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COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, RSC 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

BRIEF OF LAW

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT

MILLER THOMSON LLP
525-8th Avenue Avenue S.W.
Calgary, AB, Canada T2P 1G1

Attention: James W. Reid / Bryan A. Hosking

Telephone: 403.298.2418 / 780.429.9773

Fax: 403.262.0007

E-mail: jwreid@millerthomson.com /
bhosking@millerthomson.com

File No.: 0276443.0001

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PART I - INTRODUCTION

1. Tool Shed Brewing Company Inc. (“**Tool Shed**” or the “**Company**”) files this Brief of Law in support of an application (the “**Application**”) to approve a sale transaction with the Purchaser (defined below) after the completion of a Court-approved stalking horse sale and investment solicitation process (the “**SISP**”). The SISP was run in accordance with the Court-approved process, which generated no other qualified bids other than that of the Purchaser.
2. On January 31, 2024 (the “**Filing Date**”), Tool Shed filed a Notice of Intention to Make a Proposal pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”). KPMG Inc. consented to act as proposal trustee (the “**Proposal Trustee**”) with respect to Tool Shed’s proposal proceedings (the “**NOI Proceedings**”).¹
3. Tool Shed required urgent financing to continue operations as a going concern. The NOI Proceedings were commenced in order to provide Tool Shed the resources and breathing room required to conduct the SISP.
4. On February 12, 2024, the Court issued an Order (the “**February 12 Order**”) which, among other things:
 - (a) approved an Interim Loan Agreement with 2582568 Alberta Inc. (in this capacity, the “**Interim Lender**”);
 - (b) approved the SISP and designated the share purchase agreement (the “**SPA**”) between Tool Shed and 2582568 Alberta Inc. (in such capacity, the “**Purchaser**”) dated February 6, 2024, as the stalking horse bid in the SISP;
 - (c) approved the Interim Lender’s Charge in the amount of \$300,000.00 and the Administration Charge in the amount of \$250,000.00; and
 - (d) extended the time for the Company to file a proposal to its creditors to April 15, 2024 (the “**Initial Stay Period**”).
5. The Proposal Trustee, in consultation with the Company, ran the SISP in accordance with the February 12 Order.

¹ Affidavit of James Costello sworn February 5, 2024 (the “**Second Costello Affidavit**”) at para 6.

6. The deadline for submission of bids under the SISP was March 11, 2024; however, this deadline was extended by the Proposal Trustee to March 14, 2024 (the “**Extended Bid Deadline**”) upon the request of the Donovan Group (as defined below).²
7. The Donovan Group submitted a request to the Proposal Trustee for a further extension of the Extended Bid Deadline, along with a conditional, unexecuted, non-binding bid on the morning of March 14, 2024 (the “**Conditional Bid**”).³
8. The Proposal Trustee refused to grant the further bid extension request to the Donovan Group. As a result, no binding bids were received by the Extended Bid Deadline in accordance with the SISP.
9. On March 19, 2024 and March 21, 2024, the Proposal Trustee informed the Purchaser that the SPA was the successful bid in the SISP.⁴
10. After the Proposal Trustee informed the Purchaser that the SPA was the successful bid in the SISP and directing Tool Shed to seek Court-approval of the transaction contemplated by the SPA, on March 22, 2024, the Donovan Group submitted a subsequent bid and deposit to the Proposal Trustee (the “**Late Donovan Bid**”).⁵
11. The Proposal Trustee rejected the Late Donovan Bid as, among other things, it was not submitted in accordance with the SISP, and did not provide for substantially better recovery for the Company’s stakeholders, if any, to justify compromising the integrity of the SISP.⁶
12. The SPA is conditional upon the issuance of an approval and reverse vesting order (the “**RVO**”). The RVO structure was contemplated in the materials filed in support of the February 12 Order.

² Affidavit of James Costello sworn April 8, 2024 (the “**Fourth Costello Affidavit**”) at paras 14-17, Exhibits B and C.

³ Fourth Costello Affidavit at para 21, Exhibit E.

⁴ Fourth Costello Affidavit at para 25, Exhibit G.

⁵ Fourth Costello Affidavit at para 26.

⁶ Fourth Costello Affidavit at para 27, Exhibit H.

13. The Application seeks an Order from the Court for the following relief:
- (a) abridging the time for service of this Application to be good and sufficient, if necessary;
 - (b) pursuant to section 50.4(9) of the BIA, extending the time by which Tool Shed may file a proposal to its creditors for a 45-day period from the date following the current deadline of April 15, 2024, up to and including 11:59 p.m. (local Calgary time) on May 6, 2024, or such other date as this Honourable Court may order (the “**Extended Stay Period**”);
 - (c) authorizing and approving the Transaction (defined below) by way of a reverse-vesting process contemplated in the SPA;
 - (d) releasing the directors, officers, employees and independent contractors of the Company, the Purchaser, the Proposal Trustee (as defined below), the Interim Lender (as defined below), and ResidualCo (as defined below), as well as the Company, Purchaser, Interim Lender, and Proposal Trustee from all claims;
 - (e) annulling and/or authorizing the withdrawal of the Company’s Notice of Intention to Make a Proposal under the BIA upon closing of the Transaction;
 - (f) approving the Second Report of the Proposal Trustee dated April 8, 2024 (“**Second Report**”), to be filed, as well as the actions, conduct and activities of the Proposal Trustee and its counsel described therein; and
 - (g) such further and other relief as the Company may request and this Honourable Court may deem appropriate.
14. Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Affidavit No. 4 of James Costello, sworn April 8, 2024 (the “**Fourth Costello Affidavit**”) or the February 12 Order.

PART II - FACTS

15. The facts relevant to the Application are set out in detail in the Fourth Costello Affidavit and the Affidavit of Tom Taylor sworn April 5, 2024. A summary of the key facts as they relate to the relief requested in the Application is set out in the following section.

A. Background

16. Tool Shed is an Alberta Corporation which has been brewing craft beer for the last 11 years and specializes in alcoholic and non-alcoholic beverages.⁷ Tool Shed employs approximately 20 full time and part time staff.⁸
17. The Company operates out of its leased commercial premises located at 801 30 St NE #9, Calgary, AB TWA 5L7, in the Franklin Industrial area of Calgary (the “**Premises**” or the “**Taphouse**”).⁹
18. Since 2020, Tool Shed has faced an extraordinary strain on its financial resources, including the negative effects on the brewing industry brought on by the Covid-19 pandemic and the maturation of its credit facility with ATB Financial, which the Company was unable to re-finance.¹⁰
19. Tool Shed was unable to secure alternative financing and had to rely on cash injections and individual investors to sustain operations.¹¹
20. John Donovan (“**Donovan**”) and Julianna Bourne (“**Julianna**”) are individuals who invested in Tool Shed during this time. Julianna’s husband, Darryl Bourne (“**Darryl**”), managed Julianna’s investment.¹²
21. When the short-term loans from individual investors matured, certain investors demanded on their loans, obtained judgment against Tool Shed, and garnished the Company’s bank account (the “**Garnishment**”).¹³
22. As of November 30, 2023, Tool Shed had assets of approximately \$1,200,740.53 and estimated liabilities of approximately \$5,011,947.67.¹⁴

⁷ Second Costello Affidavit at para 13.

