

ESTATE #: 51-2772665  
COURT#: 25597

**IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK**

**IN BANKRUPTCY AND INSOLVENCY**

**JUDICIAL DISTRICT OF MONCTON**

**IN THE MATTER OF** the proposal of **TOMAVO INC.** under the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3.

**TOMAVO INC.**

Applicant

**BRIEF ON MOTION**  
(on behalf of the Applicant)

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## FACTS

1. Tomavo Inc. (“**Tomavo**”) filed a Notice of Intention to Make a Proposal on the 7th day of October, 2021 (the “**Notice**”) which is set to expire on November 6, 2021.
2. Tomavo is seeking an extension of 45 days within which to file a proposal under section 50.4(9) of the **Bankruptcy and Insolvency Act** R.S.C. 1985, c. B-3 (the “**BIA**”) to December 21, 2021.
3. Tomavo relies upon the facts set out in the Affidavit of Mohamedamer Abdualsoud (commonly known as Amer Khaled) sworn on November 5, 2021 (the “**Khaled Affidavit**”) and the First Report of KPMG Inc. (the “**Proposal Trustee**”) dated November 8, 2021.
4. The Khaled Affidavit sets out particulars of the activities of Tomavo since the Notice was filed, which include:
  - (a) Since in or around October, 2021, Tomavo has been working closely with its primary supplier, Courchesne Larose, to review and improve various aspects of their business, including but not limited to business planning, product offerings, supply-chain management, sales and marketing, cost control, and management processes and procedures. Courchesne Larose is a Canada-wide fruit and vegetable wholesaler, importer and exporter based out of Montreal, Quebec, with over 100 years of experience in the industry and over \$400 million in sales volume.
  - (b) 95% of Tomavo’s product is supplied by Courchesne Larose, and they

are by far its single largest creditor. Courchesne Larose has agreed, while Tomavo works out terms of an acceptable creditor proposal, to accept payment on account for produce supplied on a cash on delivery basis. Tomavo pays its account weekly and is able to meet all current liabilities.

(c) Tomavo has replaced its Chief Financial Officer with Anil Sharma, a former Global Process Advisor at Exxon Mobil Corporation and a Chartered Professional Accountant. Its previous CFO was not performing to satisfactory standards, nor was he similarly credentialed.

(d) Tomavo has developed a mobile app to sell its products, which has yet to be implemented. Tomavo intends to launch the mobile app in Montreal and Toronto, delivering ordered produce to customers' doorsteps, and using Courchesne Larose warehouses to package orders.

(e) On or about October 7, 2021, Tomavo engaged KPMG as licensed insolvency trustees to oversee Tomavo's business operations and to assist with its insolvency issues, including the preparation of a viable creditor proposal. Courchesne Larose has gratuitously offered to pay for all legal and accounting expenses incurred by Tomavo in the course of preparing this creditor proposal.

(f) Tomavo intends to engage a public relations firm, National PR, based in Halifax, to advise on and manage issues it has faced resulting from misleading yet damaging news reporting in Halifax.

(g) Tomavo appears to have generated a great deal of interest from third parties interested in securing franchise rights to open additional stores in their locations, a potential future profit stream which it is currently investigating.

(h) Immediately after the filing of the Notice, after consultation with representatives of KPMG and Courchesne Larose, Tomavo gave notice to its landlords in Dartmouth, NS and Fredericton, NB to disclaim its realty leases in those municipalities, pursuant to subsection 65.2(1) of the BIA effective November 7, 2021. The closure in Dartmouth should reduce operating costs by approximately \$50,000 monthly and the closure of the Fredericton location will enable Tomavo to move its operations to a better and less costly location. These closures will enable Tomavo to narrow its focus to the more profitable locations.

(i) Since in or about October, 2021, the President of Tomavo, Amer Khaled, has been speaking with other creditors and suppliers essential to Tomavo's ongoing business operations, making arrangements for the continued supply of necessary goods and services. Mr. Khaled has had positive communications with the creditors/suppliers contacted to date.

