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COURT / ESTATE 25-3038201
FILE NUMBER B301-038201

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF TOOL SHED BREWING COMPANY
INC.

DOCUMENT **BENCH BRIEF OF THE RESPONDENT,
2594617 ALBERTA LTD.**

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Bench Brief of 2594617 Alberta Ltd.

**APPLICATION BEFORE THE HONOURABLE JUSTICE SIDNELL ON APRIL 15,
2024 AT 2:00 PM ON THE COMMERCIAL LIST**

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	FACTS	5
III.	ISSUES	5
IV.	LAW & ARGUMENT.....	5
A.	The Fourth Costello Affidavit	5
B.	The Stalking Horse Bid does not satisfy the <i>Soundair</i> test	6
i.	The Soundair Test	6
ii.	The Stalking Horse Bid does not serve the interests of all parties, but rather, prefers related parties and subordinate creditors.....	6
iii.	The SISP was not fair and transparent, and lacked efficacy and integrity	7
iv.	The Proposal Trustee acted without due consideration in accepting the Stalking Horse Bid in the circumstances of this case	9
C.	The Stalking Horse Bid is contrary to the objectives of the BIA.....	12
D.	Response to arguments of Tool Shed and the Proposal Trustee	13
i.	The Final Bid is sufficiently superior to the Stalking Horse Bid to justify departure from the SISP deadlines.....	13
ii.	The Alternative Bidder’s non-compliance with the SISP is overstated and does not negatively impact the integrity of the SISP	14
iii.	Accepting the Final Bid would not harm the principles of commercial certainty.....	15
iv.	The SISP is deliberately flexible and the Proposal Trustee should rely on that flexibility to achieve the best price	16
V.	Conclusion	17
VI.	Authorities.....	18

I. INTRODUCTION

1. Tool Shed Brewing Inc. (**Tool Shed**) is a corporation incorporated pursuant to the laws of the Province of Alberta, with its registered office in Calgary, Alberta. Its business consists primarily of brewing and selling craft beer.

2. On January 31, 2024, after more than a year of attempting to restructure its debts and/or seek a sale of or investment in its business, the Canada Revenue Agency (**CRA**) took steps to garnish Tool Shed's account with the Alberta Gaming, Liquor and Cannabis Commission (the "**AGLC**"). This forced Tool Shed to file a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"). KPMG Inc. agreed to act as the proposal trustee of Tool Shed (in such capacity, the **Proposal Trustee**).

3. On February 12, 2024, Tool Shed sought and received an Order from the Court approving a Sales and Solicitation Process (the **SISP**) for Tool Shed's business and assets on February 12, 2024 (the **February 12 Order**). The SISP involves a stalking horse bid (the **Stalking Horse Bid**) made by 2582568 Alberta Inc. (the **Stalking Horse Bidder**), which is controlled by James Costello, the CEO of Tool Shed.

4. Two of Tool Shed's secured creditors and investors, John Donovan and Darryl Bourne, participated in the SISP together with two other individuals (the **Bidding Group**), ultimately incorporating the Respondent, 2594617 Alberta Ltd. (**259** or the **Alternative Purchaser**), to submit a bid in the SISP. The Bidding Group encountered significant issues in obtaining fulsome and accurate information from Tool Shed via the Proposal Trustee during the due diligence phase of the SISP, which forced them to seek an extension of the original bid deadline under the SISP.

5. Due to Tool Shed's continued delay in answering the Bidding Group's questions, the Bidding Group submitted an offer on the extended bid deadline, conditioned on receiving the answers to certain outstanding due diligence inquiries, and sought a further extension of the bid deadline in order to submit an unconditional bid once the outstanding inquiries were answered.

6. On March 18, 2024, the Proposal Trustee's counsel denied the request for an extension and also provided the answers to the outstanding due diligence inquiries. Having

received answers to their outstanding questions, on March 22, 2024, the Bidding Group submitted an unconditional bid (the **Final Bid**) and deposit to the Proposal Trustee. Six days later, on March 28, 2024, the Proposal Trustee rejected 259's unconditional bid.

7. Tool Shed subsequently brought an application for approval of the Stalking Horse Bid and issuance of an approval and reverse vesting order to implement the transaction contemplated therein (the **Stalking Horse Sale**).