⁸ Second Costello Affidavit at para 24.

⁹ Fourth Costello Affidavit at para 45.

¹⁰ Second Costello Affidavit at paras 34-35.

¹¹ Second Costello Affidavit at para 36-37.

¹² Affidavit of Tom Taylor sworn April 5, 2024 (the “**Taylor Affidavit**”) at para 5.

¹³ Taylor Affidavit at para 6.

¹⁴ Second Costello Affidavit at paras 48-49, Exhibit I.

23. As of January 9, 2024, Tool Shed owed \$571,091.70 (the “**CRA Debt**”) in unremitted source deductions to the Canada Revenue Agency (the “**CRA**”).¹⁵
24. As at January 25, 2024, Tool Shed owed approximately \$1,097,853.94 to its trade creditors.¹⁶

B. Licenses and Permits

25. Tool Shed holds certain licenses and permits which allows it to brew and/or distribute alcoholic beverages in the provinces of Alberta, British Columbia, Saskatchewan, and Manitoba (the “**Licenses and Permits**”).¹⁷
26. The Licenses and Permits are necessary for the Company’s business, as Tool Shed cannot legally operate without them. The Licenses and Permits allow Tool Shed to:
- (a) Manufacture beer at the Taphouse;
 - (b) Sell liquor to the public at the Taphouse;
 - (c) Serve food to the public at the Taphouse;
 - (d) Sell its liquor for off-Premises consumption, such as at markets and trade shows;
 - (e) Conduct its business and operations in the City of Calgary;
 - (f) Act as a representative to sell its own manufactured liquor product; and
 - (g) Sell its products in the provinces of British Columbia, Saskatchewan, and Manitoba.¹⁸
27. The process for obtaining the Licenses and Permits is expensive and time consuming.¹⁹ Tool Shed would have to cease operations if it had to apply for new licenses and permits

¹⁵ Second Costello Affidavit at para 54, Exhibit J.

¹⁶ Second Costello Affidavit at para 76.

¹⁷ Fourth Costello Affidavit at para 43.

¹⁸ Fourth Costello Affidavit at para 47, Exhibits K, L, M, N, O, P.

¹⁹ Fourth Costello Affidavit at para 46.

as it would be unable to manufacture and sell its product until a decision was made by the relevant agency.²⁰

28. Furthermore, the Licenses and Permits are non-transferrable and are in many cases tied to the Premises. They become void if the Premises is transferred to or leased by someone other than the Company.²¹

C. Investor Meetings, Pre-Filing Sales Process, and Conversion Attempts

29. Tool Shed's previous Chief Financial Officer, Tom Taylor ("**Taylor**"), was in regular contact with investors of Tool Shed throughout the first half of 2023 in order to strategize how to deal with Tool Shed's liabilities in the face of its uncertain future.²²
30. Taylor provided the Company's investors, particularly Donovan and Darryl, with ongoing and detailed breakdowns of Tool Shed's financial information such as cash flow forecasts, sales forecasts, operation and financing costs, payroll, tax liabilities, and financial reports.²³
31. Taylor also facilitated investor meetings where Tool Shed's investors were invited to discuss options for the Company moving forward. These discussions included further investment options, a restructuring, or a sale of the Company to try to see a return for investors and to avoid the liquidation of the Company.²⁴
32. On March 22, 2023, Tool Shed retained Miller Thomson LLP to assist with the restructuring of its affairs and to attend to the release of the funds that were the subject of the Garnishment.²⁵
33. Counsel to Tool Shed and counsel to, among others, Donovan, Darryl, and Julianna, agreed to a form of Consent Order for the release the funds that were the subject of the

²⁰ Fourth Costello Affidavit at para 46.

²¹ Fourth Costello Affidavit at para 49.

²² Taylor Affidavit at paras 7-8.

²³ Taylor Affidavit at paras 8-10 and 18, Exhibits A, B, and D.

²⁴ Taylor Affidavit at paras 13-15, Exhibit C.

²⁵ Taylor Affidavit at para 21.

Garnishment, in order to allow Tool Shed to continue to operate and run a sale and investment solicitation process.²⁶

34. In accordance with the investor's terms for agreeing to the Consent Order, Tool Shed carried out a robust out-of-court sale and investment solicitation process (the "**Initial SISP**") from April to September of 2023. The objective of the Initial SISP was to restructure or refinance Tool Shed's debt load, find a purchaser, or find an equity partner to allow it to pay off debt and continue to grow its operations.²⁷
35. The Company canvassed the opportunity with a number of identified potential investors, stakeholders, and creditors, which included advertising on "Insolvency Insider" and sending teasers to potentially interested parties, including the current investors in Tool Shed.²⁸
36. The Initial SISP was run in consultation with Tool Shed's investors, including Donovan and Darryl.²⁹ Donovan and Darryl were regularly provided detailed financial information of the Company as well as updates on potential bidders, marketing efforts, and the contents of a data room maintained in furtherance of the Initial SISP.³⁰ They frequently asked questions and voiced their concerns to Taylor, which the Company did its best to respond to.³¹
37. Donovan in particular was heavily involved in the Initial SISP, and took on an advisory role to the Company in the summer of 2023.³² In this role, Donovan was provided access to Tool Shed's books and records, which he regularly reviewed with Taylor and commented on.³³ Donovan and Darryl chose not to execute a non-disclosure agreement to gain access to the data room as they already had the confidential information memorandum on the Company and access to its books and records.³⁴

²⁶ Taylor Affidavit at para 22.

²⁷ Taylor Affidavit at para 24.

²⁸ Second Costello Affidavit at paras 80-83, Exhibits R and Q.

²⁹ Taylor Affidavit at para 24.

³⁰ Taylor Affidavit at paras 26-27, Exhibit G.

³¹ Taylor Affidavit at paras 29-31, Exhibit H.

³² Taylor Affidavit at paras 26, 34-35, Exhibit J.

³³ Taylor Affidavit at paras 32-33, Exhibit I.

³⁴ Taylor Affidavit at para 36.

