

Court File No. 23-02978830-0031
Estate File No. 31-2978830

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED,
OF WHYTE'S FOODS INC.**

Applicant

**FACTUM OF THE APPLICANT
(ST. LOUIS SALE APPROVAL, STAY EXTENSION AND SEALING)**

October 4, 2023

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon (LSO #35638M)
Tel: (416) 869-5623
Email: lpillon@stikeman.com

Natasha Rambaran (LSO #80200N)
Tel: (416) 869-5504
Email: nrambaran@stikeman.com

Lawyers for Whyte's Foods Inc.

TO: THE SERVICE LIST

PART I - OVERVIEW¹

1. On August 23, 2023, the Company filed a notice of intention to make a proposal pursuant to Section 50.1(1) of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) and Alvarez & Marsal Canada Inc. was appointed as the Proposal Trustee.
2. On August 31, 2023, the Court granted the Initial Order, which, among other things: (a) approved the SISP, and authorized and directed the 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.
3. Following the Initial Order being granted, the Proposal Trustee and the Financial Advisor, in consultation with the Company, commenced the SISP. The Bid Deadline has now passed. The Company, the Proposal Trustee and the Financial Advisor continue to negotiate with certain parties who submitted Bids.
4. The Company has been able to complete the negotiation of the St. Louis Purchase Agreement and now seeks this Court’s approval thereof. The Company is also seeking an extension of the Stay Period to allow the Company to implement the St. Louis Transaction, conclude the negotiations in respect of the other Bids received during the SISP and to take other ancillary steps.
5. This factum is filed in support of the Company’s motion seeking an order (the “**St. Louis Sale Approval Order**”), *inter alia*:
 - (a) approving the St. Louis Transaction contemplated by the St. Louis Purchase Agreement between the Vendor and Purchasers and vesting in the Purchasers, all of the Vendor’s right, title and interest in and to the St. Louis Purchased Assets;
 - (b) extending the time to file a proposal and the corresponding stay of proceedings until and including October 13, 2023 (the “**Stay Period**”);
 - (c) sealing Confidential Appendix “1” to the Second Report; and

¹ Capitalized terms used and not defined herein have the meaning ascribed to such terms in the Affidavit of Elizabeth Kawaja sworn October 2, 2023 (“**Kawaja Affidavit**”).

- (d) granting such further and other relief as counsel may advise and this Honourable Court may permit.

PART II – FACTS

6. The facts with respect to this motion are briefly summarized below and more fully set out in the Initial Kawaja Affidavit and the Affidavit of Elizabeth Kawaja sworn October 2, 2023 (the “**Kawaja Affidavit**”).

A. Applicant’s Activities Since Commencement of NOI Proceedings

7. Since the Initial Order was granted, the Company, with the assistance of the Proposal Trustee, and their respective counsel, has taken the following additional steps to reduce operating costs, preserve cash, divest non-core assets and generate liquidity:

- (a) resolving the Smucker Dispute in consultation with, and with the support of, the Proposal Trustee and the Lenders;²
- (b) obtaining the Lenders’ approval with respect to the Revised Cash Flow Forecast;³
- (c) communicating with various stakeholders including suppliers and employees, to provide information regarding the NOI Proceedings and the stay of proceedings;⁴
- (d) working with suppliers, customers and employees to ensure ongoing production at the Wallaceburg Facility and the St. Louis Facility;⁵
- (e) considering potential disclaimers of contracts for redundant vehicles and equipment and working with relevant parties to ensure and/or schedule the return of any equipment or property in respect of any disclaimed contracts;⁶
- (f) working with the Financial Advisor and the Proposal Trustee in conducting the SISP, including participating in various meetings with potential Bidders;⁷ and
- (g) working with the Proposal Trustee and counsel in respect of the negotiations of the St. Louis Agreement.⁸

² Kawaja Affidavit at para 12.

³ Kawaja Affidavit at para 17.

⁴ Kawaja Affidavit at para 20.

⁵ Kawaja Affidavit at para 20.

⁶ Kawaja Affidavit at para 20.

⁷ Kawaja Affidavit at para 20.

B. Prior Sale Process

8. Prior to initiating these NOI Proceedings, the Company invested significant time and effort, with the assistance of its advisors, to explore strategic transaction opportunities. These efforts included the engagement of Kroll in February 2023 to commence the Prior Sale Process.⁹

9. The Prior Sale Process included potential bids for all the Property, including: (a) the Wallaceburg Facility and operations; (b) the St. Louis Facility and operations; (c) inventory and equipment located at the Wallaceburg Facility, the St. Louis Facility and/or the Ste. Thérèse Facility; and (d) other Property.¹⁰

10. While the Prior Sale Process produced significant interest from multiple parties, the Company was not able to implement a transaction prior to the Filing Date. As a condition of the ongoing available liquidity in favour of the Company, it was necessary that the balance of the Prior Sale Process be completed within these NOI Proceedings.¹¹

11. Accordingly, the Company determined that the best path to maximize stakeholder value and preserve the Company as a going concern was to commence these NOI Proceedings and complete the SISP. In carrying out the SISP, the Company has benefitted from the work related to the Prior Sales Process that was conducted by Kroll.¹²

C. SISP Summary and Milestones¹³

12. On August 31, 2023, the Company obtained the Initial Order, which, among other things, authorized the Company to continue the Prior Sale Process in accordance with the SISP.¹⁴

13. Pursuant to the SISP, the Proposal Trustee and Kroll, in consultation and with participation of the Company, conducted the process in order to solicit interest for an “as is, where is” sale of the Property or investment in the Business.¹⁵

14. The SISP contemplated the following milestones, each of which could be modified by the Proposal Trustee as permitted in the SISP:¹⁶

⁸ Kawaja Affidavit at para 20.

