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MCINNES COOPER
LAWYERS | AVOCATS

John D. Stringer, Q.C.
Direct 902.444.8608
john.stringer@mcinnescooper.com

Purdy's Wharf Tower II
1300-1969 Upper Water Street
PO Box 730
Halifax NS
Canada B3J 2V1
Tel 902.425.6500 | Fax 902.425.6350

Our File: BU-1934
November 18, 2009

HAND DELIVERED

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

Hfx No. 297999

My Lord:

Re: *The Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended: Motion by Growthworks Atlantic Venture Fund Limited for an Order Appointing a Receiver in Respect of the Assets, Property and Undertaking of Canadian Sailing Expeditions Inc.

The Applicant, Growthworks Atlantic Venture Fund Limited ("Growthworks") seeks an Order appointing BDO Dunwoody Goodman Rosen Inc. as Receiver of all of the assets, property and undertaking of Canadian Sailing Expeditions Inc. ("CSE"), pursuant to *Nova Scotia Civil Procedure Rule* 73, and Section 43(9) of the *Judicature Act,* R.S.N.S. 1989 c.240.

Though originally scheduled to be heard on Monday September 21, 2009 1:00 p.m., the hearing of this Motion was that day adjourned *sine die.*

By way of an Amended Notice of Motion filed on November 18, 2009, Growthworks seeks to be heard in respect of this Motion on Friday November 20, 2009.

The Affidavit of Paul G. Goodman FCA, FCIRP, FIIC, sworn on September 16, 2009; the Affidavit of Thomas J. Hayes sworn on September 16, 2009; and the Supplemental Affidavit of Thomas J. Hayes sworn on November 18, 2009 have been submitted in support of Growthworks' Motion.

We intend to serve copies of the documents in support of this Motion upon CSE, by email to CSE's counsel which has acknowledged its authority to accept such service. The documents in support of this Motion shall also be sent to BDO Dunwoody Goodman Rosen Inc., via its counsel.

We intend to serve the following creditors of CSE by email through their respective counsel:

Caterpillar Financial Services Limited ("Caterpillar")
Nova Scotia Business Inc. ("NSBI")

Please accept what follows as the written submissions of Growthworks.

1. Background:

The Affidavits filed herewith set forth certain background facts which shall not be addressed at length herein, however the following facts are relevant to the within Motion:

CSE received from this Honourable Court an Initial Order affording protection from its creditors pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") on June 27, 2008. The Initial Order provided for a Stay Termination Date of July, 24, 2008, which Stay Termination Date was extended repeatedly on Motion by CSE and presently stands as December 4, 2009.

Growthworks was at all times and remains a senior secured creditor of CSE, pursuant to various Debtor In Possession "DIP" loans authorized by this Honourable Court.

With the Assistance of its Court appointed Monitor, BDO Dunwoody Goodman Rosen Inc. (the "Monitor"), CSE formulated a Plan of Compromise or Arrangement (the "Plan") which was submitted to CSE's creditors for consideration at a duly constituted Meeting of Creditors on February 17, 2009.

The requisite majorities of CSE's creditors, by creditor class as required under the CCAA, approved the Plan, and the same was submitted to this Honourable Court for sanction on March 5, 2009.

By way of a Sanction Order dated March 5, 2009, the Plan was sanctioned by this Honourable Court, and thereafter the Stay Termination Date was routinely extended as and when required to accommodate CSE's efforts to implement the Plan.

Fundamental to the Plan, and CSE's financial ability to perform the Plan, was the sale by CSE of its principal asset, the sailing vessel "Caledonia". Despite the best efforts of CSE and the Monitor following this Honourable Court's issuance of the Sanction Order, the intended sale of the Caledonia and other assets of CSE was not completed.

In or around early September 2009, it became apparent to CSE and the Monitor that senior secured creditors Growthworks, Caterpillar Financial Services Limited and Nova Scotia Business Inc. were unwilling to provide further DIP or interim financing to facilitate CSE's continued operation and efforts to market its principal asset, the Caledonia.

