



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: 31-3042209; 31-3042213;
Estate No. 31-3042209

DATE: February 15 2024

NO. ON LIST: 7 (added hearing)

TITLE OF PROCEEDING: RLogistics Limited Partnership, 1919162 ONT INC, & 1696308 ONT et al
BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Harvey Chaiton (debtor)	RLogistics Limited Partnership	harvey@chaitons.com
Laura Culleton		laurac@chaitons.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Bryan Tannenbaum	Proposal Trustee	btannenbaum@tdbadvisory.ca
Jeff Berger		jberger@tdbadvisory.ca

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE STEELE:

[1] RLogistics Limited partnership dba Factorydirect.ca (“Factory Direct”) brings a motion for an order (i) approving the consulting agreement with Danbury Global Limited and AD Hennick & Associates Inc. (the “Consulting Agreement”), (ii) granting an administration charge and a director’s charge, (iii) approving the KERP and granting the KERP charge, (iv) approving relief in connection with the *Wage Earner Protection Program Act* (“WEPPA”) for employees whose employment with Factory Direct is terminated as part of the NOI Proceedings, (v) extending the time for filing the proposal from March 8, 2024 to April 22, 2024, (vi) administratively consolidating this proceeding with the proceedings commenced by RLogistics Inc. and 1696308 Ontario Inc., and (vii) sealing the confidential appendices to the First Report of the Proposal Trustee.

[2] RSM Canada Limited (now known as TDB Restructuring Limited) in its capacity as proposal trustee of Factory Direct, filed its First Report. The Notices of Intention to Make a Proposal were filed by Factory Direct on February 7, 2024, and by RLogistics Inc. and 1696308 Ontario Inc., Factory Direct’s general partners (the “General Partners”) on February 12, 2024 pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*.

[3] The orders sought are granted for the following reasons.

Consulting Agreement

[4] Under the Consulting Agreement, a liquidation sale will be conducted. Under s. 65.13 of the BIA the Court can authorize the sale or disposition of assets by the debtor outside the ordinary course of business. In deciding whether to grant such authorization, s. 65.13(4) of the BIA sets out a non-exhaustive list of factors the Court is to consider.

[5] The Proposal Trustee supports the engagement of the Consultant and the commencement of the liquidation sale. The Consultant has significant experience in retail liquidation sales. The Proposal Trustee is of the view that the Consultant’s fee structure is reasonable and consistent with other proposals received by Factory Direct leading up to the filing of the NOI. The Consultant will charge a commission fee of 3% on the gross proceeds for any assets sold at the stores during the term of the liquidation sale. The Proposal Trustee notes that the Consultant is able to move quickly to commence the liquidation sale to help prevent further losses.

[6] Notice of this motion was provided to the secured creditor whose security will be primed by the charges sought (discussed below). The landlords have not yet received notice. Counsel for Factory Direct indicated that they will serve the landlords with the Court Order and endorsement. Further, with regard to the manner in which the liquidation sale will be conducted, counsel for Factory Direct indicated that the liquidation sale will be done in accordance with the terms of the relevant lease or as otherwise agreed with the applicable landlord.

WEPPA

[7] Factory Direct seeks an order under section 5(5) of WEPPA, which provides that in proceedings under Division I of Part III of the BIA, the Court may determine that the former employer meets the criteria prescribed by regulation. Section 3.2 of the *Wage Earner Protection Program Regulations* provides:

For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

[8] Factory Direct will be liquidating its business and closing its stores. Factory Direct will also be reducing its workforce. The debtor indicated that the terminated employees will have unsecured claims against the debtor for termination and severance pay with very uncertain recovery. The employees who are being retained are necessary to conduct the liquidation sale. They are being retained to wind down Factory Direct's business operations. The First Report indicates that Factory Direct will need to eventually terminate all of its employees other than those who are deemed necessary to carry out the sales process. The Proposal Trustee supports the relief. Accordingly, the conditions required for the Court to make a declaration under section 5(5) of WEPPA are satisfied.

Extension of Stay

[9] Factory Direct seeks to extend the period within which it is required to file a proposal pursuant to section 50.4(8) of the BIA. Section 50.4(9) of the BIA provides that the Court may grant an extension (not exceeding 45 days for any individual extension) provided that the Court is satisfied that:

- a. The debtor has acted, and is acting, in good faith and with due diligence;
- b. The debtor 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.