38. Tool Shed's current Chief Executive Officer, James Costello ("**Costello**"), executed a non-disclosure agreement in the Initial SISP to gain access to the data room.³⁵ Prior to stepping in as CEO, Mr. Costello was a creditor and investor in Tool Shed, but was never involved with management of the business.
39. The Company received six expressions of interest and one bid during the Initial SISP. The bid was made by an entity that Costello was involved with, Four Horsemen Ventures Inc. ("**Four Horsemen**"). The Four Horsemen bid was conditional on the Company obtaining secured creditor support, including from Donovan and Julianna, as it involved a compromise of a portion of these creditor's claims. Secured creditor approval of the Four Horsemen bid was never obtained³⁶ despite the bid providing some return on the investments of all investors.³⁷
40. Following the termination of the Initial SISP, Costello came on as interim CEO of the Company to assist it with a restructuring of its untenable debt. Tool Shed underwent six months of intense consultation with the Company's secured creditors, convertible debenture holders, and shareholders to try to reach an agreement to see a significant portion of Tool Shed's debt voluntarily converted into equity.³⁸
41. Following months of consultations, in December 2023 Tool Shed proposed a debt settlement agreement which would have seen the forgiveness of up to 90% of the total unsecured debt, with 15% of the amounts owing to unsecured creditors being repaid in the form of Class A common shares in the share capital of the Company at a deemed price per share of \$54.59.³⁹
42. Tool Shed's attempts at converting its unsecured debt failed, and the Company put its creditors on notice that it would have no choice but to file for creditor protection to salvage the going concern value of the business, if any.⁴⁰

³⁵ Fourth Costello Affidavit at para 33.

³⁶ Second Costello Affidavit at paras 85-89, Exhibits T and U.

³⁷ Fourth Costello Affidavit at para 34.

³⁸ Second Costello Affidavit at para 93.

³⁹ Second Costello Affidavit at paras 95-96, Exhibit V.

⁴⁰ Second Costello Affidavit at paras 99-100, Exhibit W.

43. Costello approached all current investors, including Donovan and Darryl, to see if they wanted to invest in the Purchaser, as stalking horse bidder, and be part of the investor group in the restructured Tool Shed entity.⁴¹
44. Darryl informed Costello that he and Julianna would not be able to invest any new money into Tool Shed.⁴²

D. NOI Proceedings and the SISP

45. On January 29, 2024, the Alberta Gaming, Liquor, and Cannabis Commission (the “**AGLC**”) advised Tool Shed that it received a requirement to pay notice from the CRA (the “**Requirement to Pay**”).⁴³
46. Pursuant to the Requirement to Pay, the AGLC was holding back funds that were due and owing to Tool Shed, which represented the vast majority of Tool Shed’s revenues.⁴⁴
47. As a result of the Requirement to Pay and virtually all revenues from the AGLC being garnished by the CRA, Tool Shed was forced to file for these NOI Proceedings in order to maximize stakeholder value and preserve the Company as a going concern.⁴⁵
48. Tool Shed brought an application for an Order to direct that the AGLC release all current and future funds due and owing to the Company, or that may become due and owing to the Company but were being withheld as a result of the Requirement to Pay. The Court granted the Order sought on February 5, 2024.⁴⁶
49. On February 12, 2024, the Court approved, among other things, the SISP.⁴⁷ The SISP was designed by the Proposal Trustee, in consultation with the Company, to be a final attempt for the Company to canvass the market in order to identify any bids superior to the stalking horse bid made by the Purchaser.⁴⁸

⁴¹ Fourth Costello Affidavit at para 37.

⁴² Ibid at para 38.

⁴³ Affidavit No. 1 of James Costello sworn February 1, 2024 (the “**First Costello Affidavit**”) at para 21.

⁴⁴ First Costello Affidavit at para 24.

⁴⁵ First Costello Affidavit at para 27.

⁴⁶ Order of Justice B.B. Johnston pronounced February 5, 2024.

⁴⁷ Fourth Costello Affidavit at para 9.

⁴⁸ Second Costello Affidavit at para 124.

50. The Second Report provides the following summary of the SISP:
- (a) the SISP was commenced on February 12, 2024;
 - (b) the Proposal Trustee posted the teaser document on its website <http://KPMG.com/ca/tool-shed-brewing-company>;⁴⁹
 - (c) the Proposal Trustee utilized KPMG's Corporate Finance group to solicit interest from third parties in the brewing industry;⁵⁰
 - (d) an invitation to prospective buyers to submit an offer for the sale of Tool Shed's business and assets was published in *Insolvency Insider*, a well known and respected publication among insolvency professionals with access to a large range of parties who may have an interest in distressed investment, lending, or sales transactions, as well as the *Calgary Herald*;⁵¹
 - (e) a virtual data room containing confidential information about the Company and its business operations was populated and maintained;⁵²
 - (f) the Proposal Trustee received responses from four parties during the SISP. Representatives from two of those groups signed non-disclosure agreements and reviewed the materials in the virtual data room;⁵³ and
 - (g) the parties who executed a non-disclosure agreement included Donovan and Darryl.

The Donovan Group Due Diligence and Bid Extension Requests

51. After executing a non-disclosure agreement in order to participate in the SISP, Donovan, for himself, Darryl, and Myron Tetreault ("**Myron**" and together with Donovan and Darryl, the "**Donovan Group**") submitted a significant list of requests to the Company for further information. The Company worked diligently to respond to the approximately 100

⁴⁹ Fourth Costello Affidavit at Exhibit A.

⁵⁰ Second Report at para 25.

⁵¹ Second Report at para 24.

⁵² Second Report at para 24.

⁵³ Second Report at para 26.

requests, which were answered to the best of the Company's ability in less than two business days for each request.⁵⁴

52. Pursuant to the Extended Bid Deadline request, the Proposal Trustee extended the bid deadline under the SISP from March 11, 2024 at 12:00 p.m. to March 13, 2024 at 12:00 p.m. Although the Donovan Group asked for an extension until March 25, 2024, the Proposal Trustee chose to grant only a 72-hour extension as it was important to move expeditiously to mitigate cashflow strain on the Company and ensure a competitive and fair sales process was maintained.⁵⁵
53. The Proposal Trustee informed all potential bidders that final requests for information were to be delivered to the proposal Trustee by March 11, 2024 at 12:00 p.m., and that the Company had to provide final responses by March 12, 2024 at 12:00 p.m.⁵⁶
54. The Proposal Trustee provided the Company with a list of final due diligence requests from the Donovan Group on March 11, 2024 (the "**Final Due Diligence Request**"), which the employees of Tool Shed worked diligently to complete to the best of the Company's ability before March 12, 2024 deadline given by the Proposal Trustee.⁵⁷

The Conditional Bid

55. Despite the Final Due Diligence Request being answered to the best of Tool Shed's ability based on the information available to it, on the morning of March 14, 2024, the Donovan Group submitted a further request for an extension of the bid deadline (the "**Further Extension Request Letter**"), along with an unexecuted, non-binding, Conditional Bid to purchase 100% of the equity in the Company.⁵⁸ The Further Extension Request Letter sought an extension of the bid deadline to March 22, 2024 so that the Donovan Group could submit an unconditional bid.⁵⁹

⁵⁴ Fourth Costello Affidavit at para 12.