⁹ Kawaja Affidavit at para 21.

¹⁰ Kawaja Affidavit at para 24.

¹¹ Kawaja Affidavit at para 30.

¹² Kawaja Affidavit at para 31.

¹³ All capitalized terms used in this section and not otherwise defined have the meanings given to them in the SISP.

¹⁴ Second Report of the Proposal Trustee dated October 4, 2023 [“**Second Report**”] at para 1.6.

¹⁵ Kawaja Affidavit, Exhibit “A”, Affidavit of Elizabeth Kawaja sworn August 28, 2023 [“**Initial Kawaja Affidavit**”] at para 113.

Milestone	Deadline
Company to obtain Initial Order including approval of (i) Kroll's engagement; and (ii) SISP	August 31, 2023
Publish notice of SISP on the Proposal Trustee's website	Two (2) business days following date of the Initial Order
Deliver Teaser Letter and NDA to Known Potential Bidders and set up the VDR	Two (2) business days following the date of the Initial Order
Template purchase and sale agreement to be posted in the VDR	Seven (7) calendar days following date of the Initial Order
Bid Deadline	5:00 p.m. (EST) on September 21, 2023
Proposal Trustee to (i) review submitted Bids; (ii) seek clarification of Bids; (iii) select Successful Bid(s); and (iv) negotiate final agreements	On or before 12:00 p.m. (noon) (EST) on September 25, 2023
Hearing of the Sale Approval Motion	October 2, 2023
Target closing date for sale and/or investment transactions	October 6, 2023
Outside closing date for sale and/or investment transactions	October 10, 2023

15. The timelines and terms in the SISP were developed in consultation with the Proposal Trustee, the Financial Advisor and the Lenders. While the timelines in the SISP are truncated, given the expansive Prior Sale Process conducted by Kroll (as described in the Initial Kawaja Affidavit and the First Report), the timelines and terms are reasonable and appropriate in the circumstances, and resulted in a fair and equitable process to appropriately canvass the market to maximize value for the Company and its stakeholders.¹⁷

D. Conduct of the SISP¹⁸

16. Following the Initial Order being granted and the SISP being approved by the Court, the Proposal Trustee and the Financial Advisor, in consultation with the Company, commenced the SISP. To date, the Proposal Trustee and the Financial Advisor have taken the following steps in accordance with the SISP:

¹⁶ Initial Kawaja Affidavit at para 115.

¹⁷ Second Report at para 6.8.

¹⁸ All capitalized terms used in this section and not otherwise defined have the meanings given to them in the SISP.

- (a) posted the SISP on the Proposal Trustee's website on September 1, 2023;
- (b) posted the template purchase and sale agreement in the VDR on September 7, 2023;
- (c) prepared a list of Known Potential Bidders;
- (d) delivered the Teaser Letter and NDAs, as applicable, to Known Potential Bidders on August 31, 2023;
- (e) engaged with 42 Known Potential Bidders;
- (f) executed NDAs and provided VDR access to certain Known Potential Bidders;
- (g) answered information requests and promptly uploaded relevant documents to the VDR for access by all Potential Bidders;
- (a) updated information relating to available property for sale, including equipment and inventory located at various locations;
- (b) participated in meetings and facilitated discussions between management and certain Potential Bidders, both virtually and on site, and conducted six (6) onsite tours of the Wallaceburg Facility facilitated by the Financial Advisor and the Company; and
- (c) participated in meetings and facilitated discussions between certain Potential Bidders and Smucker, and certain Potential Bidders and the Lenders.¹⁹

17. The Financial Advisor returned to 27 Known Potential Bidders who participated in the Prior Sale Process and was also in contact with 14 additional parties.²⁰

18. Four (4) Bids were received (in addition to the negotiations that were ongoing with Putters regarding the St. Louis Agreement) by the Bid Deadline, which included two (2) going concern transactions and two (2) bids for various parcels of equipment, inventory and/or intellectual property.²¹ One of the Bidders that submitted a Bid before the Bid Deadline also submitted a subsequent supplemental Bid after the Bid Deadline.²²

¹⁹ Kawaja Affidavit at para 38; Second Report at para 6.9.

²⁰ Kawaja Affidavit at para 39.

²¹ Kawaja Affidavit at para 43.

²² Kawaja Affidavit at para 44.