8. 259 asks the Court to deny Tool Shed's application to approve the Stalking Horse Bid. The Final Bid is a superior bid, which benefits more arm's length stakeholders (the Stalking Horse Bid provides zero recovery to any of Tool Shed's secured or unsecured creditors), and which does not unfairly prefer subordinate creditors and related parties, unlike the Stalking Horse Bid.

9. Tool Shed alleges bad faith on the part of the Bidding Group: these allegations are pure speculation. They are not supported by evidence. To the contrary, the Bidding Group has presented compelling evidence demonstrating that Messrs. Costello and Sherman have a deeply vested personal interest, both reputational and financial, in seeing the Stalking Horse Bid succeed

10. In the event that Tool Shed's application is denied, 259 has scheduled its own application for an approval and reverse vesting order (largely identical in form to that sought by Tool Shed) in respect of the Final Bid. 259's application is set to be heard on April 23, 2024.

11. 259 will rely on the Affidavit of John Donovan sworn April 11, 2024 (the **Donovan Affidavit**), in opposing the Application and will also refer to and rely on the following materials:

- (a) Notice of Application filed by Tool Shed on April 8, 2024 (the **Application**);
- (b) Affidavit No. 2 of James Costello sworn on February 5, 2024 (the **Second Costello Affidavit**);
- (c) Affidavit of Tom Taylor sworn on April 5, 2024 (the **Taylor Affidavit**);
- (d) Affidavit No. 4 of James Costello sworn on April 8, 2024 (the **Fourth Costello Affidavit**);

- (e) Second Report of the Proposal Trustee dated April 8, 2024 (the **Second Report**);
- (f) various orders filed in the within proceedings.

II. FACTS

12. For efficiency, the relevant facts will be referenced as necessary throughout the Law & Argument section, below.

III. ISSUES

13. This Honourable Court should deny Tool Shed’s application to approve the Stalking Horse Bid and should allow 259 to proceed with its application on April 23, 2024 to approve the Final Bid.

IV. LAW & ARGUMENT

A. The Fourth Costello Affidavit

14. In considering Tool Shed’s argument, this Court should exercise caution with respect to accepting Mr. Costello’s evidence about the alleged bad faith of the Bidding Group in paragraphs 31 to 42 of the Fourth Costello Affidavit.

15. In paragraph 31, Mr. Costello offers his “belief” and a conclusory statement, as to the good faith of the Bidding Group. This statement should be disregarded. Affidavit evidence should not contain argument, opinions or conclusions.¹

16. In paragraphs 32 and 33, Mr. Costello purports to give evidence about Mr. Donovan’s and Mr. Bourne’s involvement with Tool Shed in 2023, the time they allegedly spent reviewing Tool Shed’s books and records, and to what records they had access. Mr. Costello was not involved as an advisor or officer of Tool Shed at this time, and could not have personal knowledge of the matters sworn to, nor does Mr. Costello identify the source of information for these statements, which are therefore inadmissible hearsay.

17. In paragraph 32, Mr. Costello states that “Donovan and Darryl have spent more time reviewing the Tool Shed books and records than anyone currently involved with the Company, including the Stalking Horse Bidder.” Again, Mr. Costello has no personal knowledge of the

¹ *Alberta Treasury Branches v Leahy*, 1999 ABQB 185 (CanLII), at para 84 [**TAB 1**].

time spent by Messrs. Donovan and Bourne reviewing the books and records – he was not an advisor to or officer of Tool Shed at the relevant time. Further, Mr. Costello does not identify who he means when he says “anyone currently involved with the Company”, nor does he quantify the length of time spent by Messrs. Donovan and Bourne or anyone else in reviewing the books and records.

18. Finally, it would be concerning if the Stalking Horse Bidder had spent less time than Mr. Donovan and Mr. Bourne reviewing Tool Shed’s books and records, given that its principal, Mr. Costello, has been the CEO of the Company for the past eight months.

