

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICE OF INTENTION  
TO MAKE A PROPOSAL OF 2505243 ONTARIO LIMITED  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**FACTUM OF 2505243 ONTARIO LIMITED  
(Extension of Time to File a Proposal and Further DIP Increase)**

February 24, 2021

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**PART I - INTRODUCTION**

1. This factum is filed in support of a motion by 2505243 Ontario Limited (the **Company**) for an order, among other things, (a) extending the time for the Company to file a proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the **BIA**) to the date that is fifteen (15) business days after the date on which this Court issues its decision in the Action (defined below) (the **Proposed Extension Date**); (b) further increasing the maximum borrowing available in Post-Filing Advances (as defined in the Order of this Court dated October 20, 2020) on the terms as amended by the third amendment to the DIP Term Sheet dated February 24, 2021; and (c) approving the fifth report of KSV Restructuring Inc. in its capacity as the proposal trustee (in such capacity, the **Proposal Trustee**) and the activities of the Proposal Trustee described therein.
2. The primary purpose of the Company's proceedings has been to pursue the Company's litigation claim (the **Action**) against Princes Gates GP Inc., the general partner of Princes Gates Hotel Limited Partnership (collectively, **PGH**). There are no other assets of any materiality in the estate of the Company other than any potential recovery from the Action.

## **PART II - THE FACTS**

### **A. Background**

3. On Friday, September 24, 2020, the Company filed a NOI to make a proposal pursuant to the BIA and commenced these proceedings (the **NOI Proceedings**). KSV Restructuring Inc. was named as the Proposal Trustee in the NOI Proceedings.
4. The filing was made in response to the filing of an application for a bankruptcy order (the **Bankruptcy Application**) by PGH and a small number of other trade creditors of the Company.<sup>1</sup>
5. Immediately upon the commencement of the NOI Proceedings, the Company brought a motion to be heard on the following Tuesday, September 29, 2020 to address the Bankruptcy Application in light of the filing of the NOI. That motion was opposed by PGH and adjourned to October 9, 2020, which was the Court's earliest next availability.<sup>2</sup>
6. On October 9, 2020, the Court stayed PGH's bankruptcy application (the **Stay Order**) to permit the NOI Proceedings to continue in order to pursue the Action to determine whether there will be any recovery to the Company's estate.<sup>3</sup>
7. Once the Stay Order was granted, the Company sought to impose an expedited timeline for pursuing the Action with a view to conducting the trial prior to the end of the six month period permitted under the BIA. Since that time, the Company has moved as quickly as possible both within the NOI as well as within the Action. In particular, the following steps have been taken:

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<sup>1</sup> Affidavit of Peter Eliopoulos sworn February 24, 2021 (**Eliopoulos Affidavit**), Motion Record of the Company (**MR**), Tab 2, p. 10 at para. 5.

<sup>2</sup> Eliopoulos Affidavit, MR, Tab 2, p. 10-11 at para. 7.

<sup>3</sup> Eliopoulos Affidavit, MR, Tab 2, p. 10-11 at para. 7.

(a) NOI Proceedings:

- (i) On October 20, 2020, the Court, among other things, authorized and empowered the Company to obtain Post-Filing Advances under the DIP facility;<sup>4</sup>
- (ii) On December 4, 2020 and January 22, 2021, the Court authorized and empowered the Company to obtain further additional Post-Filing Advances under the DIP facility;<sup>5</sup>

(b) Action:

- (i) On November 10, 2020, the Court endorsed an expedited timetable, pursuant to which the parties have adhered to since then, subject to extensions approved by the Court or upon mutual agreement between the parties;<sup>6</sup>
- (ii) The motion for security for costs was heard on December 4, 2020;<sup>7</sup>
- (iii) Examinations for discovery took place on January 25, 26 and 29, 2021 and February 1, 2021;<sup>8</sup>
- (iv) Answers to undertakings were delivered on February 8, 2021;<sup>9</sup>

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<sup>4</sup> Order of the Court dated October 20, 2020, MR, Tab 8.

<sup>5</sup> Order of the Court dated January 22, 2021, MR, Tab 13.

<sup>6</sup> Endorsement of Justice Koehnen dated November 10, 2020, MR, Tab 9.

<sup>7</sup> Affidavit of Peter Eliopoulos sworn January 18, 2021, MR, Tab 3, p. 46 at para. 12.

<sup>8</sup> Endorsement of Justice Koehnen dated December 22, 2020, MR, Tab 12.

<sup>9</sup> Endorsement of Justice Koehnen dated December 22, 2020, MR, Tab 12.

- (v) Expert reports of the Company were delivered on February 12, 2021;<sup>10</sup>
- (vi) The pre-trial conference took place on February 9, 2021;<sup>11</sup> and
- (vii) The trial management conference took place on February 19, 2021.<sup>12</sup>

8. The Trial is scheduled to commence on March 1, 2021. The current date by which the Company must file a proposal is March 8, 2021.<sup>13</sup>

### **PART III - ISSUE**

9. The sole issue addressed in this factum is whether this Court should grant a final extension of the time in which it must file a proposal to the Proposed Extension Date, which date is beyond the six month period provided for under the BIA.

### **PART IV - LAW AND ANALYSIS**

#### **A. The Court has the Jurisdiction to Extend the Stay**

10. Section 50.4(9) of the BIA provides that after the initial 30 day period to file a proposal, the Court may grant extensions of the time in which a debtor must file a proposal up to a maximum of five (5) additional months (the **BIA Maximum Extension**).