19. Following the Bid Deadline, the Applicant, the Proposal Trustee and the Financial Advisor, in consultation with the Lenders, and each of their respective counsel, began reviewing and discussing the Bids received.²³

20. The milestone contemplated in the SISP for the Proposal Trustee and the Financial Advisor to review submitted Bids, seek clarification of Bids, select Successful Bid(s) and negotiate final agreements has been extended to complete ongoing negotiations with parties who submitted Bids before the Bid Deadline and to review and consider the additional Bid that was received after the Bid Deadline.²⁴

21. At this time the Company, Kroll, the Proposal Trustee and the Lenders continue to review the Bids that have been received for the Property other than the St. Louis Facility and the St. Louis Purchased Assets. The Company is not currently in a position to finalize or seek approval of a transaction at this time, other than for the St. Louis Purchase Agreement. The Company is continuing to work on finalizing the details of a transaction in respect of the other Property and will return to the Court as soon as possible to seek approval of any additional transactions that are completed.²⁵

E. Marketing of St. Louis Facility / Interim St. Louis Arrangements

22. While the St. Louis Facility and related equipment were previously marketed during the course of the Prior Sales Process, no parties expressed a specific interest in the St. Louis Facility, and, as a result, no tours of the St. Louis Facility were conducted. Kroll did not receive any bids in respect of the St. Louis Facility and/or operations during the Prior Sales Process.²⁶

23. As noted to this Court at the hearing for the Initial Order, as part of the Company's response to finance the ongoing operations of its business and necessary capital expenditures, the Company entered into the Interim St. Louis Arrangements with Putters on July 21, 2023.²⁷

24. The Interim St. Louis Arrangements provided for the purchase by Putters of crop and other ingredients from local growers, and contribution towards various other production and operating costs of the Company. The resulting inventory is segregated from and does not form part of the Company's Property. The financial assistance provided by Putters allowed the

²³ Kawaja Affidavit at para 46.

²⁴ Kawaja Affidavit at para 47.

²⁵ Kawaja Affidavit at para 48.

²⁶ Kawaja Affidavit at para 32.

²⁷ Kawaja Affidavit at para 33.

Company to continue operations at the St. Louis Facility through September and ensured that the growers did not endure any delay in payment for crop.²⁸

25. The Interim St. Louis Arrangements also provided for a period of exclusivity for the Company and Putters to negotiate the terms of the St. Louis Purchase Agreement for the St. Louis Facility and related equipment.²⁹

26. Following the Initial Order, the Company, the Proposal Trustee and its respective counsel continued to negotiate the terms of a potential transaction with Putters relating to the St. Louis Facility and certain equipment. The Lenders, and in particular, FCC (whose collateral includes the real property and equipment at the St. Louis Facility), were consulted throughout the Company's negotiations with Putters. Ultimately, an agreement was reached with respect to the St. Louis Facility and the St. Louis Purchased Assets.³⁰

27. Given the timing of finalizing the negotiations and the potential that some assets located at the St. Louis Facility would be excluded from the St. Louis Purchase Agreement, details of the St. Louis Facility, equipment and non-Putters segregated inventory continued to be available as part of the overall SISP.³¹

28. While the St. Louis Facility was not specifically excluded from the SISP, the Financial Advisor conveyed the fact that there was an offer on the St. Louis property to various parties and none of the parties expressed a specific interest in the St. Louis Facility, nor made an offer for such property in the context of the SISP.³²

29. During the SISP, one party expressed interest in the PIT line located in the St. Louis Facility, however, no other parties expressed interest in the St. Louis Facility.³³

30. The Company, in consultation with the Lenders, has been able to complete the negotiation of the St. Louis Purchase Agreement and now seeks this Court's approval thereof. In light of the value provided by Putters with respect to the Interim St. Louis Arrangements and the consideration to be paid as part of the St. Louis Purchase Agreement, the Company believes that the St. Louis Transaction provides reasonable recovery in respect of the St. Louis Facility and the St. Louis Purchased Assets.

²⁸ Kawaja Affidavit at para 34.

²⁹ Kawaja Affidavit at para 35.

³⁰ Kawaja Affidavit at para 36.

³¹ Kawaja Affidavit at para 37.

³² Kawaja Affidavit at para 38.

³³ Kawaja Affidavit at para 42.

31. The key terms of the St. Louis Purchase Agreement are summarized below:³⁴

Summary of Key Terms of the St. Louis Purchase Agreement	
Purchasers	9498-8995 Québec Inc. and 9498-8938 Québec Inc.
Guarantor	Ailments Putters Inc.
Deposit	\$745 000 in cash
Purchase Price	\$7,450,000 in cash
Purchased Assets	Land, Building, Furniture and certain Equipment and Other Assets
Excluded Assets	Cash on Close; certain Inventory located at the St. Louis Facility; tax benefits; certain Used Assets; Contracts; certain machinery and other equipment and property at the St. Louis and Ste. Thérèse Facilities; IT equipment; rights under the St. Louis Purchase Agreement and ancillary agreements; minute books and corporate records; and IP
Inventory Storage	Whyte's Inventory to remain on site at the St. Louis Facility until December 31, 2023 at the latest, at no additional cost.
Transaction Structure	Asset purchase agreement
Closing	The date that all conditions have been satisfied or waived, except for those conditions that by their nature can only be satisfied on the Closing Date, or such earlier or later date as agreed to by the Parties
Conduct of Business until Closing Time	Until Closing, the Vendor will (i) pay all utility bills in respect of the Building as and when due, and (ii) not, without the prior written consent of the Purchaser, remove from the St. Louis Facility any empty barrels, unused pallets, empty plastic bins and empty wood boxes
Employees	The Purchaser will offer employment to certain Designated Employees
Access to one Employee	Purchaser to permit the Vendor and the Proposal Trustee with reasonable access to one of the Designated Employees for post-Closing activities
Key Conditions to Closing	<ul style="list-style-type: none"> the Court granting the Approval and Vesting Order the Proposal Trustee delivering its certificate confirming the satisfaction of all conditions under the Agreement and payment of the Purchase Price no action or proceeding be pending or threatened by any Person (other than the Proposal Trustee, the Vendor or the Purchaser) and no order or notice from any Governmental Entity, to (or seeks to) enjoin, restrict or prohibit, on a temporary or permanent basis any of the transactions contemplated by this Agreement or imposing any terms or conditions on the transactions contemplated by the Agreement