Although by way of an Order obtained on September 14, 2009 the Stay Termination Date was further extended to September 21, 2009. Up to and including September 21, 2009, it appeared to be the case that no further extension requests were to be made to this Honourable Court by CSE, and thus that CSE lacked the financial capacity to implement the Plan as approved by creditors and sanctioned by this Honourable Court and that CSE would imminently cease operations.

On the steps of this Honourable Court, on September 21, 2009, an agreement was struck amongst Growthworks, NSBI, Caterpillar and CSE whereby NSBI would advance, via the Monitor, the sum of $200,000 to CSE to permit CSE to meet its protective disbursements and other maintenance and operational costs up to and including December 4, 2009.

On the basis of this eleventh hour infusion of funding, CSE made a Motion on September 21, 2009 for a twenty four hour extension of the Stay Termination Date in order that the parties might finalize the terms of the NSBI advance, and the parties agreed to return to Chambers the following day, September 22, 2009.

In the late afternoon and evening of September 21, 2009 the parties finalized the terms of the NSBI advance, and On September 22, 2009, the parties returned to Court where CSE made a Motion for a further extension of the Stay Termination Date to December 4, 2009.

Your Lordship granted CSE's Motion and the Stay Termination Date was thereby extended to December 4, 2009.

Immediately upon receiving the September 22, 2009 extension Order, the Monitor and representatives of CSE, in consultation with Growthworks and other interested parties, continued their vigorous efforts to conclude a sale of the vessel Caledonia, but despite these best efforts, no such agreement of purchase and sale has been achieved.

By way of an email dated November 10, 2009, CSE President Douglas Prothero advised Growthworks, Caterpillar and other interested parties that CSE presently has few viable prospects for a sale of the vessel Caledonia, and those few prospects which do have some potential would not see this potential develop into an actual sale within the current stay period. Thus, CSE is running headlong into the Stay Termination Date with no viable prospect of a sale materializing before CSE's essential maintenance and operational funding run out.

There are no further funding advances on the horizon which might facilitate a further extension of the Stay Termination Date in these proceedings.

On November 16, 2009, Robert MacKeigan Q.C. on behalf of CSE made arrangements with the scheduling office of this Honourable Court in order for CSE to present a Motion on Friday November 20, 2009 at 9:30am, seeking an Order terminating the stay of proceedings, thus providing secured creditors of CSE such as Growthworks with an opportunity to take steps to realize upon their security.

Mr. MacKeigan's email correspondence to the Court suggested that a secured creditor of CSE might seek to make a Motion related to the enforcement of security contemporaneously with the termination of the stay of proceedings currently protecting CSE.

By way of the within Motion, Growthworks seeks so re-engage its previously adjourned Motion seeking an Order appointing BDO Dunwoody Goodman Rosen Inc. as receiver over all of the property, assets and undertaking of CSE, with all of the powers as set forth in the draft order submitted herewith, and/or as permitted by law.

The Affidavit of Paul G. Goodman filed in support of the within Motion endorses the approach herein proposed by Growthworks, namely the appointment of a receiver for the benefit of CSE's creditors. This supporting evidence reinforces the conclusion that this outcome represents the

most just, seamless and expedient mechanism to safeguard the primary asset of CSE and see to its eventual liquidation under Court supervision.

The form of Order is based upon the approved Model Receivership Order commonly used across Canada, and the changes which have been made to the form of Order since it was first presented in draft to this Honourable Court on September 16, 2009 are highlighted in a blackline version which has been filed, alongside three clean copies of the currently sought Order, with these Motion materials.

2. Law and Argument:

The Appointment of a Receiver

(a) Law

Houlden, Morawetz & Sara, in *The 2009 Annotated Bankruptcy and Insolvency Act*, at Section L1A, page 948 state:

"The appointment of a receiver by the court will be made in accordance with provincial law."

The former (1972) *Nova Scotia Civil Procedure Rule* 46 which permitted the appointment of receivers where the same was found to be "just and convenient" finds no direct counterpart in the current version of the *Nova Scotia Civil Procedure Rules*, however Rule 73 now governs Motions for the appointment of a receiver, other than interlocutory or interim receiverships, which are addressed at Rule 41.

