



SUPERIOR COURT OF JUSTICE

ENDORSEMENT

COURT FILE NO.: BK-23-02978830-0031 DATE: August 31, 2023

NO. ON LIST: 5

TITLE OF PROCEEDING: **Whyte's Foods Inc., et al.**

BEFORE JUSTICE: **Justice Cavanagh**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Elizabeth Pillon	Whyte's Foods Inc.	lpillon@stikeman.com
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Stuart Brotman	Proposal Trustee (Alvarez & Marsal Canada)	sbrotman@fasken.com
Haddon Murray	Farm Credit Canada	Haddon.murray@gowlingwlg.com
Jamey Gage	Smucker Foods of Canada Corp.	jgage@mccarthy.ca
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Jennifer Stam	Wells Fargo Capital Finance	Jennifer.stam@nortonrosefulbright.com
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ENDORSEMENT OF JUSTICE CAVANAGH:

1. Whyte's Foods Inc. (the "Company") is a leading producer of pickled and fermented food products in Canada.
2. In recent years, the Company has faced significant operational and financial challenges that have impacted its production levels and profitability.

3. On August 23, 2023, the Company filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act* and commenced these NOI proceedings. Alvarez & Marsal Canada Inc. was appointed as proposal trustee (the “Proposal Trustee”) in the NOI proceedings. The current filing and commencement of the NOI proceedings stem from the Company’s need for additional capital to address its imminent liquidity crisis.
4. On this motion, the Company seeks an order, among other things, (a) authorizing and empowering it to obtain and borrow under a DIP facility from Wells Fargo Capital Finance, the DIP lender, in order to finance the Company’s working capital requirements and other general corporate purposes and capital expenditures; (b) approving the engagement of Kroll Corporate Finance Canada Limited (“Kroll”) as Financial Advisor of the Company in the NOI proceedings; (c) approving the SISP for a sale or investment in the Company’s property and authorizing and directing the Financial Advisor and the Proposal Trustee, in consultation together and with the Company, to conduct the SISP, (d) granting priority charges against the Company’s property or the DIP property, as applicable, and approving the priority of such charges, (e) extending the time for the Company to file a proposal and the corresponding stay of proceedings until October 10, 2023; and (f) with the consent of the Proposal Trustee, and in accordance with the cash flow forecast and the DIP facility, authorizing the Company to pay critical suppliers.
5. The factual background to this application is set out in the Affidavit of Elizabeth Kawaja sworn August 28, 2023 and summarized in the Company’s factum at paragraphs 10-62.
6. Under s. 183(1) of the BIA, this Court has inherent jurisdiction to grant the relief requested.
7. Pursuant to subsection 50.6 (1) of the BIA, this Court has authority to approve the DIP facility and the DIP Lender’s charge. The court may order that the DIP loan and charge rank in priority over the claim of any secured creditor of the Company. I have considered the factors in section 50.6(5) of the BIA and I am satisfied that the proposed DIP facility and the DIP lender’s charge should be approved. I accept the submission in paragraph 14 of the Company’s factum. The DIP charge does not secure any pre-filing obligation of the Company and the use of post-filing operating receipts to reduce the balance of a pre-existing asset-based revolving credit facility in accordance with the Company’s existing practices does not affect the relative pre-filing position of secured creditors over the Company’s assets.
8. The Company seeks approval of Kroll’s engagement for the purposes of assisting it and the Proposal Trustee with conducting the SISP to consummate a sale and/or investment transaction(s) for the Company’s property. Kroll has prior experience assisting the Company with the prior sale process and has extensive experience in matters of this nature. The Proposal Trustee is supportive of Kroll’s engagement as financial advisor. I am satisfied that the engagement of Kroll as financial advisor should be approved.
9. Pursuant to section 65.13 of the BIA, the Court is authorized to approve a sale of assets in a proposal proceeding under the BIA. The non-exhaustive factors set out in subsection 65.13 (4) of the BIA, although expressly applying to approval of a sale of assets rather than approval of the process, provide useful guidance for the Court to consider in determining whether to approve a sale process. I have considered these factors, as well as the factors set out in *Nortel Networks (Re)*, 2009CanLII 39492 (in the context of CCAA proceedings), and I am satisfied that the proposed SISP should be approved. I accept the submission at paragraph 27 of the Company’s factum.
10. The Company seeks an Administration charge in the maximum amount of \$250,000 to secure the fees and disbursements of the Proposal Trustee, counsel to the Proposal Trustee, and counsel to the