B. The Stalking Horse Bid does not satisfy the *Soundair* test

i. The Soundair Test

19. Court approval of a proposed sale to a bidder requires the vendor to satisfy the test set out in *Royal Bank v Soundair Corp.*,² which requires Court to consider:

- (a) whether it has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.³

20. A consideration of these factors in the circumstances of this case demonstrates that the Stalking Horse Bid should not be approved.

ii. The Stalking Horse Bid does not serve the interests of all parties, but rather, prefers related parties and subordinate creditors

21. The Stalking Horse Bid is not in the interests of all parties. It is primarily in the interests of James Costello, Graham Sherman, and Tool Shed’s professional advisors. While the CRA will recover its outstanding source deduction amount, none of Tool Shed’s creditors benefit from the Stalking Horse Bid in terms of obtaining any kind of recovery.

² *Royal Bank v Soundair Corp.*, [1991] OJ No 1137, 1991 CarswellOnt 205 [*Soundair*] [TAB 2].

³ *Soundair* [TAB 2].

22. Furthermore, the Stalking Horse Bid allows subordinate creditors to recover in priority to Tool Shed's secured creditors. It provides for payment of interest and penalties due on delinquent source deductions, which are not deemed trust amounts protected under section 67(3) of the BIA.⁴ The Stalking Horse Bid further provides for payment of unsubstantiated amounts due to Mr. Sherman and Mr. Costello for services rendered up to and including the Closing Date (thus including pre-filing amounts), and for payment of pre-filing fees of Miller Thomson LLP outside of the Administration Charge.

23. Contrary to Tool Shed's submissions, the February 12 Order expressly provides that the Administration Charge secures the professional fees and disbursements incurred both before and after the granting of this Order.⁵

iii. The SISP was not fair and transparent, and lacked efficacy and integrity

24. First, it is not the case that the Bidding Group did not object to the terms of the SISP at Tool Shed's application to approve the same on February 12, 2024.⁶ Rather, counsel to the Bidding Group appeared and confirmed on the record that, while the Bidding Group was not opposing the application, it continued to have reservations with the SISP.

25. Second, the fairness of the SISP was tainted by Mr. Costello's involvement in it, given that he was, and remains in a significant conflict of interest. Mr. Costello both controls the Stalking Horse Bidder, and is the CEO of Tool Shed.⁷ He has been involved in the day-to-day management of the Company since late August 2023.⁸ Mr. Costello has managed and directed Tool Shed throughout the SISP, and based on his evidence and the Second Report, was involved in reviewing the Initial Bid and the Final Bid, and consulting with the Proposal Trustee on whether to accept or reject the same.⁹

26. This placed Mr. Costello in a significant conflict of interest, given his position as principal of the Stalking Horse Bidder. There is no evidence that any attempt was made to exclude Mr. Costello from the decision-making process in the SISP.

⁴ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, [BIA] s 136(1) [TAB 3].

⁵ Order of Justice M.J. Lema pronounced February 12, 2024.

⁶ Brief of Law of Tool Shed Brewing Company Inc., filed April 9, 2024 (**Tool Shed Brief**), paras. 73(d) and 74(b).

⁷ Second Costello Affidavit, paras 2 and 117; Fourth Costello Affidavit, para 1 and Exhibit "B".

⁸ Second Costello Affidavit, paras 2, 10 and 93; Fourth Costello Affidavit, paras 35 and 37.

⁹ Fourth Costello Affidavit, para 56; Second Report, paras 29, 32 and 37.

27. Furthermore, the SISP lacked the requisite efficacy and integrity because of an imbalance of information between the Stalking Horse Bidder and 259. In *Bloom Lake, gpl, Re*,¹⁰ the Justice Hamilton stated that unequal access to information constitutes a fundamental flaw in a sales process.¹¹ In this case, there is significant inequality in access to information as between the competing bidders.

28. Mr. Costello's own affidavit evidence demonstrates that he has been intimately involved with managing the company.¹² From this, the Court can infer that Mr. Costello has in-depth knowledge of the Company's business, assets, finances, and operations. As such, the Stalking Horse Bidder had access to information and insight into the finances, business, and operations of Tool Shed, which was not similarly available to 259.