⁵⁵ Fourth Costello Affidavit at paras 17-18, Exhibit C.

⁵⁶ Fourth Costello Affidavit at para 18.

⁵⁷ Fourth Costello Affidavit at paras 19-20, Exhibit D.

⁵⁸ Second Report, Confidential Appendix C.

⁵⁹ Fourth Costello Affidavit at para 21, Exhibit E.

56. The Proposal Trustee rejected the further bid deadline extension request from the Donovan Group and the Conditional Bid for a number of reasons, including:
- (a) the Conditional Bid was not in compliance with the procedures established under the SISP;
 - (b) the Conditional Bid contained further due diligence conditions allowing the Conditional Bid to be terminated if the due diligence conditions were not fulfilled or waived;
 - (c) the Conditional Bid was unexecuted;
 - (d) the Conditional Bid provided a condition for the retention of 50% of full-time employees of Tool Shed to accept offers of employment; and
 - (e) the Conditional Bid failed to account for professional fees incurred prior to the commencement of the NOI Proceedings in contravention of the February 12 Order.⁶⁰
57. The Extended Bid Deadline expired on March 14, 2024 at 12:00 p.m. No Qualified Bids other than the SPA were submitted to the Proposal Trustee by the Extended Bid Deadline.
58. As a result, no auction was conducted by the Proposal Trustee, and the SPA was declared by the Proposal Trustee to be the Successful Bid under the SISP.⁶¹

The Late Donovan Bid

59. On March 22, 2024 at 4:04 pm, after the Proposal Trustee had advised the Purchaser that it was the successful bid and directed Tool Shed to seek Court-approval of the SPA, the Donovan Group submitted the Late Donovan Bid along with a deposit. The Late Donovan Bid was an executed, unconditional Share Purchase Agreement.⁶²

⁶⁰ Fourth Costello Affidavit at paras 22-23, Exhibit F.

⁶¹ Second Report at para 34.

⁶² Fourth Costello Affidavit at para 26; Second Report, Confidential Appendix D.

60. The Proposal Trustee considered the Late Donovan Bid, and on March 28, 2024, the Proposal Trustee advised the Donovan Group that it would not be accepting the Late Donovan Bid for a number of reasons, including:
- (a) that although the stated value of the purchase price of the Late Donovan Bid may be higher than the purchase price under the SPA, the price is not substantially higher;
 - (b) the Late Donovan Bid does not does not contemplate assumption of the interest and penalties associated with the CRA Debt, which must be paid pursuant to s. 60(1.1) of the BIA, representing a difference of approximately \$116,000;
 - (c) the Late Donovan Bid includes the pre-filing legal fees of Miller Thomson LLP (“**Pre-Filing Fees**”) up to the maximum amount of that secured by the Administration Charge, whereas the SPA proposes paying the Pre-Filing Fees outside the limits of the Administration Charge;
 - (d) the Proposal Trustee has significant concerns about the Donovan Group’s ability to close its proposed transaction by the outside closing date of April 30, 2024 due to the Donovan Group’s delays and non-compliance with the SISP procedure;
 - (e) accepting the Late Donovan Bid would prejudice the Purchaser by denying it the opportunity to submit a better offer in the auction, which it would have been entitled to do if the Late Donovan Bid was submitted within the Extended Bid Deadline. This would subvert the intention of the SISP to provide the Purchaser with an opportunity to participate in the auction;
 - (f) the restraints on the Company’s cash flow are too significant to extend the dates to hold an auction and would delay the closing of a transaction; and
 - (g) the Late Donovan Bid does not provide a substantially better recovery for the Company’s stakeholders, if any, to justify compromising the integrity of the SISP as approved by the Court, and which bidders are entitled to rely on.⁶³

⁶³ Fourth Costello Affidavit at para 27, Exhibit H.

61. Ultimately the Proposal Trustee determined that the principles of commercial certainty, efficacy and fairness required it to reject the Late Donovan Bid.⁶⁴
62. As a result of the position taken by the Proposal Trustee, on the March 28, 2024, the Proposal Trustee advised the service list that the SISP has now concluded with no Superior Offer being received.⁶⁵
63. Tool Shed now seeks approval of the SPA by the Court in accordance with the SISP.

E. The SPA

64. The transaction contemplated by the SPA (the “**Transaction**”) is a going-concern transaction that, if approved, will retain the Premises and ensure that the Company’s customers and suppliers maintain their relationship with Tool Shed.⁶⁶
65. The principal terms of the SPA include the following:
 - (a) the Purchaser agrees to purchase all of the equity in Tool Shed pursuant to a reverse-vesting share purchase transaction;
 - (b) the total consideration payable by the Purchaser is in the approximate amount of \$1,215,000.00. The purchase price is comprised of certain assumed liabilities, and payment of outstanding arrears to the Company’s Landlord under the Lease;⁶⁷
 - (c) it is expected that the Purchaser will continue to operate the business as a going concern and will continue to employ all of Tool Shed’s 20 existing employees;⁶⁸
 - (d) the Lease of the Premises will continue uninterrupted;
 - (e) in accordance with the SPA, closing of the Transaction is expected to occur within ten business days after the conditions to closing have been satisfied or waived.⁶⁹
Tool Shed is currently targeting a closing date of May 6, 2024;

⁶⁴ Fourth Costello Affidavit at para 28.

⁶⁵ Fourth Costello Affidavit at para 29.

⁶⁶ Fourth Costello Affidavit at para 51.

⁶⁷ Fourth Costello Affidavit at para 52.

⁶⁸ Fourth Costello Affidavit at para 57.

⁶⁹ Fourth Costello Affidavit at para 52.