³⁴ Capitalized terms not defined in this section have the meaning ascribed to them in the St. Louis Purchase Agreement

PART III – ISSUES

32. The issues in respect of the relief being sought under the St. Louis Sale Approval Order are whether this Court should:

- (a) approve the St. Louis Transaction and the vesting of the Vendor's right, title and interest in and to the St. Louis Purchased Assets in the Purchasers;
- (b) extend the time for the Company to file a proposal and the corresponding Stay Period until and including October 13, 2023; and
- (c) seal Confidential Appendix "1" to the Second Report.

PART IV – LAW AND ANALYSIS

A. APPROVAL OF THE ST. LOUIS TRANSACTION

Sale Approval Generally

33. The Court has jurisdiction to approve a sale of assets outside of the ordinary course of business pursuant to section 65.13 of the BIA.³⁵

34. 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:

- (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

³⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 65.13 ["BIA"].

- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.³⁶

35. The Court has noted that the criteria in subsection 36(3) of the *Companies' Creditors Arrangement Act* (Canada) – which are identical to those contained in subsection 65.13(4) of the BIA – correspond to the principles articulated in *Royal Bank of Canada v Soundair Corp*, for the approval of the sale of assets in an insolvency scenario:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process.³⁷

36. The Court has also noted that “It is not necessary for [a] debtor to present its proposal under the BIA before an order approving a sale”.³⁸

37. Courts have commonly approved sale transactions where a debtor company has conducted a sales process prior to making an insolvency filing.³⁹ In approving transactions of this nature, courts have held that the same principles that apply to the approval of a sale transaction resulting from a post-filing sales process apply to the approval of a sale transaction resulting from a pre-filing sales process.⁴⁰

This Court should Approve the St. Louis Transaction

38. The above criteria provided in subsection 65.13(4) and the *Soundair* principles, along with the economic realities of the Company and the proposed transaction, support this Court's approval of the St. Louis Transaction, as:

³⁶ BIA, s 65.13(4).

³⁷ *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 21 citing *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (Ont CA).

³⁸ *Karrys Bros Ltd (Re)*, 2014 ONSC 7465 [“*Karrys*”] at para 11 citing *Komtech Inc (Re)*, 2011 ONSC 3230 at para 33; see also *OEL Projects Ltd (Re)*, 2020 ABQB 365 at para 30.

³⁹ *Re Nelson Education Limited (Re)*, 2015 ONSC 5557 [“*Nelson*”]; *Re Bloom Lake*, 2015 QCCS 1920 [“*Bloom Lake*”]; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586; *Feronia Inc (Re)*, 2020 BCSC 1372 at para 49.

⁴⁰ *Nelson*, supra at paras 31-33; *Bloom Lake*, supra at para 29; *Elleway Acquisitions Limited v 4358376 Canada Inc*, 2013 ONSC 7009 at paras 27 and 31-32; *Re Tool-Plas Systems Inc*, 2008 CanLII 54791 (Ont SCJ) at paras 15-19.

- (a) the terms of the St. Louis Purchase Agreement are the result of extensive negotiations between the Company, Putters and their respective advisors;⁴¹
- (b) the St. Louis Facility and the St. Louis Purchased Assets were marketed as part of the Prior Sale Process conducted by Kroll;⁴²
- (c) the timelines and terms of the SISP were developed in consultation with the Proposal Trustee, the Financial Advisor and the Lenders, and were approved by this Court;⁴³
- (d) the St. Louis Purchased Assets formally remained in the SISP and available for potential Bidders to seek additional information and formulate a potential bid;⁴⁴
- (e) the St. Louis Purchase Agreement represents the best and only offer for the St. Louis Purchased Assets;⁴⁵
- (f) the Company believes that this agreement provides reasonable recovery in respect of the St. Louis Facility and the St. Louis Purchased Assets;⁴⁶
- (g) the Purchaser will offer employment to the Designated Employees on terms and conditions that are substantially similar to those existing immediately prior to the execution of the St. Louis Purchase Agreement, including Employee Plans;⁴⁷
- (h) the Purchaser is considering a second round of potential offers of new employment to approximately 15 additional employees once operations at the St. Louis Facility are restarted;⁴⁸
- (i) the ability to maintain inventory at the St. Louis Facility and the access to one of the Designated Employees post-closing will assist in monetizing this collateral post-closing;⁴⁹

⁴¹ Second Report at para 7.4(a).