29. Conversely, and contrary to Tool Shed's assertion, Mr. Donovan and Mr. Bourne did not have "over a year of intimate familiarity with Tool Shed's financials, sales, liabilities and business operations."¹³ Rather, the evidence on behalf of the Bidding Group confirms that Mr. Donovan received partial ad hoc financial statements and other summary financial information;¹⁴ copies of agreements with various creditors, lists of shareholders, a copy of a unanimous shareholders' agreement, a list of assets, general ledger extracts, and some forecast information.¹⁵

30. Further, Mr. Donovan did not take on an advisory role to Tool Shed, as Mr. Taylor suggests.¹⁶ While the idea of a management committee was raised, it was not pursued, and while Mr. Donovan briefly assisted Mr. Taylor in managing Tool Shed's finances, this was short-lived.

31. Tool Shed cites *Arrangement Relatif à Blackrock Metals Inc*, for the proposition that modifying a sales process that "provides a level playing field" can result in negative impacts to the parties, such that modifications should not be lightly granted in service of preserving the integrity of the process.¹⁷

¹⁰ *Bloom Lake, gpl, Re*, 2015 QCCS 1920 [*Bloom Lake*] [TAB 4].

¹¹ *Bloom Lake* at para 59 [TAB 4].

¹² Second Costello Affidavit, paras 10 and 93; Fourth Costello Affidavit, paras 35 and 37.

¹³ Tool Shed Brief, para 74(d).

¹⁴ Donovan Affidavit, paras 15 and 22; Taylor Affidavit, Exhibits "A", "B", "C" and "G".

¹⁵ Donovan Affidavit, paras 20 and 22.

¹⁶ Taylor Affidavit, para 34.

¹⁷ *Arrangement Relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at paras 60 and 82 [*Blackrock*] [TAB 5].

32. Modifying the SISP in this case did not affect the integrity of the SISP. The SISP was already inherently and fundamentally flawed, and did not provide a level playing field due to the significant information asymmetry between the Stalking Horse Bidder, and 259 given that the Stalking Horse Bidder's principal was also the CEO of Tool Shed, and the consequent conflict of interest.

33. Mr. Costello swears that he believes the Bidding Group acted in bad faith in making the Final Bid. The evidence does not support this conclusion. For example, Mr. Costello points to Mr. Bourne declining the opportunity to invest in the Stalking Horse Bid as evidence of bad faith.¹⁸ However, it is equally possible that Mr. Bourne simply did not want to invest in a company run by Mr. Costello. In fact, Mr. Bourne and Mr. Donovan had previously agreed to a contingent resolution negotiated by Mr. Costello in December 2023, which was ultimately rejected by Tool Shed's unsecured creditors.¹⁹

34. Rather, the evidence before this Court demonstrates that Mr. Costello has a vested interest in seeing the Stalking Horse Bid succeed, to preserve his reputation and his investment in Tool Shed. Specifically, Mr. Costello and Mr. Sherman have made public statements that suggest the Stalking Horse Bid was part of their long-standing plan to continue running the business of Tool Shed.²⁰

iv. The Proposal Trustee acted without due consideration in accepting the Stalking Horse Bid in the circumstances of this case

35. In determining whether a receiver has acted improvidently or failed to get the best price, the Court may consider the following factors:

- (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;
- (b) whether the circumstances indicate that insufficient time was allowed for the making of bids;
- (c) whether inadequate notice of sale by bid was given; or

¹⁸ Fourth Costello Affidavit, paras 37-39.

¹⁹ Donovan Affidavit, para 23.

²⁰ Donovan Affidavit, paras 61-64, Exhibits W, X, and Y.

- (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.²¹

36. Several of these factors are engaged in the circumstances of this case, specifically whether the Stalking Horse Bid is in the best interests of the creditors and whether there was sufficient time for the making of bids.

37. The Stalking Horse Bid, as compared to the Final Bid, is not in the best interests of creditors. Here, the Stalking Horse Bid and the Final Bid offer substantially different outcomes for Tool Shed's creditors. While both the Final Bid and the Stalking Horse Bid provide for payment of priority amounts due to CRA, the Final Bid provides recovery for Tool Shed's first and second-ranking secured creditors, namely Mr. Donovan and his co-lender, and Wayne Orr. These creditors stand to recover nothing pursuant to the Stalking Horse Bid. Thus, the Proposal Trustee appears not to have considered the interests of Tool Shed's secured creditors in accepting the Stalking Horse Bid.