Although this Motion is filed on an interlocutory basis to the extent it is tangential to the ongoing *CCAA* proceeding bearing this Honourable Court's file Hfx No. 297999, Growthworks does not seek an "interlocutory receivership" as defined in Rule 41, which was intended by the architects of the *Nova Scotia Civil Procedure Rules* to give rise to a mandate remaining temporarily effective pending the outcome of a trial or the hearing of an application. The receivership sought in these proceedings is a final, as opposed to interim remedy.

The present Rule 73 contains few references to a situation in which a receiver is to be appointed on the Motion of a secured creditor, however such is addressed in passing at Rule 73.03(1) which provides:

> "(1) A person who starts a receivership proceeding to enforce a security must, as soon as possible after the proceeding is started, deliver both of the following to a prior registered or recorded security holder:
>
> (a) a copy of the notice by which the proceeding is started;
>
> (b) a statement providing details of the prior security instrument." (emphasis added)

Beyond this passing reference at Rule 73.03 to a secured creditor initiating a receivership proceeding, little guidance is provided by the present Rule respecting the installation of a permanent receiver. Notwithstanding this fact, it is respectfully submitted this Honourable Court retains its traditional discretion to so appoint where the prevailing circumstances support the conclusion that such relief is just and convenient to grant.

In ***Torstar Corp. v. ITI Information Technology Institute Inc.***, 2002 CarswellNS 335 (N.S.S.C.), a case considering a receiver's appointment pursuant to the former Civil Procedure Rule 46, Chief Justice Kennedy observed at paragraph 27 that the power to appoint a receiver pursuant to the subject Rule was "quite significant". Later in the decision, His Lordship made the following observation in respect of this significant power (paragraph 29):

> "...Why did the court exercise that kind of power? The appointment of the receiver and manager preserved the assets of ITI for the benefit of all the interested parties, in order to allow the receiver and manager the opportunity to find a purchaser for those assets. The funds borrowed under the receiver's certificates were used to continue the operation of the ITI schools across Canada, pending the closing of the sale to the purchaser. There were some thirteen hundred students attending those schools at the time. It was a court order, made for good reason."

Although the phrase "just and convenient" which appeared within Rule 46 of the 1972 Rules, has not found its place in the current Rules, it is respectfully submitted this Honourable Court nevertheless retains a broad discretionary power to appoint a receiver in a proceeding when it appears to be "*just and convenient*" to do so. Section 43(9) of the *Judicature Act,* R.S.N.S. 1989 c.240 provides:

> "A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases it which it appears to the Supreme Court to be just or convenient that such an order be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, whether the estate's claimed to by both or by either of the parties are legal or equitable." (emphasis added)

In ***Pelican Lake First Nation v. Bill*** [2003] S.J. No. 866 (Sask Q.B.), the following comments were made by Klebuc J. respecting the "just and convenient" standard in relation to the appointment of a receiver (at paragraph 19):

> "The phrase "just or convenient" is often referred to in receivership applications. In Receiverships, Bennett at p. 91 articulates the essential requirements of such phrase:
>
> > In determining whether it is "just or convenient" that a receiver should be appointed, the court will consider many factors which will vary in the circumstances of the case. The court will consider whether irreparable harm might be caused if no order were made, the risk to the security holder, the apprehended or actual waste of the debtor's assets, the preservation and protection of the property pending the judicial resolution, the balance of convenience to the parties and the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others."

It is respectfully submitted that it remains appropriate in the context of receivership Motions for this Honourable Court to consider in the circumstances whether such an appointment is just and convenient. The Court is given much discretion in exercising this *significant power*, and must

balance the respective conveniences, and weigh the potential prejudices associated with alternative outcomes in considering when and how to exercise it.

