

Endorsement of Mr. Justice Koehnen dated October 9, 2020

From: Koehnen, Mr. Justice Markus (SCJ)

Sent: October 9, 2020 6:09 PM

To: Stam, Jennifer <jennifer.stam@nortonrosefulbright.com>; Sutton, Randy <randy.sutton@nortonrosefulbright.com>; Choi, Peter <peter.choi@nortonrosefulbright.com>; Jeff.Larry@paliareroland.com; Bobby Kofman <bkofman@ksvadvisory.com>; Carey, Peter <pcarey@loonix.com>; Lambert, Thomas <tlambert@loonix.com>

Subject: Re: In the Matter of a Notice of Intention to Make a Proposal of 2505243 Ontario Limited: Estate Number 31-2675288

Counsel:

Jennifer Stam, Randy Sutton, and Peter Tae-Min Choi for 2505243 Ontario Limited

Jeffrey Larry for the Proposal Trustee, KSV Restructuring Inc.

Peter Carey, Thomas P. Lambert for Princes Gates GP Inc. et al.

This email constitutes my endorsement arising out of today's hearing and should be placed into the court file.

The moving party, 2505243 Ontario Limited (the "Company") brings an urgent motion to stay a bankruptcy application commenced by, among others, the operator of Hotel X Toronto. For the reasons set out below, I grant the relief the Company seeks and allow its Notice of Intention to proceed.

The Company leased and operated two restaurants in Hotel X and provided other food and beverage services to the hotel. Disputes arose between the two.

The Company was able to operate at the hotel for between one and two years before the hotel was shut down in March 2020 by virtue of the Covid 19 pandemic. On July 2, 2020, shortly before the hotel was scheduled to host NHL teams, Hotel X terminated the agreements under which the Company operated its facilities at the hotel.

On July 20, 2020, the Company commenced an action against Hotel X. On September 9, 2020 Hotel X and five other creditors commenced a bankruptcy application against the Company. For all intents and purposes, Hotel X is the driving force behind the bankruptcy application. The remaining five creditors are relatively small and have total claims of approximately \$100,000.

On September 24, 2020 the Company filed a Notice of Intention pursuant to section 50.4 of the BIA.

The Company submits that its Notice of Intention stayed the bankruptcy application. Hotel X disagrees. Both have pointed to conflicting authorities about the extent to which a Notice of Intention does or does not stay a bankruptcy application. I do not need to decide that issue on today's motion.

Regardless of the effect of a Notice of Intention on a bankruptcy application, section 43 (11) of the BIA allows the court to stay a bankruptcy application "for other sufficient reason." In my view there is sufficient reason to stay the bankruptcy application on the facts of this case.

Counsel for Hotel X candidly admitted that it commenced the bankruptcy application because it found itself to be a defendant in what is described as an unmeritorious action by the Company. Whether that action is meritorious or not is, however, not really an issue for Hotel X to decide. On my view of the record, Hotel X commenced the application for the collateral purpose of putting an end to the litigation, not to protect any legitimate creditor interest.

The most solid asset of the Company is approximately \$30,000 in cash. A bankruptcy will swallow more than that in costs.

The other assets of the company include the claim against Hotel X and a receivable of \$1,246,000 that the Company says Hotel X owes it.

There is a further asset listed on the books of the Company of property, plant and equipment recorded at a cost of \$6,983,000. It appears that all of those assets are located at Hotel X and reflect the cost of building out the restaurants and food and beverage facilities at the hotel. Counsel for Hotel X notes that the leases between the hotel and the Company provide that the assets belong to the hotel once they have been installed.

As a practical matter, the only potential assets beyond the \$30,000 and cash that are available to pursue in a bankruptcy are assets that would have to be claimed from Hotel X. Hotel X also asserts significant claims against the Company which would make it a major creditor in a bankruptcy.

In these circumstances, the only plausible motive for Hotel X to bring a bankruptcy application against a company with \$30,000 cash but many claims against the hotel, would be to put an end to such claims. That is not a legitimate use of the bankruptcy powers the BIA provides.

A Notice of Intention holds a much better promise of pursuing claims against Hotel X which would create a pool of assets to distribute among creditors. I appreciate that parties related to the Company may also be creditors of the Company and may in fact carry the day when it comes to approving a Notice of Intention. Given however that there are only \$30,000 in assets otherwise available, the prejudice to non-arms length creditors if that occurs is nonexistent. The costs of a bankruptcy swallow the \$30,000 in any event as a result of which there is nothing to distribute to creditors. The only possibility of a creditor distribution will arise out of whatever claims the company has against Hotel X.

Allowing the Notice of Intention to continue causes no prejudice to any of the creditors. Hotel X has no legitimate basis for using bankruptcy powers to avoid litigation against it. If the litigation is without merit, the litigation process gives Hotel X numerous mechanisms to protect itself against unmeritorious litigation. Remedies for unmeritorious litigation should be pursued using the mechanisms available in civil litigation, not by using bankruptcy as a tool to quash litigation.

Given that I heard no submissions about the form of the order during argument today, I have not signed the draft order submitted. I leave it to the parties to agree to the form and content of an order. If the parties are unable to do so, they can email me directly for a short case conference to resolve the issue.

The underlying litigation between the parties also calls for case management. I would invite the parties to discuss amongst themselves how best to address that litigation. If the parties are unable to agree, I will make myself available at any time for a case conference at 8:30 in the morning or after 4:30 in the afternoon. Any party can mail me directly for a case conference to address how the disputes between them should be resolved.

Justice Markus Koehnen