



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: BK-24-03038619-0031

DATE: April 15, 2024

NO. ON LIST: 5

TITLE OF PROCEEDING: BRR LOGISTICS LIMITED et al

BEFORE: JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

| Name of Person Appearing | Name of Party            | Contact Info   |
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**For Defendant, Respondent, Responding Party:**

| Name of Person Appearing | Name of Party                | Contact Info   |
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**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party                      | Contact Info   |
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## **ENDORSEMENT OF JUSTICE KIMMEL:**

- [1] The applicant (the "Company" or "BRR") filed a notice of intention ("NOI") to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, as amended (the "BIA") on January 31, 2024 (the "NOI Filing Date"). On February 27, 2024, the Honourable Justice Conway made an order ("First Day Order"). BDO Canada Limited ("BDO") was appointed Proposal Trustee in the NOI proceedings. Among other things, the First Day Order approved a Liquidation Plan.
- [2] The Company now seeks the following orders:
- a. extending the time to file a proposal up to and including May 30, 2024;
  - b. declaratory relief in respect of certain former employees pursuant to section 5(5) of the *Wage Earner Protection Program Act* (Canada) S.C. 2005, c. 47, s. 1, as amended ("WEPPA"), and section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-22 ("WEPP Regulations");
  - c. approval of the Proposal Trustee's Second Report dated March 21, 2024 (the "Second Report") and third report dated April 9, 2024 (the "Third Report"), the activities and conduct of the Proposal Trustee detailed therein, and the fees and disbursements of the Proposal Trustee and its legal counsel as detailed in the Third Report;
  - d. a sealing order in respect of the Confidential Supplement to the Proposal Trustee's Third Report until the conclusion of these NOI proceedings and the discharge of the Proposal Trustee, or until further Order of the Court;
  - e. approval of the auction proposal dated March 19, 2024 (the "Auction Proposal") delivered to the Company by Platinum in respect of the sale of trailers, reefers, and residual material handling equipment of the Company by way of auction;
  - f. authorization for the Company to enter into an auction services agreement with Platinum in respect of the Sale of the Equipment (the "Auction Agreement");
  - g. authorization for Platinum to conduct the auction, as references in, and in accordance with the terms of, the Auction Agreement (collectively, the "Auction"); and
  - h. vesting in each purchaser at such Auction (each, a "Purchaser") the Company's right, title and interest in and to the Equipment purchased by such respective Purchaser at the Auction (in each case, the "Purchased Assets"), free and clear of any claims and encumbrances (the "Platinum AVO").

- [3] Prior to the wind-down of its business, BRR owned and operated a frozen foods sale and logistics business. Its customers included manufacturers, grocers, and brokers. The Company had thousands of retail customers and operated in all provinces and territories in Canada, with most of its business conducted in Ontario.
- [4] Prior to the NOI Filing Date, the Company had approximately 46 employees, 20 of whom were unionized. As part of its orderly liquidation and wind-down of the business, the Company completed significant lay-offs and currently only employs three individuals who continue to assist with the orderly wind-down and liquidation.
- [5] The Company, with the assistance of the Proposal Trustee, continues to carry out the Liquidation Plan in accordance with the terms of the First Day Order. As detailed in the Third Report of the Proposal Trustee, sales of inventory and equipment, and collection of accounts receivable, are ongoing.

#### Approval of the Platinum Auction Proposal, Auction Agreement and the Platinum AVO

- [6] The Company has worked with the Proposal Trustee to solicit liquidation proposals from a number of third-party auctioneers in respect of the Company's trailer, fleet, and miscellaneous handling equipment. The Company received six (6) proposals.
- [7] Among the proposals received, it was determined that Platinum's Auction Proposal provided the most favorable terms to liquidate the Company's Equipment. Platinum's Auction Proposal requires that the Equipment be sold free and clear of any and all liens and encumbrances.
- [8] The Court has the jurisdiction to approve a sale transaction within BIA proposal proceedings in the absence of a proposal. See *Re Komtech Inc.*, 2011 ONSC 3230 at para. 33. Such an Order may be made where the Court is satisfied that the criteria set out in section 65.13(4) has been satisfied, and having regard to the applicable principles for the Court to consider on a motion for the approval of a sale of assets as set out in *Royal Bank v. Soundair Corp.*, (1991), 83 D.L.R. (4th) 76 (Ont. C.A.). See also *Re Nelson Education Limited*, 2015 ONSC 5557 at para. 37.
- [9] Based on the written and oral submissions of the Company and the recommendation and support of the Proposal Trustee, and in the absence of any opposition (all known creditors who may have an interest in the subject Equipment, including lien claimants, having been put on notice of this motion and no one appearing to oppose it), Platinum's Auction Proposal and the Auction contemplated therein appear to satisfy the criteria in subsection 65.13(4) of the BIA and the *Soundair* principles.
- [10] Further, all of the other statutory requirements for obtaining relief under section 65.13 of the BIA have been satisfied.