[10] The Proposal Trustee's First Report indicates that Factory Direct is of the view that more than 30 days will be required for the sales process. The Proposal Trustee supports the request to extend the stay by 45 days (to April 22, 2024) for the following reasons, which I accept:

- a. Factory Direct is acting in good faith and with due diligence;
- b. The extension of the stay will provide Factory Direct with an appropriate period in which to conduct the sales process and liquidate its inventory to the benefit of its creditors; and
- c. The extension of the stay does not appear to materially prejudice any of Factory Direct's creditors.

Sealing of Confidential Appendix

[11] Factory Direct seeks a sealing order in respect of the KERP to protect the key employees from having their personal information disclosed.

[12] Section 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.

- [13] In *Re Danier Leather Inc.*, 2016 ONSC 1044 [Commercial List], at paras 82-84, Penny J. addressed the test for a sealing order in respect of a KERP. He noted that “the KERP evidence involves matters of a private, personal nature” and that “it would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated.”
- [14] Factory Direct seeks to protect commercially sensitive and confidential and personal information of its key employees in the context of these proceedings. The KERP in this case contains confidential and personal information of key employees including (i) identifiable information of the persons covered under the KERP; and (ii) commercially sensitive compensation information.
- [15] 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). The information in the KERP would not assist its stakeholders. However, disclosure of this confidential information would harm Factory Direct’s employees and breach their privacy interests.
- [16] I am satisfied that the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42 requirements, as modified in *Sherman Estate v. Donovan*, 2021 SCC 25.
- [17] Factory Direct 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.

KERP and KERP Charge

- [18] Factory Direct seeks approval of the KERP and the KERP charge in the amount of \$81,000, which will rank subordinate to the equipment financiers, the Administration Charge and the Director’s Charge. The KERP charge is to have priority over 1313256 Ontario Inc.’s secured loan.
- [19] The KERP will provide for either a lump sum payment or weekly payment to the Key Employees covered by the KERP. The employees covered by the KERP hold management positions with respect to finance, marketing, logistics, and IT, which are critical to Factory Direct’s ability to run the liquidation sale and wind down the business.
- [20] In determining whether a KERP and KERP Charge are reasonable, the Court will generally consider the following factors:
- a. Whether the monitor or trustee supports the KERP and KERP charge;
 - b. Whether there is a “potential” loss of management in that the beneficiaries of the KERP may likely consider other employment opportunities if the KERP and the KERP charge are not approved;
 - c. Whether the beneficiaries of the KERP are considered to be important to the management and operations of the debtor company;

- d. Whether a replacement can be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and
- e. The business judgment of the board of directors of the debtor company.

[21] Factory Direct states that the KERP and the KERP charge are essential to assist Factory Direct in winding down its business. Factory Direct submits that these additional factors support the request:

- a. The Proposal Trustee supports the KERP;
- b. The continued involvement and cooperation of the KERP Employees is critical to the success of this proceeding;
- c. The Proposal Trustee believes that the KERP will assist Factory Direct to retain the KERP Employees, which is in the interests of stakeholders; and
- d. The amounts payable under the KERP are reasonable in the circumstances.

[22] I am satisfied that the KERP and KERP charge are appropriate in the circumstances.

Administration Charge and Director's Charge

[23] Factory Direct also seeks an administration charge and director's charge.

[24] The administration charge sought is for \$300,000 to secure the fees of the administrative professionals, whose services are needed for these proceedings.

[25] The Court has the jurisdiction to grant the administration charge under section 64.2(1) of the BIA. As noted by Factory Direct, administrative charges have been approved in BIA proceedings where the participation of insolvency professionals is required: *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 at paras. 32-33. The Proposal Trustee supports the request for the administration charge.

[26] The director's charge sought is for \$600,000 to secure the indemnification of its directors and officers against any obligations and liabilities that they may in their capacity as a director or officer during the NOI proceedings (excepting liability resulting from gross negligence or wilful misconduct).

[27] Factory Direct notes that the purpose of the director's charge is to:

- a. Keep the directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the process, and in addition to avoid a potential destabilization of the business if they resigned; and
- b. Enable the company to benefit from experienced directors/officers during the proceedings.

[28] The First Report notes that Factory Direct's existing D&O policy may not be sufficient to cover Factory Direct's director and officer obligations in the NOI proceedings. The Proposal Trustee is of the view that the director's charge sought is reasonable in the circumstances.

[29] Section 64.1 of the BIA gives the Court the authority to grant a charge in connection with the indemnification of a director or officer.

Administrative Consolidation

[30] Factory Direct and the General Partners seek an order administratively consolidating their proposal proceedings. This relief is sought to avoid multiplicity of proceedings and unnecessary costs.

[31] Order attached.

A handwritten signature in blue ink, appearing to be 'J. Lee', is located in the lower right quadrant of the page.