(f) to close the Transaction, the Purchaser requires that, among others, i) this Court grant an RVO in a form satisfactory to the Purchaser, which includes a release of the Released Parties (as hereinafter defined), ii) that the Licenses and Permits remain in good standing, and iii) the Reorganization Transactions (as defined in the SPA) shall have been completed.⁷⁰

66. The Company has consulted with the Proposal Trustee to assess the reasonableness of the purchase price and the Proposal Trustee has advised it is of the view that it is reasonable in the circumstances.⁷¹

F. Stay Extension

67. Currently, Tool Shed must file a proposal on or before April 15, 2024, or it will be deemed to be bankrupt pursuant to the BIA. In order to provide Tool Shed with sufficient time to close the Transaction, the Company requires the Court to extend the time for Tool Shed to file a proposal up to and including May 6, 2024.⁷²

68. The Second Cash Flow Statement projects that the Company has sufficient cash during the Extended Stay Period.⁷³

PART III - ISSUES

69. The following issues are before the Court:

- (a) Should the Court approve the Transaction?
- (b) Should the Court grant the RVO?
- (c) Should the Court grant the Release?
- (d) Should the Court annul these NOI Proceedings?
- (e) Should the Court approve the Proposal Trustee's activities?

⁷⁰ Fourth Costello Affidavit at para 52.

⁷¹ Fourth Costello Affidavit at para 56.

⁷² Fourth Costello Affidavit at para 64.

⁷³ Second Report at Appendix A.

- (f) Should the Court extend the time to file a proposal and the stay of proceedings?

PART IV - LAW AND ANALYSIS

A. The Transaction Should be Approved

The section 65.13(4) test is met

70. Subsection 65.13(1) of the BIA authorizes this Court to approve a sale of a debtor company's assets outside of the ordinary course of business. When deciding whether to approve such a sale, the Court is required to consider the non-exhaustive list of factors set out at subsection 65.13(4) of the BIA:
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the trustee filed with the Court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.⁷⁴
71. The criteria in s. 65.13(4) of the BIA largely correspond to the common law factors applied to the consideration of an asset sale in insolvency, articulated in *Soundair*.⁷⁵
- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

⁷⁴ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("BIA") s 65.13, [Tab 1].

⁷⁵ *Royal Bank of Canada v Soundair Corp*, [1991] OJ No 1137, 4 OR (3d) 1 [*Soundair*] [TAB 2].

- (b) the efficacy and integrity of the process by which offers have been obtained;
 - (c) whether the interests of all parties have been considered; and
 - (d) whether there has been unfairness in the working out of the process.
72. In Just Energy Inc.'s proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**"), the Ontario Superior Court of Justice [Commercial List] held that where the factors listed at s. 36(3) of the CCAA – the CCAA equivalent of the BIA factors – support a proposed transaction, *Soundair* is likely satisfied as well.⁷⁶
73. The factors listed at s. 65.13(4) of the BIA are satisfied in this case:
- (a) *Whether the Sale Process leading to the Transaction was reasonable in the circumstances* – The followed the Initial SISF, which lasted four months. The SISF was a targeted and open process, conducted over a one-month period with a focus on the micro-brewing industry. The Company operates in a niche market with a limited number of potential purchasers or investors, many of which were already canvassed during the Initial SISF.⁷⁷ Furthermore, the Proposal Trustee utilized KPMG's Corporate group to solicit interest from players in the brewing industry.

The Proposal Trustee extended the deadline for bids as it was a one-phase bidding process, to allow interested bidders to complete their due diligence and submit their best and final bid. This ensured that the process remained fair and transparent while not compromising the integrity of the Court-ordered process.
 - (b) *Whether the Proposal Trustee approved the process leading to the proposed sale or disposition* – The Proposal Trustee carried out the SISF. The Proposal Trustee is of the view that the SISF was conducted in a fair, reasonable, and transparent manner.⁷⁸ Furthermore, the Proposal Trustee is of the view that management of the Company acted in good faith and with due diligence during the SISF.⁷⁹

⁷⁶ *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at paras 32 and 62 [Tab 3].

⁷⁷ Second Costello Affidavit at paras 80-83.

⁷⁸ Second Report at para 39.

⁷⁹ Second Report at para 39.

- (c) *Whether the Proposal Trustee filed a Report to the Court stating that in their opinion the sale would be more beneficial to the creditors than a sale under a bankruptcy* – The Proposal Trustee believes that the proposed going-concern Transaction is superior to a bankruptcy liquidation.⁸⁰ These NOI Proceedings have allowed, and the proposed Transaction will allow (if closed), the Company to operate as a going concern for the benefit of the CRA and the Company's Landlord, customers, suppliers and employees.⁸¹ Conversely, a liquidation is highly unlikely to result in any significant recovery for the CRA and no recovery for Tool Shed's other stakeholders. The Proposal Trustee recommends that the SPA be approved.⁸²
- (d) *The extent to which creditors were consulted* – As detailed in the Taylor Affidavit, the Second Costello Affidavit, and the Fourth Costello Affidavit filed in this Action, Tool Shed's creditors have been routinely consulted with respect to a potential sale of the Company throughout the Initial SISP and prior to the NOI Proceedings being initiated. In particular, Donovan and Darryl were heavily involved in the Initial SISP and in the discussions surrounding Tool Shed's options to avoid a liquidation scenario. All of the Company's creditors received notice of the application which resulted in the February 12, 2024 Order,⁸³ and notice of the Application. None of Tool Shed's creditors opposed the relief sought in the hearing for the February 12 Order or the timelines contained within the SISP.
- (e) *The effects of the proposed sale on the creditors and other interested creditors* – If approved, the Transaction will allow for the Company's business to continue as a going-concern, which preserves employment and allows for the continuation of services to its customers. The Lease arrears have since been satisfied by the Company throughout the course of these NOI Proceedings. The Company's unpaid source deductions will become an Assumed Liability, to be paid post-closing. Moreover, the Company's unsecured creditors are no worse off under the proposed Transaction than in a bankruptcy; and

⁸⁰ Second Report at para 44.

⁸¹ Second Report at para 45.

⁸² Second Report at para 38.

⁸³ Affidavit of Marica Ceko, sworn and filed February 8, 2024 in these NOI Proceedings.

- (f) *Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value* – The consideration for the Transaction is fair in the circumstances. The proposed Transaction is the only Qualified Bid received by the Proposal Trustee during the SISP. The Proposal Trustee is of the view that the purchase price in the SPA is fair and reasonable.⁸⁴

The Soundair test is met

74. In light of the foregoing, the Company submits that the *Soundair* factors are also met. However, given that the Company anticipates that there may be allegations of unfairness with respect to the SISP and potential opposition to the approval of the SPA, the *Soundair* factors are considered in detail below:

- (a) *Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently* – To establish this criterion, it must be demonstrated that sufficient effort has been made to obtain the best price and that the Proposal Trustee, in consultation with the Company, did not act improvidently based on the information available to it at the time the SPA was accepted.⁸⁵ The decision to accept a particular offer is a matter of business judgment on the part of the Proposal Trustee that should not be interfered with lightly in the absence of evidence of imprudence or unfairness.⁸⁶ Only where the subsequent offer is so substantially higher than the offer accepted by the Proposal Trustee then it may be that the Proposal Trustee has not conducted the sales process properly.⁸⁷

In this case, the Proposal Trustee undertook an extensive marketing campaign to ensure that the opportunity came to the attention of prospective purchasers. Multiple parties expressed interest and executed non-disclosure agreements to gain access to the data room. The Proposal Trustee and the Company worked diligently to ensure that the large volume of additional due diligence requests were responded to in a timely fashion to the best of the Company's ability.