Company that are incurred in connection with services rendered to the Company both before and after commencement of the NOI proceedings. I am satisfied that the Administration charge is needed to facilitate the NOI proceedings and the SISF. I accept the submission in paragraph 31 of the Company's factum.

11. Section 64.1 (1) of the BIA provides that a court may grant a charge in favour of any director or officer to indemnify them against obligations and liabilities that they may incur as a director or officer after the commencement of the proposal proceeding. The Company seeks a Directors' charge over the Company's property to indemnify the Company's directors and officers in respect of liabilities they may incur as directors and officers during the NOI proceedings, up to a maximum principal amount of \$700,000. The proposed Directors' charge would be subordinate to the proposed Administration charge but the initial tranche of \$350,000 will rank in priority to all other encumbrances, including the DIP lender's charge in respect of the DIP property. The second tranche of \$350,000 will rank behind the DIP lender's charge in respect of collateral described in the materials as the "FCC Collateral". I am satisfied that the Directors' charge is essential for the continued participation of the Company's directors and officers to avoid destabilization of the Company's business and should be approved.
12. Section 50.4 (9) of the BIA provides that the Court may grant an extension or further extension not exceeding 45 days for any individual extension or five months in the aggregate following the expiry of the original 30 day period, where the court is satisfied that the insolvent person has acted, and is acting, in good faith and with due diligence, would likely be able to make a viable proposal if the extension being applied for was granted, and no creditor would be materially prejudiced if the extension being applied for was granted. I am satisfied that these factors have been met and the extension of the proposal period is appropriate. The Proposal Trustee and the DIP lender support the extension of the proposal period.
13. The Company may seek to pay certain pre-filing arrears to critical suppliers, being those vendors whose products and/or services are essential to the Company's ongoing operations and/or may also be critical to implementing the contemplated sale or other restructuring alternatives in the NOI proceedings. The Proposal Trustee will oversee any payments of pre-filing amounts made to critical suppliers. Payments will only be made with the express authorization of the Proposal Trustee, and only to critical suppliers that the Proposal Trustee agrees are essential to the Company's business operations and such payments are provided for in the cash flow forecast. The Proposal Trustee and the DIP Lender support the Company's request for approval to make payments to critical suppliers and for post-filing goods and services in the ordinary course.
14. With the DIP facility, the Company is projected to have sufficient cash to continue operating through the end of the stay period. The cash flow projection assumes that the Company will continue to receive cash from collection of accounts receivable. The Proposal Trustee reports that one of the Company's main customers, and the account debtor in respect of a substantial portion of the Company's accounts receivable, has given notice of the termination of the Supply Agreement between it and the Company and has demanded payment of amounts allegedly owing by the Company as a result of alleged breaches of the Supply Agreement. The Company disputes the validity of the termination of the Supply Agreement both under the terms of the Supply Agreement and as a violation of the stay in these NOI proceedings. The Company and the customer are in discussions with respect to the termination of the Supply Agreement with a view to achieving a resolution which assures the continuation of supply and payment consistent with the assumptions underlying the cash flow forecast and the DIP facility agreement. Depending on the outcome of such discussions, a material update to the cash flow forecast and the DIP facility agreement may be required.

15. I am satisfied that the requested Order should be made. Order to issue in form of Order signed by me today.