



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: BK-24-03051650-0031
BK-24-03051657-0031
BK-24-03051653-0031
BK-24-03051656-0031
BK-24-03051654-0031

DATE: 14 March 2024
NO. ON LIST: 1, 2, 3, 4, and 5

TITLE OF PROCEEDING: Bankruptcy of ORGANIC GARAGE (CANADA) LTD. et al
BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Asim Iqbal	Counsel for Organic Garage (Canada) Ltd., 2412383 Ontario Inc., 2347018	aiqbal@millerthomson.com
Monica Faheim	Ontario Inc., 2507158 Ontario Inc., and 2581751 Ontario Inc.	mfaheim@millerthomson.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Adrienne Ho	Counsel for the Proposal Trustee, KPMG	aho@airdberlis.com
Miranda Spence		mspence@airdberlis.com
Pritesh Patel	Proposal Trustee KPMG	pritchpatel@kpmg.ca
Fatima Tahreem		tahreemfatima@kpmg.ca
Fred Tayar	Counsel for Tobias Ihde	fred@fredtayar.com
David Preger	Counsel for landlord - 8000 Bathurst Street Holdings Inc.	dpreger@dickinsonwright.com
Harvey Ash	Counsel for Ping Hay Szeto	harveyash@yorklegal.ca
Graham Phoenix	Counsel for for MAAB Global (Proposed Stalking Horse Bidder)	gphoenix@LN.law
Sanea Tanvir	Counsel for Junction Road Nominee Inc. (landlord)	stanvir@mccarthy.ca

For Other:

Name of Person Appearing	Name of Party	Contact Info
Sharon Bart	Property manager - 8000 Bathurst Street Realty Inc.	sbart@mandrholdings.com
Ty Diamond	Junction Road Nominee Inc - Landlord	tdiamond@diamondkilmer.ca
Dina Peat	(Observer) Counsel for 8841896 Canada Inc.	dpeat@dv-law.com
Irving Fox	(Observer) Counsel for the Toronto Wholesale Produce Association	irving@ontlaw.com
Alice Shimoon	Representative for landlord – 8020 Bathurst St.	ashimoon@mandrholdings.com

ENDORSEMENT OF JUSTICE STEELE:

Overview

- [1] Organic Garage (Canada) Ltd. (“Organic Garage”), 2412383 Ontario Inc., 2347018 Ontario Inc., 2507158 Ontario Inc., and 2581751 Ontario Inc. (the “Lease Subsidiaries,” and collectively with Organic Garage, the “Companies”) bring a motion in connection with their filing of Notice of Intention to make a proposal under the *Bankruptcy and Insolvency Act*.
- [2] On this motion, the Companies seek an order:
- a. Procedurally consolidating the proposal proceedings;
 - b. Extending the time to file a proposal to April 30, 2024;
 - c. Granting a director and officer charge in the amount of \$140,000;
 - d. Granting an administration charge in the amount of \$150,000;
 - e. Approving a key employee retention plan (“KERP”) for certain personnel and sealing the unredacted schedule to the KERP;
 - f. Approving a sale process; and

g. Approving a stalking horse asset purchase agreement for certain of the debtors' assets (the "Stalking Horse APA").

[3] The relief sought is supported by the Proposal Trustee.

[4] For the reasons set out below, the motion is granted.

Background

[5] The Companies filed their NOI on March 5, 2024.

[6] KPMG was named as the Proposal Trustee.

[7] There is a separate bankruptcy proceeding in respect of Organic Garage Ltd. ("PublicCo"), which is scheduled for trial on March 25-26, 2024.

[8] PublicCo is not a debtor in these NOI proceedings.

[9] Based on the First Report of the Proposal Trustee, PublicCo (which was publicly traded until trading was halted) owns 100% of the shares of Organic Garage. Organic Garage, in turn, owns 100% of the Lease Subsidiaries.

[10] Organic Garage and its subsidiaries operate the retail grocery business. Organic Garage employs approximately 100 non-unionized employees.

[11] On October 25, 2019, PublicCo issued two unsecured convertible debentures with a total face value of \$3 million. These debentures matured on October 25, 2022. At that time the holders of the debentures (the "Holders") issued notices of default to PublicCo for failure to repay the debt.

[12] The First Report of the Proposal Trustee states the following in respect of the Holders:

30. The Proposal Trustee understands the Debtors are not borrowers or guarantors of the Convertible Debentures. Accordingly, the Holders are not included in the Debtors' creditor listings.