38. Further, the way in which the SISP unfolded resulted in 259 having insufficient time to make its bid. The Bidding Group encountered delays in the SISP from its inception. Details of the SISP were only posted a full week after the SISP was approved.²² The NDAs between the Proposal Trustee and members of the Bidding Group were not signed by the Proposal Trustee until February 26, 2024, five days after Mr. Donovan had requested the same, such that access to the Data Room was first made available to certain members of the Bidding Group on that date.²³

39. The next issue encountered by the Bidding Group was that Data Room contained insufficient information for the group to complete basic due diligence, such as data on sales, customers and key contracts.²⁴ This information was also not provided to Mr. Donovan or Mr. Bourne in 2023.²⁵ As such, the Bidding Group made a number of information requests to Tool Shed via the Proposal Trustee, to enable it to complete its due diligence and submit an

²¹ *Bank of Montreal v River Rentals Group Ltd*, 2010 ABCA 16, at para 13 [*River Rentals Group*] [TAB 6].

²² Donovan Affidavit, para 26.

²³ Donovan Affidavit, paras 27-28 and 31.

²⁴ Donovan Affidavit, para 32.

²⁵ Donovan Affidavit, paras 15, 20 and 22; Taylor Affidavit, Exhibits "A", "B", "C" and "G".

unconditional bid.²⁶ These requests were delivered to the Proposal Trustee on February 26, March 1, March 4, March 6 and March 11.²⁷

40. While Tool Shed provided some of the information requested, the information that had been provided by the end of the week before the bid deadline was not sufficient for the Bidding Group to submit an unconditional bid. This prompted the Bidding Group's counsel, on March 7, 2024 to request an extension to the initial bid deadline of March 11.²⁸

41. Despite the fact that the Bidding Group requested a two-week extension (and confirmed that the ultimate closing date would not be delayed as a result), the Proposal Trustee extended the bid deadline by only 72 hours to March 14, 2024 (the **Extended Bid Deadline**), and limited the Bidding Group's right to request and receive further due diligence information.²⁹

42. On March 11, 2024, the Bidding Group submitted a list of outstanding due diligence items, some of which were requests made previously, and some of which arose from a brewery tour led by Mr. Sherman on March 8.³⁰ Still further questions arose as a result of a meeting between Mr. Donovan, Mr. Newman and a number of Tool Shed employees on March 12, 2024.³¹ While Tool Shed provided responses to some of the Bidding Group's requests on March 12 and 13, certain information was either not received until March 18, 2024 (after the expiry of the Extended Bid Deadline) or was never received.³²

43. As the Bidding Group was receiving due diligence information up to and following the Extended Bid Deadline, 259 had insufficient time to complete its basic due diligence and submit an unconditional bid. The importance of the information finally provided on March 18 is evidenced by the fact that, upon receiving this information, the Bidding Group submitted an unconditional bid in just under four days.³³

44. Furthermore, the Proposal Trustee and Tool Shed were aware that 259 intended to submit an unconditional bid in a higher amount than the Stalking Horse Bid following receipt of

²⁶ Donovan Affidavit, paras 33-34.

²⁷ Donovan Affidavit, paras 32, 34, 37 and 39.

²⁸ Donovan Affidavit, para 35

²⁹ Donovan Affidavit, paras 35-36, Exhibit "H".

³⁰ Donovan Affidavit, paras 37 and 39.

³¹ Donovan Affidavit, para 43.

³² Donovan Affidavit, paras 44-45, and 47-49, Exhibits "N", "O", and "Q".

³³ Donovan Affidavit, paras 48-49, and 53, Exhibits "S", "T", and "U".

certain requested information, as the Bidding Group’s counsel expressly put them on notice of their client’s intention to do so.³⁴ In these circumstances, it would have been provident for the Proposal Trustee to wait until the Final Bid had been submitted before advising the Stalking Horse Bidder that its bid was accepted.