11. While Section 50.4(9) of the BIA does not contemplate extensions beyond the BIA Maximum Extension, the Court has, in limited circumstances, exercised its inherent jurisdiction to extend the six-month time period where the requirements of justice

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<sup>10</sup> Endorsement of Justice Koehnen dated December 22, 2020, MR, Tab 12. The parties agreed to extend the deadline for delivery of the expert reports to February 12, 2021. The expert reports of PGH were delivered late in the evening on February 16, 2021, four days after the deadline.

<sup>11</sup> Endorsement of Justice Koehnen dated December 22, 2020, MR, Tab 12.

<sup>12</sup> Endorsement of Justice Koehnen dated December 22, 2020, MR, Tab 12.

<sup>13</sup> Eliopoulos Affidavit, MR, Tab 2, p. 11 at para. 11.

demanded such extension. This has been the case, in particular, in the last year given the global COVID-19 pandemic and the busy schedule of the Court to avoid undue prejudice to debtors who would otherwise be deemed bankrupt through no fault of their own.

12. In *Durham Sports Barn Inc.*, this Court found that Durham should be granted an extension given a determination on the issues was necessary in order for it to make a proposal.<sup>14</sup> In doing so, the Court found that an overly strict and technical compliance with Section 50.4(9) of the BIA without any regard for the circumstances of the case was contrary to the objectives of the BIA. The Court held that it had the power through the inherent jurisdiction of the Court to make such an order in a “situation where the requirements of justice demanded it.”<sup>15</sup>
13. In another case, the Superior Court of Québec extended the time to file a proposal beyond the six-month timeframe due to the extenuating circumstances faced by the debtor company as a result of COVID-19.<sup>16</sup>

#### **B. The Court should Grant the Stay**

14. In the current circumstances, the requirements of justice demand a reasonable and necessary extension of time to file a proposal to the Proposed Extension Date. The situation faced by the Company is similar to the situation in *Durham* in that (a) initial 15 days of the NOI Proceedings were lost due to court scheduling issues beyond the

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<sup>14</sup> *Durham Sports Barn Inc. Bankruptcy Proposal*, [2020 ONSC 5938](#) at paras. 59-61 (*Durham Sports*)

<sup>15</sup> *Durham Sports* at para. 61 citing *Gillespie v. Manitoba (Attorney General)*, [2000 MBCA 1](#) at para. 92.

<sup>16</sup> See the [Order](#) of the Honourable Martin Castonguay in the matter of the *Notice of Intention to Make a Proposal under the Bankruptcy and Insolvency Act of 168662 Canada Inc.* (bearing Court File No. 500-11-058613-205) extending the period of time to file a proposal beyond the six-month timeframe.

Company's control to address the Bankruptcy Application;<sup>17</sup> and (b) the Company's ability to make a proposal to its creditors hinges on being successful in the litigation.<sup>18</sup> This situation in restructurings is unusual as it is not common for a debtor company's assets to consist solely of potential recovery from a single piece of litigation despite the fact that it has significant operating debt including claims from trade creditors and possible employees.

15. The DIP lender has already invested considerable funds in the litigation without assurance there will be a return absent success in the litigation.<sup>19</sup> The preparation and filing a proposal in the absence of a trial decision and without the knowledge of the value of the estate would be unfair and prejudicial to the Company and its creditors.<sup>20</sup> Further there will be no value to the DIP lender in funding the professional cost of the preparation of a proposal if there is no prospect of a return to the estate.<sup>21</sup> No stakeholder, on the other hand, will be prejudiced by the extension.<sup>22</sup>
16. The Company, with the direction of the Court, has worked judiciously to ensure the commencement of the trial on March 1, 2021.<sup>23</sup> However, the BIA Maximum Extension for the Company is March 24, 2021, which is just over 2 weeks after the currently scheduled last day of the trial. The requested extension will allow the Company to

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<sup>17</sup> Eliopoulos Affidavit, MR, Tab 2, p. 10 at para. 7.

<sup>18</sup> Eliopoulos Affidavit, MR, Tab 2, p. 11 at para. 9.

<sup>19</sup> Eliopoulos Affidavit, MR, Tab 2, pp. 12-13 at paras. 18-19.

<sup>20</sup> Eliopoulos Affidavit, MR Tab 2, p. 12 at para. 13.

<sup>21</sup> Eliopoulos Affidavit, MR, Tab 2, p. 13 at para. 21.

<sup>22</sup> Eliopoulos Affidavit, MR, Tab 2, p. 12 at para. 16.

<sup>23</sup> Eliopoulos Affidavit, MR, Tab 2, p. 11 at para. 10.

complete the trial and receive the Court's decision, the timing of which is out of the Company's control.<sup>24</sup>

17. The Company is acting in good faith and with due diligence.<sup>25</sup>

**PART V - ORDER REQUESTED**

18. For the reasons set out above, the Company requests that this Court grant an order substantially in the form attached to its motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of February, 2021.

Worton Fox Fulbright Canada  
LLP

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<sup>24</sup> Eliopoulos Affidavit, MR, Tab 2, p. 12 at para. 13.

<sup>25</sup> Eliopoulos Affidavit, MR, Tab 2, p. 12 at para. 15.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Durham Sports Barn Inc. Bankruptcy Proposal*, [2020 ONSC 5938](#)
2. *Gillespie v. Manitoba (Attorney General)*, [2000 MBCA 1](#)

**SCHEDULE "B"**  
**RELEVANT STATUTES**

***Bankruptcy and Insolvency Act, R.S.C. 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.

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Estate/Court File No.: 31-2675288

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