Preliminary Matters – Adjournment Request

[13] The Holders sought an adjournment of this matter to March 25-26, 2024. The trial of a contested bankruptcy application in respect of PublicCo is scheduled to be heard at that time.

- [14] I heard submissions from the parties on the contested adjournment request.
- [15] After hearing submissions, I determined that the Holders' adjournment request would be denied for the following reasons:
- a. The bankruptcy application in respect of PublicCo is a separate proceeding;
 - b. The Debenture Holders are creditors of PublicCo, not the Companies;
 - c. The Companies, certain stakeholders of the Companies, and the Proposal Trustee are of the view that it is important to get the sale process started as this provides the best opportunity for the company to find a going concern purchaser and any delay is at the expense of the estate.
- [16] One of the reasons an adjournment was sought was to give the Debenture Holders' counsel the opportunity to cross examine Matt Lurie on his affidavit.
- [17] **It was agreed that the Debenture Holders' counsel could cross examine Matt Lurie on his affidavit, which cross examination shall take place by March 20, 2024.**

Analysis

Should the Court grant procedural consolidation?

- [18] I am satisfied that procedural consolidation is appropriate.
- [19] The Court has jurisdiction under s. 183 of the BIA to make the requested procedural consolidation order. Such orders are regularly granted by this Court in the case of related corporate entities where such consolidation does not prejudice creditors of any of the estates, as is the case here: *Ashley v. Marlow Group Private Portfolio Management Inc.*, [2006] O.J. No. 1195, at para. 71.
- [20] As noted by the Companies, Courts have also found jurisdiction to consolidate multiple proceedings under Rule 6.01 of the *Rules of Civil Procedure*.
- [21] The proposed procedural consolidation will permit the estates to be administered as a single proceeding, which will reduce the administrative burden on the Proposal Trustee and result in cost savings.

Should the Court extend the time to file a Proposal?

- [22] I am satisfied that the time to file to the proposal may be extended to April 30, 2024.

- [23] Under section 50.4(9) of the BIA, the Court may extend the time by which the Company is required to file a proposal where the Court is satisfied that:
- a. The debtor company has acted and continues to act in good faith and with due diligence;
 - b. The debtor company would likely be able to make a viable proposal if the extension were granted; and
 - c. No creditor would be materially prejudiced if the extension were granted.

[24] The Proposal Trustee's report expresses the view that the Companies have satisfied the text for an extension of time to file a proposal.

[25] The Companies require the extension to be in a position to make a viable proposal to their creditors. No creditor will be materially prejudiced if the extension is granted.

Should the Director's Charge be approved?

[26] I am satisfied that the \$140,000 director's charge sought by the Companies should be approved.

[27] The Companies seek the director's charge as security for Organic Garage's indemnification for possible liabilities that may be incurred by the director and officer after the NOI filing date.

[28] The Court has endorsed the following factors to be considered when determining whether to approve a directors' charge:

- a. Whether notice has been given to the secured creditors likely to be affected by the charge;
- b. Whether the amount is appropriate;
- c. Whether the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
- d. Whether the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct:

Jaguar Mining Inc. (Re), 2014 ONSC 494, at para. 45.

[29] Organic Garage does not currently have an active D&O insurance policy. The one remaining officer and director of the Companies is not prepared to continue in this role without reasonable protection.

[30] The quantum of the proposed charge was determined with the assistance of the Proposal Trustee, which supports the proposed charge.

Should the administration charge be approved?

[31] I am satisfied that the administration charge should be approved.

[32] To secure the fees and expenses of the Companies' legal counsel, the Proposal Trustee and its counsel, an administration charge is sought.

[33] Section 64.2 of the BIA provides that the court may order such an administration charge on notice to the secured creditors who are likely to be affected by the charge.

[34] The court has identified the following non-exhaustive factors as ones that may be considered when determining whether to grant an administration charge:

- a. The size and complexity of the business being restructured;
- b. The proposed role of the beneficiaries of the charge;
- c. Whether there is an unwarranted duplication of roles;
- d. Whether the quantum of the proposed charge appears to be fair and reasonable;
- e. The position of the secured creditors likely to be affected by the charge; and
- f. The position of the proposal trustee:

Canwest Publishing Inc. (Re), 2010 ONSC 222, at para. 54.

[35] I am satisfied that the proposed administrative charge should be granted and accept the submissions of the Companies set out at para. 39 of their factum.