C. The Stalking Horse Bid is contrary to the objectives of the BIA

45. In *9354-9186 Quebec Inc v Callidus Capital Corp*, the Supreme Court identified the objectives of Canada’s insolvency statutes. The Court held that these objectives include the purposes of preserving and maximizing the value of a debtor’s assets, and ensuring fair and equitable treatment of the claims against a debtor.³⁵

46. The Stalking Horse Bid provides for the payment of creditors of Tool Shed in a manner that is inconsistent with the scheme of distribution set out in s. 136(1) of the BIA.³⁶ This is not fair or equitable to the creditors of Tool Shed, nor does it maximize the value of Tool Shed’s assets for creditors.

47. Tool Shed submits that the Stalking Horse Bid should be approved because it assumes liability for the penalties and interest on the amounts owing to the Canada Revenue Agency (the **CRA**). These amounts are unsecured, and the distribution of funds to an unsecured creditor in priority to a secured creditor runs contrary to the scheme of distribution set out in section 136(1) of the BIA.³⁷

48. Penalties and interest owing on CRA source deductions are not captured by the deemed trust established by s. 227(4) *Income Tax Act*.³⁸ The Proposal Trustee and Tool Shed reference s. 60(1.1) of the BIA,³⁹ which provides that no proposal shall be approved without the consent of the Crown if it does not provide for the payment in full of source deductions and related penalties or interest within 6 months of court approval. The application before this Court

³⁴ Donovan Affidavit, paras 45 and 47, Exhibit “N”.

³⁵ *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10, at para 40 [*Callidus*] [TAB 7].

³⁶ BIA, s 136(1) [TAB 3].

³⁷ *Ibid.*

³⁸ *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 227(4) [TAB 8]; *Jefferson v Canada*, 2021 FC 658 at para 57 [TAB 9]; *San Diego Catering Ltd, Re*, 1994 CarswellBC 390, [1995] BCJ No 654 at para 17, aff’d 1996 CarswellBC 2072, [1996] BCWLD 2600 [TAB 10]; and *Canadian Asbestos Services Ltd v Bank of Montreal* 1993 CarswellOnt 226, [1993] OJ No 1487 at para 15 [TAB 11].

³⁹ BIA, s 60(1.1) [TAB 3].

is not for approval of a proposal, but rather, for approval of a liquidation sale in NOI proceedings, which will be annulled if the order sought is granted.

49. Contrary to Tool Shed’s submissions, the February 12 Order does not require that any bid assume liability for the CRA source deductions and related penalties and interest. Rather, the February 12 Order requires an assumption of liability for all priority payments, “including but not limited to all amounts due and owing...on account of source deductions to the Canada Revenue Agency.”

50. The 259 Bid provides for all source deductions owing to the CRA as required by the Order, not the penalties and interest owing on those amounts.

51. Tool Shed also argues that the Stalking Horse Bid is superior to the Final Bid because it accounts for the pre-filing legal fees of counsel for the Proposal Trustee beyond the maximum amount secured by the Administration Charge, whereas the Final Bid only covers these fees up to the maximum amount secured by the Administration Charge. The pre-filing legal fees are not a secured amount, and therefore rank behind Tool Shed’s secured creditors.

52. The Proposal Trustee incorrectly states in the Second Report that “removing” the payment of the \$80,000 due to Miller Thomson LLP contravenes the February 12 Order. The February 12 Order expressly provides that all fees due to Miller Thomson, both pre- and post-filing are captured by the Administration Charge.⁴⁰ As such, the Final Bid is consistent with the February 12 Order, while the Stalking Horse Bid is not.

D. Response to arguments of Tool Shed and the Proposal Trustee

i. The Final Bid is sufficiently superior to the Stalking Horse Bid to justify departure from the SISP deadlines

53. Tool Shed and the Proposal Trustee both state that the purchase price under the Final Bid was not sufficiently greater than that under the Stalking Horse Bid to justify the contravention of the overall integrity of the SISP.⁴¹

54. On an arithmetic basis, the Final Bid is higher than the Stalking Horse Bid. The Proposal Trustee and Tool Shed both suggest that there are two aspects of the Purchase Price

⁴⁰ February 12 Order, para 4.

⁴¹ Second Report, para 37(f); Tool Shed Brief, paras 74(a) and (c).

under the Final Bid that are problematic, namely the \$80,000 in legal fees outside the Administration Charge, and the amount due to CRA. As explained in the prior section, these amounts do not have priority to Tool Shed's secured creditors, such that purporting to pay them disturbs the priority scheme under the BIA.