⁸⁴ Second Report at para 46.

⁸⁵ *Re Terrance Bay Pulp Inc*, 2012 ONSC 4247 at paras 50-55 [*Terrance Bay*] [TAB 4]

⁸⁶ *Terrance Bay*, *ibid* at paras 45 and 52-54 [TAB 4]; *Soundair*, *supra* note 75 at paras 21 and 30-31 [TAB 2].

⁸⁷ *Soundair*, *supra* note 75 at para 30 [TAB 2].

The Proposal Trustee accepted the SPA as the “Successful Bid” on March 19 and 21, 2024. At that point in time, the Conditional Bid was of a non-binding nature. The consideration proposed to be offered by the Donovan Group appeared to be only slightly in excess of the SPA. However, the Conditional Bid used the concept of a “purchaser credit bid” included as part of the purchase price amount. That value was comprised of various secured notes previously belonging to Donovan and other creditors, which were assigned to the Purchaser on March 8, 2024 and March 11, 2024. The purchase price of the Conditional Bid without the credit bid was \$1,073,703.27.

The Proposal Trustee noted that the Conditional Bid was not compliant with the Court-ordered SISP and was conditional upon further due diligence being conducted, which combined with the cash flow concerns of the Company did not provide enough certainty to extend the bid deadline in order to potentially receive a binding bid from the Donovan Group.

Therefore, based on the information available to the Proposal Trustee at the time the SPA was declared the Successful Bid, including the risks associated with the Conditional Bid, the consideration in the SPA is not so unreasonably low so as to warrant the Court’s intervention in the SISP. The Company submits that the Proposal Trustee made sufficient efforts to gain the best price, and did not act improvidently.

- (b) *The efficacy and integrity of the process by which offers have been obtained –* Receiving a higher offer is not the only consideration to be taken into account when deciding whether to deviate from a Court-ordered sales process.⁸⁸ Modifying a sales process that provides a level playing field could result in negative impacts to the parties involved, and therefore Courts have insisted on the importance of preserving the integrity of the sales process.⁸⁹ In this case, the Proposal Trustee was asked by the Donovan Group to extend the bid deadline in the SISP twice. The Proposal Trustee considered the Initial Extension Request and ultimately decided to make an extension of 72 hours to allow the Donovan Group to complete additional due diligence and submit a binding bid. The Proposal Trustee’s reasons

⁸⁸ *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828, at para 59 [*Blackrock*] [TAB 5].

⁸⁹ *Blackrock*, *ibid* at paras 60 and 82 [TAB 5].

for granting a shorter extension than was requested by the Donovan Group included the need to move the sales process forward to maintain competitiveness and mitigate cashflow strain on the Company. The Company submits that it is advantageous to the stakeholders that Tool Shed complete the restructuring process as soon as possible in order to give it the best chance of its long-term survival.

The Donovan Group did not object to the terms of the SISP at the hearing for the February 12 Order and are bound by the SISP procedure as a voluntary participant in the sales process. Therefore, the Company submits that Proposal Trustee has acted in a manner which ensured that the sales process was effective at soliciting competitive offers without compromising the integrity of the process.

- (c) *Whether the interests of all parties have been considered* – The Proposal Trustee explicitly considered the interests of all parties in deciding to extend the bid deadline, declining the request in the Further Extension Request Letter, and rejecting the Late Donovan Bid. The Proposal Trustee considered the interests of the Donovan Group as an interested bidder in granting an extension of the bid deadline, and in considering the Late Donovan Bid. The Proposal Trustee considered the prejudice that the Purchaser would suffer if the Late Donovan Bid was accepted as a Qualified Bid, as there would be no opportunity for the Purchaser to participate in an auction to submit a better bid. The Proposal Trustee considered the Company’s cash flow constraints in deciding whether it was feasible to accommodate further delays to either hold a late auction or extend the closing date. It also considered the fact that the Late Donovan Bid did not provide for full satisfaction of the CRA Debt and the pre-filing legal fees of the Company’s counsel. Finally, it considered the interests of the Company’s stakeholders in deciding to reject the Late Donovan Bid, as it did not provide a substantially better recovery for anyone other than the Donovan Group to justify compromising the Court-approved process;⁹⁰ and
- (d) *Whether there has been unfairness in the working out of the process* – When Courts are asked to adjourn a sale approval hearing or asked to not approve a

⁹⁰ Second Report at para 37(g).

binding bid, it must exercise its discretion to balance the interests of the stakeholders affected.⁹¹ This includes balancing the ongoing costs of the Company's operations, the costs of the parties involved and their counsel, as well as the risk of losing an unconditional "bird in the hand" bid for a more uncertain bid.⁹² As detailed above, the Proposal Trustee carefully considered each of the Donovan Group's requests for further time to conduct due diligence, and gave thoughtful consideration to the Late Donovan Bid. This provided the Donovan Group with ample opportunity to submit a superior bid, especially considering the fact that Donovan and Darryl have over a year of intimate familiarity with Tool Shed's financials, sales, liabilities, and business operations. The Company submits that the Donovan Group was capable of submitting a binding bid before the Extended Bid Deadline. There is no unfairness to them by the Proposal Trustee declining to grant them a further extension, or declining to approve the Late Donovan Bid for, among other reasons, non-compliance with the SISP. The Company submits that the Proposal Trustee's decisions have protected the predictability and integrity of the sale process for the benefit of all stakeholders, and that on balance, the SPA should be approved without delay.

75. Section 65.13(5) of the BIA states that if the proposed sale is to a person "who is related to the insolvent person" the Court may authorize the transaction only if it is satisfied that (a) good faith efforts were made to transact with persons unrelated to the debtor; and (b) the consideration received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale.⁹³
76. In the present case, Costello controls the Purchaser and is also the current CEO of the Company. However, the Company submits that the conditions set out in s. 65.13(5) are satisfied.
77. As described above, the opportunity was extensively marketed to potential parties not related to Tool Shed. The reality is that Tool Shed operates in a niche industry with limited strategic purchasers. Investors unrelated to the Company who are unfamiliar with Tool

⁹¹ *Re Bellatrix Exploration Ltd*, 2020 ABQB 332 at para 30 [*Bellatrix*] [TAB 6].

