

# COX & PALMER

Nova Scotia New Brunswick Prince Edward Island Newfoundland and Labrador  
www.coxandpalmer.com

June 24, 2009

## HAND DELIVERED

The Honourable Justice A. David MacAdam  
The Law Courts  
1815 Upper Water Street  
Halifax, NS B3J 1S7

My Lord:

**RE: Canadian Sailing Expeditions Inc. – *Companies' Creditors Arrangement Act*  
S.H. No. 297999**

I am an associate of Robbie MacKeigan's and, in his absence from the office, I am scheduled to appear before Your Lordship on Monday, June 29, 2009 at 9:30 a.m. for an order extending the stay termination date set out in the initial order made by this Court on June 27, 2008 (the "Initial Order") as extended by subsequent orders of this Court to August 31, 2009.

Filed with this application is the affidavit of Douglas Prothero, President and Director of the Company. Unlike prior motions in this matter, I understand that Paul Goodman of BDO Dunwoody Goodman Rosen Inc., court appointed monitor (the "Monitor"), will not be filing a report with the Court in respect of this motion.

Pursuant to paragraph 57 of the Initial Order, this application has been brought on two clear days' notice to GrowthWorks Atlantic Venture Fund Limited ("GrowthWorks"), Nova Scotia Business Inc. ("NSBI"), Caterpillar Financial Services Limited ("Caterpillar") and National Marine and Fire Services Inc.

### **Extension of Stay of Proceedings**

As set out in the affidavit of Mr. Prothero on file, Navigator Voyages Inc., ("Navigator") the purchaser under the Agreement of Purchase and Sale that is central to the sanctioned Plan of

**Gavin D. F. MacDonald**

*Associate*

*Main Line* 902 421 6262 *Direct* 902 491 4464

*Fax* 902 421 3130 *Email* [gmacdonald@coxandpalmer.com](mailto:gmacdonald@coxandpalmer.com)

Purdy's Wharf Tower I 1100-1959 Upper Water Street Halifax NS B3J 3N2

*Correspondence* PO Box 2380 Central Halifax NS B3J 3E5

\*20588/0023/1068662v1

Arrangement (the "Plan") has made significant progress in securing senior debt financing from the existing lenders to the Company but requires additional time to finalize an equity investment and its debt financing. The Company seeks an extension of the stay of proceedings in order to continue its effort with a view to completing a financing and implementation of the Plan as soon as possible. We do not anticipate that Caterpillar, Growthworks or NSBI will object to this extension.

Paragraph 11(4) of the CCAA sets out the jurisdiction of the Court to consider the Company's application:

- (4) Other than initial application court orders – A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
  - (a) staying until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1;
  - (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
  - (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Pursuant to section 11(6) of the CCAA, the burden of demonstrating to the Court that it is appropriate for it to grant the requested extension rests with the Company. Section 11(6) reads as follows:

- (6) Burden of proof on application – The court shall not make an order under subsection (3) or (4) unless
  - (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

- (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted and is acting, in good faith and with due diligence.

In *Re Federal Gypsum Company* (2007 NSSC 347) at paragraph 16, Justice MacAdam cited Justice Glennie of the New Brunswick Court of Queen's Bench in *Re Cansugar Inc.*, 2004 NBQB 7 in summarizing the requirements to order an extension of a stay termination date as follows:

- (a) the circumstances exist to make the order appropriate;
- (b) that the applicant has acted and continues to act in good faith; and
- (c) that the applicant has acted and continues to act with due diligence.

Justice Farley in *Lehndorff General Partners Ltd., Re*, (1993) 17 CBR (3d) 24 (Ont. Gen. Div. [Commercial List]) in connection with the principles to be reviewed in such applications commented at para 6 as follows:

The CCAA is intended to provide a structured environment for the negotiation of compromises between the debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so *and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA...* [emphasis added]

These comments of Justice Farley were quoted with approval by Justice Glennie of the New Brunswick Court of Queen's Bench in *Re Simpson's Island Salmon Ltd.* 2006 NBQB 6 at para 27.

Justice Glennie further wrote in *Re Cansugar Inc.*, supra at para 9:

In my opinion, the requirements of section 11(6) of the CCAA have been satisfied in this case. The continuation of a stay is

supported by the overriding purpose of the CCAA, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court, and to prevent manoeuvres for positioning among creditors in the interim.

Also quoted in *Re Federal Gypsum Company*, supra, was the decision *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at para 28 on the supervisory role of the court in applications to extend stays of proceeding:

The court's role during the stay period has been described as a supervisory one, meant to: "*preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.*" That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling creditors meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interest is maintained. [emphasis added]

As noted in Mr. Prothero's affidavit, the Company is maintaining minimal operations during the recent periods. While it had been hoped that the financing and related work would be completed by this time, it is now apparent that a further extension is required and we have prepared a draft order providing for an extension of the stay of proceedings to August 31, 2009. It remains the Company's submission that, given the level of creditor support to this motion, it is not yet evident that the Company's efforts are doomed to failure.

All of which is respectfully submitted.

Yours Respectfully,



Gavin D. F. MacDonald

GDFM/gj