55. The Final Bid also provides recovery to a greater number of creditors than the Stalking Horse Bid, which increases the value of the Final Bid from the perspective of fairness to creditors and service of the purpose of the BIA as a restructuring statute.

56. Tool Shed suggests that the fact the Final Bid provides recovery to only two more creditors is insignificant; to the contrary, it is an important aspect of the Final Bid, both for the secured creditors who stand to lose everything if the Stalking Horse Sale is approved, and in relation to preserving creditor confidence in insolvency sales.

ii. The Alternative Bidder's non-compliance with the SISP is overstated and does not negatively impact the integrity of the SISP

57. In the circumstances of this case, the robustness of the SISP is not impacted to the degree suggested by Tool Shed and the Proposal Trustee.

58. This Court is not dealing with a new bidder who submitted an unanticipated bid long after completion of a sales process. Rather, the Bidding Group advised, and the Proposal Trustee, the Company, and the Stalking Horse Bidder (through Mr. Costello) all knew on the Extended Bid Deadline that the conditionality of the Initial Bid was due to Tool Shed's failure to provide certain information requested by the Bidding Group. They also knew that the Bidding Group intended to submit an unconditional bid upon receipt of the requested information, which it ultimately did.

59. Furthermore, a stalking horse bid is designed to be a benchmark for competing offers; it is a mechanism intended to drive up the purchase price for a debtor's assets. The submission of the Final Bid therefore cannot have caused surprise or prejudice to the Stalking Horse Bidder.

60. In light of Tool Shed's delay in providing information to the Bidding Group, the Stalking Horse Bidder's knowledge of the Bidding Group's intention to submit an unconditional bid after the Extended Bid Deadline, and the aims of the stalking horse process, the integrity of the SISP would not be compromised if the Final Bid were to be accepted.

iii. Accepting the Final Bid would not harm the principles of commercial certainty

61. Tool Shed argues that approving the Stalking Horse Bid is necessary to maintain the principles of commercial certainty. Under the circumstances of this case, commercial certainty does not require that the Stalking Horse Bid be approved.

62. In *1705521 Alberta Ltd v Three M Mortgages Inc*, the Court refused to overturn the lower court's decision to approve a sale, despite the existence of higher bid that was submitted after the bid deadline,⁴² on the basis that urgency and commercial certainty are two of the overarching policy considerations in bankruptcy and insolvency proceedings.⁴³

63. The circumstances in which the Final Bid was made differ greatly from those surrounding the late bid in *Three M*. Here, when the Proposal Trustee accepted the Stalking Horse Bid, both the Proposal Trustee and the Stalking Horse Bidder (through Mr. Costello) were on notice that the Bidding Group had submitted a conditional bid subject to receiving certain information from Tool Shed, and that it was working to submit an unconditional bid. The requested information was ultimately provided four days after the extended bid deadline lapsed, and four days after that, the Bidding Group submitted their unconditional bid.⁴⁴

64. In light of the Stalking Horse Bidder's knowledge at the time the Proposal Trustee advised its bid was successful—i.e. that an unconditional bid was forthcoming subject to receipt of information, and its willing participation in a process designed to obtain competing bids, the principles of commercial certainty do not require that this Court approve the Stalking Horse Sale.

65. Further, as outlined in section C of this Brief, the Stalking Horse Bid proposes distribution to Tool Shed's creditors in a manner that is inconsistent with the scheme of distribution set out in the BIA. This itself contrary to the principle of commercial certainty: in an insolvency, the secured creditors expect to recover before unsecured creditors, and make their investments on this basis. Subverting expected priorities offends commercial certainty and changes investors' risk calculus.

⁴² *1705521 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144, paras 48-49 [*Three M*] [TAB 12].

⁴³ *Three M*, para 48 [TAB 12].