⁴² Kawaja Affidavit at para 24.

⁴³ Kawaja Affidavit at para 36.

⁴⁴ Kawaja Affidavit at para 54.

⁴⁵ Kawaja Affidavit at para 55; Second Report at para 7.4(a).

⁴⁶ Kawaja Affidavit at para 53.

⁴⁷ Kawaja Affidavit at para 56; Second Report at para 7.4(c).

⁴⁸ Kawaja Affidavit at para 56.

⁴⁹ Kawaja Affidavit at para 55.

- (j) the Interim St. Louis Arrangements and the consideration provided for in the St. Louis Purchase Agreement provide reasonable recovery in respect of the St. Louis Facility and the St. Louis Purchased Assets;⁵⁰
- (k) the Lenders have been consulted in respect of the proposed St. Louis Transaction and support approval of such transaction;⁵¹
- (l) the specific Lender who holds collateral over the bulk of the St. Louis Purchased Assets supports the St. Louis Transaction;⁵² and
- (m) the Proposal Trustee has been involved with the negotiations of the St. Louis Transaction and recommends this Court's approval of the St. Louis Purchase Agreement.⁵³

39. In the Second Report, the Proposal Trustee has noted that the St. Louis Purchase Agreement was executed and the deposit thereunder was paid in the expectation that these NOI Proceedings would continue with sufficient funding to reach closing of the transaction contemplated thereby. The Proposal Trustee's recommendations in support of that transaction are premised on this expectation being realized.⁵⁴

40. The Proposal Trustee has reported that the St. Louis Purchase Agreement represents the best transaction available to the Company for the St. Louis Purchased Assets in the circumstances.⁵⁵

41. Accordingly, the timelines and terms of the Prior Sale Process and the SISP were reasonable and appropriate in the circumstances and resulted in a fair and equitable process to appropriately canvass the market for the St. Louis Facility and the St. Louis Purchased Assets.

B. STAY EXTENSION

42. The Company is seeking an extension to file a proposal, and the corresponding stay of proceedings, until and including October 13, 2023.

⁵⁰ Kawaja Affidavit at para 53.

⁵¹ Kawaja Affidavit at para 57; Second Report at para 7.4(d).

⁵² Kawaja Affidavit at para 57.

⁵³ Kawaja Affidavit at para 58; Second Report at paras 7.1 and 7.4.

⁵⁴ Second Report at para 7.5.

⁵⁵ Second Report at para 7.4.

43. 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 (5) months in the aggregate following the expiry of the original 30-day period.⁵⁶

44. The Court may grant an extension pursuant to subsection 50.4(9) where it is satisfied that: (a) the debtor has acted in good faith and with due diligence; (b) the debtor will likely be able to make a viable proposal if the extension being applied for were granted; and (c) no creditor would be materially prejudiced by the extension.⁵⁷

45. Courts have granted an extension of time to file a proposal where a proposal has not yet been formulated and where it was necessary for a sale process to be carried out.⁵⁸

46. In the present case, these factors have been met and the extension of the Stay Period is appropriate as:

- (a) the Company has acted in good faith and with due diligence by, among other things:
 - (i) resolving the Smucker Dispute in consultation with, and with the support of, the Proposal Trustee and the Lenders;⁵⁹
 - (ii) obtaining the Lenders' approval with respect to the Revised Cash Flow Forecast;⁶⁰
 - (iii) communicating with various stakeholders including suppliers and employees, to provide information regarding the NOI Proceedings and the stay of proceedings;⁶¹
 - (iv) working with suppliers, customers and employees to ensure ongoing production at the Wallaceburg Facility and the St. Louis Facility;⁶²
 - (v) considering potential disclaimers of contracts for redundant vehicles and equipment and working with relevant parties to ensure and/or schedule

⁵⁶ BIA, s. 50.4(9).

⁵⁷ BIA, s. 50.4(9).

⁵⁸ See, for example, *Mustang GP Ltd (Re)*, 2015 ONSC 6562 at para 41.

⁵⁹ Kawaja Affidavit at para 12.

⁶⁰ Kawaja Affidavit at para 17.

⁶¹ Kawaja Affidavit at para 20.

⁶² Kawaja Affidavit at para 20.

the return of any equipment or property in respect of any disclaimed contracts;⁶³

(vi) working with the Financial Advisor and the Proposal Trustee in conducting the SISP, including participating in various meetings with potential Bidders;⁶⁴ and

(vii) working with the Proposal Trustee and counsel in respect of the negotiations of the St. Louis Purchase Agreement;⁶⁵

(b) the extension will allow the Company to implement the St. Louis Transaction (should the Court approve the transaction), conclude the negotiations in respect of the other bids received during the SISP for the Wallaceburg Facility and other assets, and take other ancillary steps; and

(c) 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.⁶⁶

47. The Proposal Trustee understands that Wells Fargo, in its capacity as DIP Lender, has confirmed that funding under the DIP Facility Agreement will continue to the completion of the NOI Proceedings, including for any agreed upon amounts accrued but unpaid at the time of the Receivership Date (including payroll). The Proposal Trustee is currently working with Ernst & Young Inc. to reconcile such amounts.⁶⁷

48. The Proposal Trustee also supports the requested extension of the Stay Period as:

(a) the continuation of the NOI Proceedings provides optionality to realize on the Company's Property either through the NOI Proceedings or a subsequent insolvency proceeding and preserves the going concern value of the Company's business as negotiations continue with the Bidders;

(b) the extension is required to complete the St. Louis Transaction;

(c) the Company continues to operate with good faith and due diligence;

⁶³ Kawaja Affidavit at para 20.