Should the KERP be granted?

[36] I am satisfied that the KERP should be granted.

[37] A modest KERP is sought in respect of four key senior employees.

- [38] The Companies state that these employees are critical to the implementation of the proposed sale process, among other things.
- [39] An unredacted copy of the KERP was provided to the Court on a confidential basis.
- [40] Having regard to the non-exhaustive list of factors set out in *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980, at para. 29, I am satisfied that the KERP should be approved.
- [41] The proposed KERP is supported by the Proposal Trustee. These employees have been identified as critical due to their experience and in-depth institutional knowledge of Organic Garage’s operations. The proposed KERP payments are modest and will only be made at the conclusion of the sale process. The Companies do not seek a charge to secure these payments.

Should the KERP Appendix be sealed?

- [42] The Companies ask that Confidential Exhibit “1” to the affidavit of Matt Lurie, containing the KERP details be sealed to protect the key employees from having their personal information disclosed.
- [43] Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.
- [44] The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, emphasized the importance of the openness of Court proceedings. The Supreme Court indicated that if the Court is being asked to limit this openness presumption, the following must be established:
- a. Court openness poses a serious risk to an important public interest;
 - b. The Order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
 - c. As a matter of proportionality, the benefits of the order outweigh its negative effects.

[45] The KERP in this case contains confidential and personal information of key employees including identifiable information of the persons covered under the KERP and commercially sensitive compensation information.

[46] I am satisfied that the benefits of the requested sealing order outweigh any deleterious effects. The sealing order is limited in scope (only applies to the KERP). Disclosure of

this confidential information could harm the employees covered under the KERP and breach their privacy interests.

[47] I am satisfied that the limited scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2022 SCC 41 requirements, as modified in *Sherman Estate*.

[48] The applicant is directed to provide the sealed confidential exhibit 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 the confidential exhibit can be physically sealed.

Should the Court approve the Sale Process and Stalking Horse APA?

[49] I am satisfied that the proposed sale process and stalking horse APA should be approved.

[50] The Court has jurisdiction to approve the proposed sale process and stalking horse APA under section 65.13 of the BIA. Courts routinely grant approval of a stalking horse sale process in the context of NOI proceedings and those under the CCAA.

[51] The following factors for the Court to consider in determining whether to authorize a stalking horse process were identified in *Brainhunter Inc. (Re)*, (2009) 183 ACWS (3d) 905, at para 13:

- 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 a sale of the business?
- d. Is there a better viable alternative?

[52] The Court in *Danier Leather Inc., Re*, 2016 ONSC 1044, at para. 23, applied the factors set out in *Brainhunter* in determining whether to approve a sale process in the context of NOI proceedings.

[53] As noted by the Companies, the criteria to be considered in deciding whether to approve a sale set out in section 65.13(4) of the BIA are also relevant when the Court is considering whether to approve a sale process. These factors are:

- 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 creditors than a sale or disposition under a bankruptcy;
- d. The extent to which 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 consideration their market value.

[54] The Companies and the Proposal Trustee submit that the sale process and the stalking horse APA are appropriate and in the interest of all stakeholders in the circumstances, including:


- a. A sale transaction is necessary at this time because the Companies are insolvent and cannot continue operations without a sale of the business or outside investment.
- b. The proposed sale process is designed to test the market by soliciting bids. The stalking horse APA provides a floor price for the applicable assets.
- c. The alternative to the proposed sale process is bankruptcy, which they state results in an erosion of value.
- d. The Proposal Trustee was consulted and will administer the sale process in consultation with the Companies.
- e. The timelines and terms of the sale process reflect the Companies' current resources and the relative simplicity of the business from a diligence perspective.
- f. The Companies obtained a liquidation value in respect of the subject assets and are satisfied that the purchase price in the bid represents consideration for the equipment that is at the high end of its forced liquidation value.

[55] The Companies and the Proposal Trustee are of the view that it is necessary to start this sales process as soon as possible due to liquidity concerns, among other things.

[56] It was noted that Court approval will be required for any sale, including if the stalking horse bid is the successful bidder. At the request of counsel for the Holders, the proposed Order was amended to include for greater certainty language to this effect.

[57] I am satisfied that the sales process and the stalking horse APA should be approved.

[58] Order attached.

A handwritten signature in blue ink, appearing to be "J. Lee", is located in the upper right quadrant of the page. The signature is written in a cursive style with a horizontal line through the middle of the letters.