

**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**  
(returnable October 20, 2020)

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TO: **THE SERVICE LIST**

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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 (a) extending the period of time for filing a proposal from October 24, 2020 to December 8, 2020; (b) granting an Administration Charge (defined below); and (c) granting a DIP Lender's Charge (defined below).

**PART II - THE FACTS**

2. The Company is one entity within a broader group of companies (the **Group**) that is a family-run business that is operated under the business name "byPeterandPauls.com".<sup>1</sup> On September 24, 2020, the Company filed a *Notice of Intention to Make a Proposal* (**NOI**) pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 (the **BIA**). KSV Restructuring Inc. was appointed as proposal trustee (the **Proposal Trustee**) in these proceedings.<sup>2</sup>

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<sup>1</sup> Affidavit of Peter Eliopoulos sworn October 16, 2020 (**Second Eliopoulos Affidavit**), Motion Record of the Company (**MR**), Tab 2, para 4.

<sup>2</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 7.

3. The filing of the NOI was necessitated by the Company's desire to protect and restructure the business in the face of an application for a bankruptcy order (the **Bankruptcy Application**) filed primarily by a party against whom the Company has commenced litigation (the **Litigation**), Princes Gates GP Inc., the general partner of Princes Gates Hotel Limited Partnership (collectively, **PGH**).<sup>3</sup>
4. On October 9, 2020, this Court heard a motion regarding whether the Bankruptcy Application was or should be stayed as a result of the filing of the NOI. The Court found that the Bankruptcy Application was stayed.<sup>4</sup>
5. The Company is now moving forward to pursue the Litigation and, in short order, establish a timeline for the adjudication of the Litigation.<sup>5</sup>
6. The Company has now arranged for funding of these proceedings from one of its related companies, Peter and Paul's Gifts Limited (in such capacity, the **DIP Lender**) and has entered into a DIP term sheet dated as of October 16, 2020 (the **DIP Term Sheet**) pursuant to which the DIP Lender has agreed to provide an interim debtor-in-possession facility (the **DIP Facility**) to the Company for an initial amount of \$300,000.<sup>6</sup> Pursuant to the terms of the DIP Term Sheet, interest will accrue at a rate of 5% and no fees will be charged.<sup>7</sup> As a condition of making the DIP Facility available, the DIP Lender has requested a super-priority charge (the **DIP Lender's Charge**) for advances made under

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<sup>3</sup> Affidavit of Peter Eliopoulos sworn September 25, 2020 (**First Eliopoulos Affidavit**), MR, Tab 3, paras 6 and 25.

<sup>4</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 9.

<sup>5</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 10.

<sup>6</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 13.

<sup>7</sup> Second Report to Court of KSV Restructuring Inc., in its capacity as Proposal Trustee, dated October 18, 2020 (**Second Report**), para 4.1(2).

the DIP Facility.<sup>8</sup> The DIP Lender's Charge will rank in priority to all other secured interests other than the proposed Administration Charge, super-priority amounts and any amounts owing to the Ministry of Finance which are found to be subject to a validly perfected lien pursuant to its personal property security registration made on August 10, 2020 (the **MOF PPR Registration**).<sup>9</sup>

7. The Company is also proposing a \$100,000 maximum administration charge (the **Administration Charge**, and together with the DIP Lender's Charge, the **Charges**) which will rank in priority to the DIP Lender's Charge.<sup>10</sup> The Administration Charge would be granted in favour of the Proposal Trustee, its counsel and counsel for the Company in connection with each of their fees and disbursements.

### **PART III - ISSUE**

8. The issues addressed in this factum are whether the Court should grant (a) the extension; (b) the Administration Charge; and (c) the DIP Lender's Charge.

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

#### **A. The Extension should be Granted**

9. Section 50.4(9) of the BIA provides that the Court may extend the time in which the Company can file a proposal. Extensions may be granted for a period of up to 45 days for a total period of not more than 6 months.<sup>11</sup>
10. The Company is acting in good faith and with due diligence. It requires an extension of the time in which it must file a proposal so that it can pursue the Litigation in order to

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<sup>8</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 14.

<sup>9</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 14.

<sup>10</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 15; First Eliopoulos Affidavit, MR, Tab 3, paras 31-32.