(j) Thanks to Tomavo's forbearance and continued supply arrangements with Courchesne Larose, as well as planned cost reductions to the business, cash flow is expected to remain positive while it undertakes efforts to formulate a successful creditor proposal

## **ISSUE**

5. Should Tomavo be granted an extension of 45 days within which to file a proposal pursuant to subsection 50.4(9) of the BIA?

## LEGAL ARGUMENT

6. Pursuant to subsection 50.4(8), an insolvent person has 30 days after the filing of a Notice of Intention to Make a Proposal within which to file a proposal with the Official Receiver, unless an extension of this time period is granted.
  
7. Subsection 50.4(9) of the BIA provides as follows:
  - 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.
  
8. Mr. Justice Glennie of the New Brunswick Court of Queen's Bench considered an application for an extension of time under s. 50.4(9) of the BIA, as well as the pertinent jurisprudence regarding such an application, in *Re Convergix Inc.*, 2006 NBQB 288, 2006 CarswellNB 460. His analysis on this section of the BIA at paragraphs 35-38, is instructive:

35. The Applicants also seek an order pursuant to Section 50.4(9) of the BIA that the time for filing a Proposal be extended by 45 days to September 10<sup>th</sup>, 2006.

36. The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: *Doaktown Lumber Ltd., Re* (1996), 39 C.B.R. (3d) 41 (N.B. C.A.) at paragraph 12.

37. An extension may be granted if the Insolvent Corporations satisfy the Court that they meet the following criteria on a balance of probabilities:

- (a) The Insolvent Corporations have acted, and are acting, in good faith and with due diligence;
- (b) The Insolvent Corporations would likely be able to make a viable proposal if the extension is granted; and,
- (c) No creditor of the Insolvent Corporations would be materially prejudiced if the extension is granted.

38. In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See *Cantrail Coach Lines Ltd., Re* (2005), 10 C.B.R. (5<sup>th</sup>) 164 (B.C. Master).

[Emphasis Added]

9. The elements of the test are set out below.

### **Good Faith and Due Diligence**

10. The first element of the test is whether the insolvent has acted in good faith and with due diligence. The decision in *Re H&H Fisheries Limited*, 2005

NSSC 346 provided the following definition at para. 17:

17 The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to one's family or a pay-down on a mortgage or judgment on one's home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of "survival". Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

[Emphasis added]

11. The Court accepted the evidence of the trustee that the company was acting with both due diligence and in good faith.

12. In *Re Convergix*, supra, Justice Glennie stated at para. 39:

39. I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

- (a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;
- (b) The Insolvent Corporations have completed a business plan;
- (c) The Insolvent Corporations are diligently working on the Restructuring;
- (d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and
- (e) Representatives of the Insolvent Corporations have met with outside investors.

13. The evidence provided in support of this motion, being the Khaled Affidavit and the report of the Proposal Trustee, both indicate that Tomavo is acting in good faith and with due diligence. There is no evidence to the contrary and Tomavo is working towards the development of a strategy to deal with their current financial issues.

### **Viable Proposal**

14. The second aspect of the test is whether a viable proposal is likely to be made. The consideration of whether a proposal was likely to be viable was addressed in *Re Baldwin Valley Investors Inc.*, 1994 CarswellOnt 253 (O.C.J.

Gen. Div. [Commercial List]), where the Court provided at para. 4:

4 It seems to me that “viable proposal” should have to take on some meaning akin to one that seems reasonable on its face to the “reasonable creditor”; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. “Likely” as defined in *The Concise Oxford Dictionary of Current English*, 7<sup>th</sup> ed. (1987; Oxford, The Clarendon Press) means:

likely 1. Such as might well happen, or turn out to be the thing specified; probable. 2. To be reasonably expected.

I do not see the conjecture of the debtor companies’ rough submission as being “likely “.

15. In *Re Convergix*, supra, Justice Glennie described the test for viability at paras. 40 to 41 as follows:

40. The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]), Justice Farley was of the opinion that “viable” means reasonable on its face to a reasonable creditor and that “likely” does not

require certainty but means “might well happen” and “probable” “to be reasonably expected”. See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4<sup>th</sup>) 114 (N.S. S.C.).