⁴⁴ Donovan Affidavit, paras 48 and 53, Exhibits "Q", "S" and "T".

iv. The SISP is deliberately flexible and the Proposal Trustee should rely on that flexibility to achieve the best price

66. Under the SISP, the Proposal Trustee has flexibility to depart from the strict requirements and deadlines of the process. Section 46 of the SISP expressly provides that

The Proposal Trustee, in consultation with the Company, may waive compliance with any one or more of the requirements of the SISP Procedures, including, for greater certainty, waive strict compliance with any one or more of the requirements specified above and deem a non-compliant bid to be a Qualified Bid, excepting the requirement that the bid be a Superior Offer pursuant to Section 24(l).

67. It is common for a proposal trustee or other court officer to modify the timelines and requirements of a SISP within reason to achieve the best result. Extending a bid deadline to permit a competitive offer to be received enhances the competitiveness of a sales process and serves the goal of getting the best price for the assets.

68. In this case, there is no evidence that modification of the SISP to extend the Bid Deadline, accept an unconditional bid, or provide a further extension of the Extended Bid Deadline would cause prejudice to the Stalking Horse Bidder or harm the integrity of the SISP.

69. Tool Shed and the Proposal Trustee suggest that a further extension of the Extended Bid Deadline would have jeopardized Tool Shed's ability to close a sale before running out of cash, and further, that the timing of submission of the Final Bid meant that an auction could not be run. This is not a fair characterization of the circumstances.

70. The Final Bid includes a closing date of April 30, 2024, and the Bidding Group and its counsel have advised the Proposal Trustee and the Company on several occasions that they are motivated, willing, and able to close on or before that date.⁴⁵

71. Further, it appears that the Stalking Horse Bidder now requires until May 6, 2024 to close its transaction.⁴⁶

⁴⁵ Donovan Affidavit, para 35 and Exhibit "H", and para 45 Exhibit "N".

⁴⁶ Fourth Costello Affidavit, para 64.

72. In its letter of March 28, 2024, the Proposal Trustee asserted that selecting the Alternative Bidder as the successful bidder would deprive the Stalking Horse Bidder of the opportunity to participate in the auction. The Proposal Trustee and Tool Shed suggest this in turn would compromise the integrity of the SISP.⁴⁷

73. This argument is groundless: an auction could have been run in the six days it took the Proposal Trustee to respond to the submission of the Final Bid, in the 10 days after the Proposal Trustee responded, or, if necessary could even be run between Tool Shed's application on April 15, 2024 and the Bidding Group's application on April 23, 2024. Furthermore, there is no evidence on the record that the Stalking Horse Bidder would have participated in an auction had one been offered. Rather, Mr. Costello suggests that he does not wish to compete with the Final Bid.⁴⁸

V. CONCLUSION

74. For the reasons set out above, 259 requests that this Honourable Court refuse to grant relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2024.

LAWSON LUNDELL LLP



Per: Alexis Teasdale
Counsel for 2594617 Alberta Ltd.

⁴⁷ Fourth Costello Affidavit, paras 27(e) and 28, Exhibit H; Tool Shed Brief, para 74(c).

⁴⁸ Fourth Costello Affidavit, para 42.

VI. AUTHORITIES**TAB**

1. *Alberta Treasury Branches v Leahy*, [1999 ABQB 185](#) (CanLII)
2. *Royal Bank v Soundair Corp*, [\[1991\] OJ No 1137](#), [1991 CarswellOnt 205](#)
3. [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended](#)
4. *Bloom Lake, gpl, Re*, [2015 QCCS 1920](#)
5. *Arrangement Relatif à Blackrock Metals Inc*, [2022 QCCS 2828](#)
6. *Bank of Montreal v Rentals Group Ltd*, [2010 ABCA 16](#)
7. *9354-9186 Quebec Inc v Callidus Capital Corp*, [2020 SCC 10](#)
8. [Income Tax Act, RSC 1985, c 1 \(5th Supp\)](#)
9. *Jefferson v Canada*, [2021 FC 658](#)
10. *San Diego Catering Ltd, Re*, 1994 CarswellBC 390, [\[1995\] BCJ No 654](#)
11. *Canadian Asbestos Services Ltd v Bank of Montreal*, [1993 CarswellOnt 226](#), [\[1993\] OJ No 1487](#)
12. *1705521 Alberta Ltd v Three M Mortgages Inc*, [2021 ABCA 144](#)