. <a href="#"><u>Andover Mining Corp. (Re)</u></a> , 2013 BCSC 1833   |
| 7. <a href="#"><u>Datataxbusiness Services Limited v KPMG Inc</u></a> , Endorsement of Cavanagh J. (17 Aug 2023)                                 |
| 8. <a href="#"><u>Danier Leather Inc. (Re)</u></a> , 2016 ONSC 1044  |
| 9. <a href="#"><u>Nortel Networks Inc. (Re)</u></a> , 2009 CanLII 39492 (ON SC)  |
| 10. <a href="#"><u>In the Matter of the Proposal of FT ENE Canada Inc.</u></a> , the Order and Endorsement of Justice Penny dated March 28, 2019 |

## **SCHEDULE "B"**

### **Statutory Authorities**

#### **Bankruptcy and Insolvency Act, RSC 1985, c B-3**

##### **Notice of intention**

**50.4 (1)** Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

##### **Certain things to be filed**

**(2)** Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

##### **Creditors may obtain statement**

**(3)** Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

##### **Exception**

**(4)** The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

- (a) such release would unduly prejudice the insolvent person; and
- (b) non-release would not unduly prejudice the creditor or creditors in question.

### **Trustee protected**

**(5)** If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

### **Trustee to notify creditors**

**(6)** Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

### **Trustee to monitor and report**

**(7)** Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

**(a)** shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

**(b)** shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

**(i)** with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

**(ii)** with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

**(c)** shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

### **Where assignment deemed to have been made**

**(8)** Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

**(a)** the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

**(b)** the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

**(b.1)** the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

**(c)** the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which

meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

### **Extension of time for filing proposal**

**(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application 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.

### **Court may not extend time**

**(10)** Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

### **Court may terminate period for making proposal**

**(11)** The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a)** the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b)** the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c)** the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d)** the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

### **Restriction on disposition of assets**

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

## **Individuals**

**(2)** In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

## **Notice to secured creditors**

**(3)** An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

## **Factors to be considered**

**(4)** 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 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.

## **Additional factors — related persons**

**(5)** If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

**(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

**(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

## **Related persons**

**(6)** For the purpose of subsection (5), a person who is related to the insolvent person includes

**(a)** a director or officer of the insolvent person;

**(b)** a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

**(c)** a person who is related to a person described in paragraph (a) or (b).

### **Assets may be disposed of free and clear**

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

### **Restriction — employers**

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

### **Restriction — intellectual property**

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

## **[Rules of Civil Procedure, RRO 1990, Reg 194](#)**

### **General Principle**

**1.04 (1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

### **Effect of Non-Compliance**

**2.01 (1)** A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

- (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
- (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

### **Court May Dispense with Compliance**

**2.03** The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.



## **Extension or Abridgment**

### **General Powers of Court**

**3.02** (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

### **[Bankruptcy and Insolvency General Rules, CRC c 368](#)**

**3** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

**6 (1)** Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

**(2)** Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

**(a)** must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

**(b)** must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

**(3)** A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

**(4)** The court may, on an *ex parte* application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

IN THE MATTER OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED AND

Court File No. BK-24-3082683-0032  
Estate No. 32-3082683

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF NIAGARA FALLS CRAFT DISTILLERS LTD. OF THE  
CITY OF NIAGARA FALLS IN THE PROVINCE OF ONTARIO

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceedings commenced at *Hamilton*

**FACTUM OF NIAGARA FALLS CRAFT  
DISTILLERS LTD.**

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