41. The Affidavit evidence in this case demonstrates that the Insolvent Corporations would likely be able to make a viable proposal as there appears to be a core business to form the base of a business enterprise; management is key to the ongoing viability of the business and management appears committed to such ongoing viability; and debts owing to secured creditors can likely be serviced by a restructured entity.

[Emphasis Added]

16. As noted in the Kahled Affidavit, Tomavo has been working diligently with its largest creditor, Courchesne Larose, since the initial stay of proceedings was issued to address the operational and cash flow issues and increasing its sales.

17. Further, it is the stated view of the Proposal Trustee that Tomavo is likely able to file a viable proposal. Tomavo has been diligently working with Courchesne Larose to create a better business model which will sustain its existing business with the retail outlets that it presently has in operation. The extension is necessitated because Tomavo is close to the deadline for the current stay of proceedings.

### **No Material Prejudice**

18. The third element of the test is whether any material prejudice will be suffered as the result of the extension being granted. The Court in *H&H Fisheries Limited, supra*, provided at para. 37:

37 This section of the Act contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be

unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

19. In *Convergix, supra*, the Court described material prejudice at paras. 42 and 43:

42. I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.

43. Accordingly, I conclude that each of the requirements of section 50.4(9) of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

See also, *Re Lockhart Saw Ltd.*, 2007 NBQB 93, 2007 CarswellNB 123 at ¶¶5-10.

20. At paragraphs 12-13 of *Re Lockhart Saw Ltd., supra*, Mr. Justice Glennie adopted the analysis used on applications for the lifting of a stay under s. 69.4 of the BIA, as follows:

12. The material prejudice referenced in section 69.4(1) of the BIA is an objective prejudice as opposed to a subjective prejudice. In other words, it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant

security and not to the extent that such prejudice may affect the creditor qua person, organization or entity. See *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]).

13. In *Acepharm Inc., Re* (1998), 4 C.B.R. (4<sup>th</sup>) 19 (Ont. Bkcty.) the court refused to lift a stay under section 69.4 of the BIA as the moving party pleaded subjective prejudice, which did not constitute material prejudice. At paragraph 10 the court cited with approval the following passage from *Honsberger, Debt Restructuring* at section 8-44:

what amounts to material prejudice must be decided on a case-by-case basis. It is a broad concept...the Bankruptcy Court being a court of equity must consider the impact of a stay on the parties. This will involve a weighing of the interest of the debtor against the hardship incurred on the creditor. This has been referred to as the “balance of hurt” test.

21. In addition, material prejudice must be more than a minor change such as those that happen in the daily operation of a business that is a going concern (see *Re Kids’ Farm Inc.*, 2011 NBQB 240 at ¶25 (Reg. Bray)).

### **Relief Requested**

22. Based on the evidence, it is submitted that:
- (a) Tomavo has acted, and continues to act, in good faith and with due diligence;
  - (b) Tomavo will likely be able to make a viable proposal if the extension sought herein is granted; and
  - (c) no creditor will be materially prejudiced if the extension sought is granted.

**CONCLUSION**

23. Tomavo respectfully suggests that this is an appropriate situation for the Court to grant a 45 day extension of the time in which to file a proposal pursuant to s. 50.4(9) of the BIA to December 21, 2021.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of November, 2021.

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## **SCHEDULE A**

### **LIST OF AUTHORITIES**

#### **LEGISLATION**

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 50.4.

#### **JURISPRUDENCE**

2. *BaldwinValley Investors Inc., Re*, 1994 CarswellOnt 253 (O.C.J. Gen. Div.)
3. *Convergix Inc., Re*, 2006 NBQB 288, 2006 CarswellNB 460 (Q.B.)
4. *H&H Fisheries Limited, Re*, 2005 NSSC 346
5. *Kids' Farm Inc., Re*, 2011 NBQB 240 (Q.B.).
6. *Lockhart Saw Ltd., Re*, 2007 NBQB 93, 2007 CarswellNB (Q.B.).