⁶⁴ Kawaja Affidavit at para 20.

⁶⁵ Kawaja Affidavit at para 20.

⁶⁶ Second Report at para 8.3.

⁶⁷ Second Report at para 8.2.

- (d) the Proposal Trustee does not believe any creditor will be materially prejudiced if the extension is granted;
- (e) the Company is expected to have sufficient liquidity through the extension period; and
- (f) the Proposal Trustee understands that the Lenders support the extension request.⁶⁸

49. It would be detrimental to the Company's ability to maintain operations if proceedings were commenced, or rights or remedies executed against the Company in the short period available to maximize recoveries for all stakeholders.

C. SEALING ORDER

50. The *Courts of Justice Act* (Ontario) provides this Court with discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record.⁶⁹

51. The test to determine if a sealing order should be granted is set out in *Sierra Club* as recast in *Sherman Estate*:

- (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.⁷⁰

52. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for purposes of this test.⁷¹

53. Courts have applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors.⁷²

⁶⁸ Second Report at para 8.3.

⁶⁹ *Courts of Justice Act*, RSO 1990, c C 43, s 137(2).

⁷⁰ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*"Sierra Club"*]; *Sherman Estate v Donovan*, 2021 SCC 25 at paras 38 and 43 [*"Sherman Estate"*].

⁷¹ *Sierra Club*, supra at para 55; *Sherman Estate*, supra at paras 41-43.

54. The Company respectfully request that this Court seals Confidential Appendix “1” to the Second Report, which contains a summary of the economic terms of the Bids received. This document contains commercially sensitive information that may, if the St. Louis Transaction fails to close, and/or if future transactions are brought forward to the Court for approval, may affect the integrity of any future sale of the assets and/or business of the Company.⁷³ Following the *Sherman* decision, Courts have continued to maintain the confidentiality of similar summaries.⁷⁴

55. The salutary effects of the sealing order, which provides the Company with the ability to maximize value for its assets at a future date, far outweigh the deleterious effects of the public not knowing the exact details of the Bids received.

56. The Proposal Trustee supports the Company’s request to seal the Confidential Appendix to the Second Report.⁷⁵

PART VI – ORDER SOUGHT

57. For the above reasons, the Company requests that this Court grant the St. Louis Sale Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2023.


STIKEMAN ELLIOTT LLP
Counsel for the Applicant

⁷² See, for example, *Ontario Securities Commission v Bridging Finance Inc.*, [2021 ONSC 4347](#) at [paras 23-28](#).

⁷³ Second Report at para 6.18.

⁷⁴ *Acerus Pharmaceuticals Corporation (Re)*, [2023 ONSC 3314](#) at [para 39](#); **see also** *Ontario Securities Commission v Bridging Finance Inc.*, [2022 ONSC 1857](#) at [paras 50-54](#).

⁷⁵ Second Report at para 6.18.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Acerus Pharmaceuticals Corporation (Re)*, [2023 ONSC 3314](#).
2. *Elleway Acquisitions Limited v 4358376 Canada Inc*, [2013 ONSC 7009](#).
3. *Feronia Inc (Re)*, [2020 BCSC 1372](#).
4. *Harte Gold Corp (Re)*, [2022 ONSC 653](#).
5. *Karrys Bros Ltd (Re)*, 2014 ONSC 7465.
6. *Komtech Inc (Re)*, [2011 ONSC 3230](#).
7. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#).
8. *Mustang GP Ltd (Re)*, [2015 ONSC 6562](#).
9. *OEL Projects Ltd (Re)*, [2020 ABQB 365](#).
10. *Ontario Securities Commission v Bridging Finance Inc*, [2021 ONSC 4347](#).
11. *Ontario Securities Commission v Bridging Finance Inc*, [2022 ONSC 1857](#).
12. *Re Bloom Lake*, [2015 QCCS 1920](#).
13. *Re Nelson Education Limited (Re)*, [2015 ONSC 5557](#).
14. *Re Tool-Plas Systems Inc*, [2008 CanLII 54791](#) (Ont SCJ).
15. *Royal Bank v Soundair Corp*, [1991 CanLII 2727](#) (Ont CA).
16. *Sherman Estate v Donovan*, [2021 SCC 25](#).
17. *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41](#).

SCHEDULE “B” RELEVANT LEGISLATION

Courts of Justice Act, RSO 1990, c C43

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

Extension of time for filing proposal

50.4 (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

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.

Factors to be considered

65.13 (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.

Companies' Creditors Arrangement Act. RSC, 1985, c C-36

Factors to be considered

36 (3) 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 monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor 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.