⁹² *Bellatrix*, *ibid* at paras 26 and 33 [TAB 6].

⁹³ BIA, s 65.13(5) [TAB 1].

Shed's operations are unlikely to purchase it given its distressed financial state and long standing financial difficulties.

78. With respect to s. 65.13(5)(b), the SPA was the only Qualified Bid that was received by the Proposal Trustee by the Extended Bid Deadline. Therefore, the consideration is superior to the alternative, which is no bid and a liquidation of the Company.
79. Based on the foregoing, it is the informed business judgment of Tool Shed and supported by the Proposal Trustee, that the SPA is in the best interest of the Company and its stakeholders. In the absence of any indication that the Company or Proposal Trustee acted improvidently, that business judgment is entitled to deference by this Court.

B. The Reverse Vesting Order Should be Granted

80. The Transaction is structured as a reverse vesting order (“**RVO**”), which courts have confirmed is an available transaction method in BIA proposal proceedings.⁹⁴
81. A traditional vesting order transfers the assets of a debtor to a purchaser leaving liabilities behind. A RVO transfers certain excluded assets (if any) and liabilities to a separate entity (in this case, ResidualCo.), while other specified retained assets and liabilities remain in the corporation subject to the sale.
82. The benefits associated with a reverse vesting transaction are particularly relevant when there are regulatory licenses and other corporate attributes/assets that are not readily transferrable in an ordinary transaction, such as in this case.⁹⁵
83. In *Harte Gold*, Penny J. of the Ontario Superior Court of Justice [Commercial List] provided commentary and guidance regarding the issuance of reverse vesting orders. In *Harte Gold* the Court noted that approval of the use of a reverse vesting structure should involve close scrutiny, since “the frequency of applications based on court approval of an RVO structure has increased significantly in the past few years”,⁹⁶ and that most of those applications were “in the context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure.”⁹⁷ As a result, Penny J. noted that a court-

⁹⁴ *Re PaySlate Inc*, 2023 BCSC 608 at paras 84-86 [*PaySlate*] [TAB 7].

⁹⁵ *Re Harte Gold Corp*, 2022 ONSC 653 at paras 70-71 [*Harte Gold*] [TAB 8].

⁹⁶ *Ibid*, at para 25 [TAB 8].

⁹⁷ *Ibid* [TAB 8].

appointed officer overseeing the process should be prepared to answer the following questions:

- (a) Why is the RVO necessary in this case?
- (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable structure?
- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (and other intangible assets) being preserved under the RVO structure?⁹⁸

84. The test set out in *Harte Gold* is met:

- (a) *The RVO is necessary*: The RVO is necessary in this case as the Company holds non-transferrable Licenses and Permits which are necessary for the Company to operate and are in many cases are tied to the Premises.⁹⁹ The Licenses and Permits would be lost under a traditional vesting order. A going concern purchaser in a traditional vesting order process would be required to apply for the Licenses and Permits, which can take a significant amount of time and money.¹⁰⁰ No offers to purchase the Company through a traditional vesting order process were received during the SISP.
- (b) *The RVO is economically superior*: An RVO transaction is economically superior to any other transaction structure. As the SISP generated no proposed going concern asset transaction, it is reasonable to infer that no potential purchaser is willing to pay more in such a transaction – which would by definition cause the loss of the Licenses and Permits.
- (c) *No stakeholder is worse off*: No stakeholder is prejudiced by the contemplated RVO transaction relative to their treatment and outcome under any other

⁹⁸ *Ibid* at para 38 [TAB 8]. See also *Blackrock*, *supra* note 88 at para 95 [TAB 5].

⁹⁹ Fourth Costello Affidavit at paras 44-45.

¹⁰⁰ Fourth Costello Affidavit at paras 46 and 49.

alternative (of which there is none). The proposed RVO structure allows the CRA and Miller Thomson LLP to recover on their claims while the unsecured creditors and remaining secured creditors receive the same outcome as in a liquidation. The Second Report indicates a forced liquidation value of Tool Shed's assets in the amount of \$508,000, which is far below the SPA purchase price.¹⁰¹ Further, under the proposed Transaction the Company will retain all of its current employees and satisfy its source deduction obligations.

- (d) *The consideration reflects the value paid:* The Purchaser is not getting something for nothing. The consideration being paid reflects the value of the Licenses and Permits and other intangible assets. The RVO structure enhances value and provides the best outcome for stakeholders, including the CRA and the Company's Landlord, employees, customers, and suppliers compared to a liquidation scenario.

85. The RVO structure has been designed to close the Transaction in an expeditious and cost-effective manner.

C. The Release Should be Granted

86. The Company seeks a Court-ordered release (the "**Release**") which includes the Company, Proposal Trustee, Purchaser, Interim Lender, and the Company's current director, officers, employees, and independent contractors who provided legal or financial services to the Company, the Proposal Trustee, the Proposal Trustee's counsel, ResidualCo, and the Interim Lender (the "**Released Parties**"). The proposed Release covers all present and future claims against the Released Parties based upon any fact, matter of occurrence in respect of the Transaction or the Company and its assets, business or affairs, except any claim that is not permitted to be released pursuant to section 50(14) of the BIA.¹⁰²

87. The language in sections 50(13) and 50(14) of the BIA¹⁰³ is substantially the same as in section 5.1(1) and 5.1(2) of the CCAA.¹⁰⁴ Section 5.1(1)/50(13) permits a debtor's directors

¹⁰¹ Second Report at paras 44-45.

¹⁰² BIA, s 50(14) [TAB 1].

¹⁰³ BIA, s 50(13) and 50(14) [TAB 1].

¹⁰⁴ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") at s 5.1(1) and 5.1(2) [TAB 9].

to be released from pre-filing claims against the debtor for which the directors could be liable. Section 5.1(2)/50(14) exempts from release creditors' claims against the directors based on contractual rights, and claims of misrepresentation and oppression against the directors.

88. As noted by the Court of Appeal for Ontario, the policy rationale behind s. 5.1 of the CCAA is to encourage directors and officers of an insolvent corporation to remain in office during a restructuring rather than immediately resign.¹⁰⁵
89. S. 5.1 of the CCAA is not limited to directors, and has been applied to both officers and employees of a debtor.¹⁰⁶ The courts have also frequently approved releases in favour of the parties, monitors, trustees, counsel, employees, shareholders, and advisors.¹⁰⁷
90. When considering a third-party release in the context of a plan, courts have examined the following non-exhaustive list of factors as set out by this Court in *Lydian International Limited (Re)* ("**Lydian Factors**").¹⁰⁸
 - (a) whether the parties to be released are necessary and essential to the restructuring;
 - (b) whether the claims to be released are rationally connected to the purpose of the plan;
 - (c) whether the plan can succeed without the releases;
 - (d) whether the parties being released contributed to the plan;
 - (e) whether the releases benefit the debtors as well as the creditors generally;
 - (f) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

¹⁰⁵ *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 99 [**Tab 10**].