- [11] The Court has jurisdiction pursuant to subsections 65.13(1) and (7) of the BIA to authorize a sale free and clear of any security, charge or other restriction, provided that it also orders that the proceeds of the sale are subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is affected by the order, which the proposed order does do. Further, there are provisions contained in the proposed order specifically designed to satisfy the requirements of section 65.13(8) of the BIA.
- [12] The Company has paid all employee wages and compensation referred to in section 60(1.3)(a) of the BIA.

### Filing Extension

- [13] The requirements under section 50.04 (8) of the BIA for the court to extend the time for filing a Proposal have been satisfied. The Company has acted and continues to act in good faith and with due diligence in furtherance of these proceedings. The Company's intention is to continue to implement the Liquidation Plan including the transaction contemplated by the Platinum AVO in consultation with the Proposal Trustee. Should recoveries be sufficient, the Company intends to present a proposal to its unsecured creditors.
- [14] The Proposal Trustee has prepared a report and has expressed the view that the Company has satisfied the test for an extension of time by which it must file a proposal.
- [15] The cash flow forecast appended to the Monitor's Third Report demonstrates that the Company is forecast to have sufficient liquidity to operate during the proposed extended period to May 30, 2024.
- [16] The requested extension is appropriate in the circumstances.

### WEPPA Declaration

- [17] The Company seeks a declaration that *Wage Earner Protection Program Act* (Canada) S.C. 2005, c. 47, s. 1, as amended ("WEPPA") applies with respect to certain former the employees.
- [18] Section 5(5) of WEPPA states that the court "may" in proceedings under the BIA, determine that a former employer meets the criteria prescribed by the WEPPA Regulations. Section 3.2 of those Regulations states that "for 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". The Company and Proposal Trustee have maintained since the First Day Order that these requirements were satisfied.

- [19] Conway J. declined to grant this relief when the First Day Order was made because there was no reason set out in the materials as to why a declaration from this court was required to supplement the views of the Company and the Proposal Trustee that these requirements had been satisfied.
- [20] Since then, the Proposal Trustee engaged with Service Canada to ensure the requirements of WEPPA were satisfied for the benefit of terminated employees. As described in the Proposal Trustee's Third Report, Service Canada advised the Proposal Trustee that the WEPPA declaration is necessary and required in order for terminated employees to receive their entitlements under WEPPA.
- [21] As required by s. 5(1) (iv) of WEPPA, the former employer (Company) is the subject of proceedings under Division I of Part III of the BIA. Further, the Company's former employees in Canada have been terminated (other than any retained to wind down its business operations), as s. 3.2 of the Regulations requires.
- [22] The requirements have been satisfied. The Proposal Trustee supports the Company's request and Service Canada has confirmed that a court order is required for the WEPPA benefits to flow to terminated employees. On the basis of this further information and Service Canada's position, I am satisfied that the requested WEPPA declaration is now appropriate to make.

### Partial Sealing Order

- [23] A partial sealing order is sought in respect of the Confidential Supplement to the Proposal Trustee's Third Report which includes commercially sensitive terms relating to the auction proposals received by the Company including a summary of each of the proposals received from the various auctioneers, as well as Platinum's Auction Proposal.
- [24] The sealing order is limited in scope to confidential information about the auction proposals that the Company has received, one of which (the Platinum Auction Proposal) has been selected. The requested sealing order is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if a transaction is not completed and further efforts to sell the Equipment have to be undertaken. Until the sale process has been carried out and sale transactions have closed, there remains a risk that a further process may be required and it would be harmful to that process for the terms of the auction proposals received to be available to participants in a later process.
- [25] The proposed sealing order is limited to the confidential information about the ongoing auction process and time limited so as to minimally intrude upon the public interest in the openness of our courts. The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality.

- [26] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Preservation of the confidentiality of information inherent in a sale process is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 85 when limited to only that material that contains the confidential and sensitive information and only for as long as may be necessary, as has been proposed in this case.
- [27] Counsel is directed to ensure that the sealed confidential report and exhibits are provided 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 report and exhibits can be physically sealed. Counsel is further directed to apply, at the appropriate time, for an unsealing order, if necessary.

#### General and Orders

- [28] The court finds the approval of the Proposal Trustee's reports and the fees and disbursements of the Proposal Trustee and its counsel to date to be appropriate in the circumstances.
- [29] Orders to go in the form signed by me today, effective immediately and without the necessity of issuing and entering.

A handwritten signature in cursive script that reads "Kimmel J.".

KIMMEL J.