SCHEDULE "C"
SUPPLEMENTAL AUTHORITIES

CITATION: Karrys Bros. Ltd. (Re), 2014 ONSC7465
COURT FILE NO.: 32-1942339/1942340/1942341
DATE: 20141224

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF AN INTENTION TO MAKE A PROPOSAL OF KARRYS BROS., LIMITED, KARRYS SOFTWARE LIMITED AND KARBRO TRANSPORT INC.,

COUNSEL: *E. Pillon and K. Esaw* for the Applicants

L. Rogers for PWC

S. Graft for BMO

C. Armstrong for Core-Mark

HEARD: December 23, 2014

ENDORSEMENT

Overview

[1] On December 23, 2014 I granted orders approving a sale of substantially all of the applicants' assets together with various related administrative orders, with reasons to follow. These are those reasons.

[2] This motion seeks approval of a sale of the applicants' assets out of the ordinary course, authorization to distribute funds to the senior secured lender, a sealing order of certain confidential information and various administrative orders, including:

- (i) extending the time for filing a proposal;
- (ii) approving a key employee retention agreement;
- (iii) approving an administrative charge;
- (iv) approving the consolidation of the applicants' proposal proceedings; and
- (v) approving the report of the proposal trustee.

Background

[3] Karrys is a wholesale distributor of tobacco, confectionery, snacks, beverages, automotive supplies and other products to retail, gas and convenience stores across Canada. As of November 1, 2014, Karrys' assets were exceeded by its liabilities by over \$1 million. Karrys experienced net losses of over \$3 million in each of the last two years.

- Page 2 -

[4] As a result of its financial difficulties, Karrys committed defaults under its loan agreement with the Bank of Montréal in 2013. BMO is Karrys' senior secured lender. BMO agreed to a number of forbearance agreements to enable the sales process which is at the heart of this motion.

[5] Karrys commenced a sales process in December 2013. It retained a financial advisor, Capitalink. Karrys had initial, exclusive negotiations with Core-Mark, itself a wholesale distributor of similar goods, in May through July 2014. Those negotiations did not result in an agreement.

[6] Karrys retained Price Waterhouse Coopers to assist Karrys and Capitalink in undertaking a more expansive sale process. In the fall of 2014, Karrys developed a process in which Core-Mark agreed to make a stalking horse bid for substantially all of Karrys' assets.

[7] Over 53 potential strategic and financial buyers were also invited to bid on the assets. Thirteen of these potential buyers entered into confidentiality agreements and received a confidential information memorandum and access to Karrys' data room. PWC and Capitalink responded to all reasonable requests for information.

[8] By the bidding deadline of noon on December 10, 2014, however, no other bids were received. Core-Mark was, accordingly, declared the successful bidder.

[9] Karrys now asks for the court's approval of the asset purchase agreement with Core-Mark and for a vesting order, together with approval of distribution, from the proceeds, of the amount owed to BMO and other related relief.

The Sale and Vesting Order

[10] Jurisdiction to make orders approving the sale derives from s. 65.13 of the BIA. Factors for the court to consider when asked to approve a sale out of the ordinary course are also listed in s. 65.13.

[11] It is not necessary for the debtor to present its proposal under the BIA before an order approving a sale, *Re Komtech*, 2011 ONSC 3230.

[12] In this case, the sale was the result of a broad and comprehensive marketing process. Two financial advisors were engaged. When initial negotiations with Core-Mark did not produce an amount the applicants originally thought acceptable, another process was initiated with the assistance of PWC. Efforts to lever the Core-Mark offer were, however, although widely promoted, ultimately unsuccessful. The "market" has, in that sense, spoken.

[13] The proposal trustee, PWC, has reviewed the sale process and is supportive of the process and the result. The proposal trustee has, as well, conducted a detailed analysis of the Core-Mark bid measured against a "liquidation in bankruptcy" scenario. Even under a "best case" liquidation scenario, the unsecured creditors would be expected to recover significantly less than under the Core-Mark sale transaction. Under the proposed sale, there is the possibility of surplus for distribution to unsecured creditors. There would be no such possibility under a liquidation scenario. BMO, the senior secured lender, is also supportive of the process and the result.

- Page 3 -

[14] Because the purchase price represents, through an extensive sales process, the highest price realizable and an amount which is greater than what could be realized under a liquidation, the consideration to be received for the assets is reasonable and fair. Further, the sale will enable Karrys to make the payments contemplated under s. 65.13(8) of the BIA.

[15] The fact that the sales process was not pre-approved by the court is not a bar to the court's approval in this case. Is clear on the evidence that the Core-Mark transaction is the best available option in the circumstances. No one has come forward to argue otherwise. The test is the same whether approval is sought before or after the process – the principles in *Soundair* govern. The *Soundair* test has been met. A judgment call had to be made whether to further extend the process in hopes of perhaps finding a better bid. Further delay would just as likely have resulted in a greater erosion of value. An immediate sale was, on the evidence, the only way to maximize recovery.

[16] In addition, the process actually followed is indistinguishable from what the court might reasonably have approved had prior authorization been sought. There is no evidence, or likelihood, that Karrys or its creditors would be in a better position if some further, or other, sales process had been followed.

[17] The sale is approved and the vesting order shall issue.