(b) Submissions

It is respectfully submitted that it is both just and convenient for this Honourable Court to appoint a receiver in respect of the assets and undertaking of CSE, which appointment would serve the best interests of all of CSE's creditors for the following reasons:

1. CSE has clearly failed in its timely implementation of the Plan which has been approved by its creditors and sanctioned by this Honourable Court. It has become obvious that the Plan, as envisaged, has not succeeded and CSE is not financially capable of continuing its operations going forward. It is submitted the appointment of a Receiver by this Honourable Court at this time is a logical and practical continuation of this process and in the circumstances represents the most just, seamless and expedient means to see to the preservation and protection of all of CSE's assets for the benefit of its general body of creditors;

2. The assets in question, particularly the sailing vessel Caledonia, are at risk of deterioration unless serviced and maintained appropriately by trained personnel. Because CSE will be ceasing operations and losing the benefit of its employee services, these inherently sensitive assets must be preserved and protected in an orderly and transparent fashion, and a Receiver, as an officer of this Honourable Court, would afford such transparency and reassurance to the creditors of CSE;

3. BDO Dunwoody Goodman Rosen Inc. would be effective as a Court-appointee operating under a Court-supervised process to locate, protect and preserve the assets of CSE in comparison, for instance, to the authority pursuant to a private appointment under Growthworks' security, and as Court appointee, would serve the interests of all of CSE's creditors, not just Growthworks;

4. The draft form of Order provided herewith comprehensively empowers the proposed Receiver in a manner generally consistent with the non-exhaustive list of powers articulated at Rule 73.04, and thus the mandate herein contemplated would be of sufficient breadth to see to the protection of the interests of CSE's creditors;

5. Absent the appointment of a receiver, given the November 20, 2009 passage of the Stay Termination Date, a veritable "free for all" might ensue as CSE's creditors seek to pursue various self-help remedies. The process herein proposed would be of general benefit to CSE's creditors and would represent an orderly and seamless transition from the CCAA-related stay of proceedings to the Court-sanctioned receivership process contemplated, without any intervening uncertainty and/or chaos;

6. It is envisaged that the Administration Charge, as defined in the Initial Order and as referenced in the DIP Financing Orders dated July 4, 2008, August 13, 2008, November 3, 2008, and April 30, 2009 would accrue no further upon the November 20, 2009 expiry of the Stay Termination Date, however any

outstanding balance of the Administration Charge as therein defined which remains unpaid as at November 20, 2009 would be respected by the Receiver according to the order of priorities set forth in each of the aforementioned DIP Orders. In accordance with the aforementioned DIP Orders, amounts outstanding properly classified as Administration Charge sums, to a maximum of $75,000, would have priority over Growthworks' DIP Security charge as set forth in the various DIP Orders issued in the CCAA proceedings;

7. To the extent all of CSE's assets are to be sold, a vesting order from this Honourable Court will likely be necessary to enable purchasers to acquire such assets "free and clear" of competing claims and relevant encumbrances. The creation of a Court-supervised Receivership process would ensure that any such Order or further direction from this Honourable Court as may be required could be more readily obtained; and

8. The purpose of the Court-ordered receivership is to provide for an orderly realization of all of the assets of CSE and the Receiver would not be carrying on the business of CSE. Growthworks is a senior secured creditor of CSE, as are Caterpillar and NSBI, pursuant to its guarantee. There may be priority issues and claims of creditors *inter se* to be dealt with upon the distribution of any proceeds from the sale of all of CSE's assets. It is respectfully submitted a Court-supervised process would create a more orderly, just and convenient mechanism to resolve to any such disputes which may arise.

For these reasons, and as further supported by the Affidavits filed in support of the within Motion, it is respectfully submitted it is both just and convenient that this Honourable Court appoint BDO Dunwoody Goodman Rosen Inc. as Receiver of all of the property, assets and undertaking of CSE, in the form of the Order filed in support of this Motion.

It is respectfully submitted the proposed Receiver should be appointed without the requirement of posting security. This is justified by virtue of the fact that the proposed Receiver is a member of the Canadian Association of Insolvency and Restructuring Professionals and carries professional liability insurance, in accordance with the provisions of Rule 73.07(a) by which the requirement to post security may be excused by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF NOVEMBER, 2009.

FOR John D. Stringer, Q.C., and BENJAMIN R. DURNFORD
Ben R. Durnford

MCINNES COOPER
1300-1969 Upper Water St.
Purdy's Wharf Tower II
PO Box 730
Halifax NS
B3J 2V1

Solicitors for the Applicant