<sup>11</sup> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (**BIA**), s 50.4(9).

make a proposal to its creditors. The Company does not believe any creditor will be materially prejudiced if the extension is granted.<sup>12</sup>

11. The Proposal Trustee supports the Company's request for the extension.<sup>13</sup>

## **B. The Charges should be Granted**

### *The Proposed Administration Charge is Appropriate*

12. Administration charges are routinely approved in BIA proposal proceedings and are provided for in Section 64.2 of the BIA.<sup>14</sup> The proposed Administration Charge is limited to a maximum of \$100,000 and intended to secure the fees and disbursements of the Proposal Trustee, its counsel and counsel for the Company.<sup>15</sup>

### *The Proposed DIP Facility is Appropriate*

13. The Company requires funding for its proceedings in order to pursue the Litigation. The Company is not generating any revenue. Absent funding, the Company will not be able to continue through the extension period.<sup>16</sup> Given the Company's circumstances, it is highly unlikely third-party arm's length lending would be possible.<sup>17</sup>

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<sup>12</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 17; Second Report, para 3.0(3).

<sup>13</sup> Second Report, para 3.0(3).

<sup>14</sup> BIA, s 64.2; Second Report, para 5.0(1).

<sup>15</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 15.

<sup>16</sup> Second Report, para 4.2(1).

<sup>17</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 11.

14. Section 50.6(1) of the BIA provides for the granting of a charge for funding provided post-filing with regard to the debtor's cash flow statement.<sup>18</sup> Section 50.6(3) provides that the charge may rank in priority over the claim of any secured creditor of the debtor.<sup>19</sup>
15. In deciding whether to approve post-filing funding, the Court should consider, among other things, the following factors:<sup>20</sup>
- (a) the period during which the Company is expected to be subject to proceedings under the BIA;
  - (b) how the Company's business and financial affairs are to be managed during the proceedings;
  - (c) whether the Company's management has the confidence of its major creditors;
  - (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the Company;
  - (e) the nature and value of the Company's property;
  - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
  - (g) the report of the Proposal Trustee.
16. The proposed funding under the DIP Term Sheet is appropriate for the following reasons:<sup>21</sup>

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<sup>18</sup> BIA, s 50.6(1).

<sup>19</sup> BIA, s 50.6(3).

<sup>20</sup> BIA, s 50.6(5).

- (a) the proposed DIP Facility is for a limited period of time which will fund principally the professional cost of this proceeding as well as pursuit of the Litigation, which is the main asset of the estate;
- (b) absent funding, the Company would not be able to fund these amounts;
- (c) the terms of the proposed DIP Facility are not onerous, do not include any fees and provide for 5% interest which is well below market;
- (d) it is unlikely that any other funding would be available to the Company on more favourable terms (if at all); and
- (e) no creditor is likely to be materially prejudiced as a result of the funding.

17. Pursuant to Sections 50.6(3) and 64.2(2) of the BIA, the Court may grant orders providing priority to the Charges over all existing security interests.<sup>22</sup>

*The Priority of the Charges is Appropriate*

18. The Company is proposing that the Charges be given priority over all encumbrances granted by the Company other than super-priority amounts or any priority lien held by the Ministry of Finance as a result of the MOF PPR Registration. The Company has given notice to the Canada Revenue Agency and the Ministry of Finance. The Company has no other secured creditors.<sup>23</sup>

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<sup>21</sup> Second Eliopoulos Affidavit, MR, Tab 2, paras 11-14; Second Report, para 4.2(1).

<sup>22</sup> BIA, ss 50.6(3) and 64.2(2).

<sup>23</sup> Second Eliopoulos Affidavit, MR, Tab 2, para 14.

**PART V - ORDER REQUESTED**

19. The Company therefore requests Orders substantially in the form filed with its motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of October, 2020.

Walter Rose Fulbright Canada LLP



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

N/A

## **SCHEDULE “B” RELEVANT STATUTES**

### ***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3***

#### **Priority of claims**

**14.06 (7)** Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

#### **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.

#### **Order — interim financing**

**50.6 (1)** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

## **Priority**

**50.6 (3)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

## **Factors to be considered**

**50.6 (5)** In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

## **Court may order security or charge to cover certain costs**

**64.2 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

## **Priority**

**64.2 (2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

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Estate/Court File No.: 31-2675288

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Proceeding commenced at TORONTO

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