The Key Supplier Issue

[18] On the very day Karrys filed its notice of intention to make a proposal, Karrys' principal tobacco supplier delivered a substantial quantity of tobacco. A dispute arose over payment. The supplier took the position it was under no legal obligation to continue to supply and that it would not supply unless payment was received. Karrys' supply agreement had expired and the parties were operating on the basis of an informal supply arrangement.

[19] Ensuring ongoing tobacco supply from this supplier was critical to Karrys in terms of the ongoing operations of the business pending the closing of the sale to Core-Mark, the satisfaction of conditions precedent to the closing with Core-Mark, including the loss of potential customers should their tobacco requirements not be satisfied, and the resulting risk that the Core-Mark transaction would be lost as a result.

[20] Karrys and its legal advisers considered there was significant litigation risk relating to the ability to enforce a stay of proceedings against the supplier in any event and, accordingly, entered into negotiations with the tobacco supplier.

[21] These negotiations resulted in a substantial payment to the supplier which, arguably, involved post-filing payment for a pre-filing obligation. Given the importance of this supplier to ongoing operations and to the success of the Core-Mark sale, however, Karrys, along with its advisors, had little option but to reach a settlement.

[22] Unlike the CCAA, the concept of "critical suppliers" is not found in the proposal provisions of the BIA. Nevertheless, in my view, similar considerations can and should be taken into account in appropriate circumstances. In this case, Karrys and its advisors reasonably believed that the ongoing viability of the business and the Core-Mark sale (which, as found

- Page 4 -

above, represents the highest realizable price for Karrys' assets available in the circumstances) required the ongoing availability of this critical source of supply. There is also a significant net benefit to Karrys arising from sales of the product supplied. The supply contract negotiated, in the context of both the importance of the supply and significant litigation risk, was, I find, reasonable in the circumstances.

BMO Distribution

[23] BMO delivered notices of intention to enforce its security. The unchallenged evidence before the court is that BMO holds a valid, perfected security interest over each of the applicants' assets. BMO is entitled to a distribution of proceeds from the sale in satisfaction of its claim.

Sealing Order

[24] I am satisfied that the confidential appendices should be sealed until the deal is closed. There is an important public interest in maximizing returns in proceedings of this kind. It is important, therefore, that until the deal is concluded, commercially sensitive information about the deal not be publicly disclosed. Failure to grant the order would impair the integrity of any subsequent process. In addition, in the context of the key employee retention agreement, there is sensitive personal information which ought not to be disclosed.

[25] The *Sierra Club* test has been met on the facts of this case, *Elleway Acquisitions Ltd.*, 2013 ONSC 7009. The salutary effects of granting the sealing order outweigh the limited deleterious effect of restricting access to these limited pieces of evidence.

Extension

[26] Section 50.4(9) of the BIA grants the jurisdiction to grant the extension. The initial proposal period expires on January 12, 2015. The Core-Mark transaction will not close until February 2015.

[27] The applicants are acting in good faith. There is some prospect of surplus funds for distribution to unsecured creditors, given time to close the Core-Mark sale and assess the remaining priorities and claims. The cash flow statements indicate that Karrys has sufficient cash to fund operations through to the end of February 2015. There is no evidence any creditor will be prejudiced by the extension.

[28] Accordingly, the time for filing a proposal is extended to February 23, 2015.

Key Employee

[29] It is often recognized in restructuring proceedings that retention of key employees is vital. Securing payment is, in turn, a vital incentive for the employee to remain.

[30] In this case, there is one employee whose assistance has been, and will remain, key to ongoing operations to the date of sale. The retention bonus in issue is relatively modest. It is supported by the proposal trustee and BMO. Without securing the retention payment, there is a

- Page 5 -

significant risk the employee would leave. In addition, given the abbreviated timeframe for closing the Core-Mark sale, it would be almost impossible to find a timely replacement.

[31] For these reasons, the retention agreement and charge, as requested, is approved.

Administrative Charge


[32] Section 64.2 of the BIA provides for a super-priority to secure the fees for needed professional services during the restructuring. Secured creditors have received notice of this request. The proposal trustee supports the granting of the charge. The amount sought is, in my view, appropriate. The administrative charge requested is approved.

Consolidation

[33] It is clear that the operations of the three applicants are closely intertwined such that it would be difficult to disentangle their affairs. In order to secure the just, most expeditious and least expensive resolution, it is necessary to consolidate these closely related bankruptcy proceedings. This will avoid duplication and reduce cost. The requested order is therefore granted.

Proposal Trustee Report

[34] Given my approval of the elements above, it follows that the first report and activities of the proposal trustee should also be approved.



Penny J.

Date: December 24, 2014

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, OF
WHYTE'S FOODS INC.**

Court File No. 23-02978830-0031
Estate File No. 31-2978830

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT
(ST. LOUIS SALE APPROVAL, STAY
EXTENSION AND SEALING)**

STIKEMAN ELLIOTT LLP

Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon (LSO #35638M)

Tel: (416) 869-5623

Email: lpillon@stikeman.com

Natasha Rambaran (LSO #80200N)

Tel: (416) 869-5504

Email: nrambaran@stikeman.com

Lawyers for Whyte's Foods Inc.