¹⁰⁶ *Re Canadian Airlines Corp.*, 2000 ABQB 442 at para 92 [*Canadian Airlines*] [**Tab 11**].

¹⁰⁷ *Green Relief Inc. (Re)*, 2020 ONSC 6837 at para 54 [*Green Relief*] [**Tab 12**]; *Canadian Airlines*, *ibid* at para 86 [**TAB 11**].

¹⁰⁸ *Re Lydian International Limited*, 2020 ONSC 4006 at para 54 [**Tab 13**]; *Re Target Canada Co*, 2016 ONSC 3651 at para 36 [*Targetf*] [**Tab 14**].

- (g) whether the releases are fair, reasonable, and not overly-broad.
91. A court must consider the particular circumstances of each case and the objectives of the CCAA (or in this case the proposal proceedings); no single factor is determinative.¹⁰⁹
92. Although *Lydian* sets out a test for third party releases in the context of a plan, courts have also granted third party releases in the absence of a plan of arrangement.¹¹⁰ Courts may grant third-party releases in the absence of a plan of compromise or arrangement or a proposal where the releases:¹¹¹
- (a) are connected to a resolution of the debtor's claims;
 - (b) will benefit creditors generally; and
 - (c) are not overly broad or offensive to public policy.
93. Courts have also granted releases in the context of RVOs in NOI proceedings.¹¹² Furthermore, this Court has granted a release of the directors, officers and employees of a "residual" company, incorporated for the purposes of facilitating a RVO structured transaction.¹¹³
94. The Company submits that the Releases should be approved because the *Lydian* Factors are satisfied:
- (a) *The Released Parties are necessary and essential to the restructuring* – The Released Parties (as the case may be) proactively pursued the SISF, and otherwise made substantial contributions to achieving the best possible outcome for the Company and its stakeholders;

¹⁰⁹ *Target*, *ibid* at para 38 [TAB 14].

¹¹⁰ *Green Relief*, *supra* note 107 at para 23 [Tab 12].

¹¹¹ *Re Nortel Networks Corp*, 2010 ONSC 1708 at para 79 [Tab 15].

¹¹² See, e.g. *Lovingly Made Ingredients Ltd.*, Unpublished Order of Feasby J., October 24, 2023. Court File No. 25-2993758/B201 993758 [*Lovingly Made Order*] [TAB 16].

¹¹³ *Ibid* [TAB 16].

- (b) *The released claims are rationally connected to the purpose of the Transaction –* The Release protects the parties who conducted the SISP and bring the Transaction before the Court for approval for the benefit of stakeholders;
- (c) *The Released Parties have contributed to the Transaction and the SPA –* The Interim Lender, the Proposal Trustee, the Proposal Trustee’s counsel, the Company’s counsel, and the Company’s director and officers have dedicated significant time and effort to these NOI Proceedings;¹¹⁴ and
- (d) *The Releases benefit both the Company and its creditors –* The Releases benefit the Company by facilitating the Transaction for the benefit of Tool Shed’s stakeholders generally.

95. In their scope, the Releases carve out any claim that is not permitted to be released pursuant to section 50(14) of the BIA.

D. The NOI Filing Should be Annulled

96. The BIA does not contemplate a situation where a company that has filed an NOI ceases to be insolvent and seeks to terminate the insolvency proceeding. The only “exit routes” contemplated by the BIA are the successful filing of a proposal or else an assignment into bankruptcy. These exit routes are insufficient where an NOI debtor completes a going concern transaction through a reverse-vesting order. Without addressing the gap, there is a risk that, post-closing, the now-solvent debtor entity is deemed bankrupt upon an expiry of the stay.

97. In *Junction Craft* the Ontario Superior Court of Justice [Commercial List] dealt with an analogous situation and held that an NOI could be “annulled” or “withdrawn” upon the successful closing of a transaction that would render the NOI debtor solvent.¹¹⁵ The NOI debtor in that proceeding sought approval of a share purchase transaction to be carried out by way of a reverse vesting order because the NOI debtor held certain non-transferrable licenses.¹¹⁶

¹¹⁴ Second Costello Affidavit at para 27.

¹¹⁵ *In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc*, Unpublished Endorsement of Penny J., December 20, 2021. Court File No. 31-2774500, [*Junction Craft*] [TAB 17].

¹¹⁶ *Ibid* at page 2 [TAB 17].

98. In this case is that the Company will become solvent upon the successful closing of the Transaction.¹¹⁷ As a result, it will no longer be an entity to which the BIA applies and the NOI can be withdrawn.
99. In *Junction Craft*, the Court recognized that “the filing of the NOI needs to be annulled and this proceeding terminated”, and further held that:
- The BIA does not contemplate a situation where a company that has filed a notice of intention is no longer insolvent and would seek to terminate the insolvency proceeding. In this case, because of the employment of the RVO approach, the Company will, if the order sought is granted, be solvent. I am satisfied the request for an order nullifying the Company’s proposal is consistent with the underlying purposes of the BIA: *Poly Innovation Inc., Re*, 2013 ONSC 2782, paras. 4-10.
100. Similar relief to that granted by the Court in *Junction Craft* has been granted by this Court.¹¹⁸
101. The facts of *Junction Craft* are directly analogous to this matter. The Company will not be insolvent following the close of the Transaction and, consequently, the NOI Proceedings should be withdrawn.

E. The Proposal Trustee’s Activities Should be Approved

102. In *Target Canada*, the Court noted that there are good policy and practical reasons to grant the approval of a monitor's reported activities, including (a) allowing a monitor to bring its activities before a court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling a court to satisfy itself that a monitor's activities have been conducted in a prudent and diligent manner; (d) providing protection for a monitor not otherwise provided by the CCAA; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by a monitor.¹¹⁹

¹¹⁷ Second Report at para 41.

¹¹⁸ *Lovingly Made Order* [TAB 16].

¹¹⁹ *Re Target Canada Co*, 2015 ONSC 7574, at paras 2, 22-23 [TAB 18].

103. These comments and the policy considerations identified by the Court in *Target Canada* apply with equal force to applications seeking approval of a proposal trustee's report and the activities of a proposal trustee described therein.
104. The activities of the Proposal Trustee and its counsel that are set out in the Second Report were necessary, consistent with the Proposal Trustee's duties and powers as set out in the BIA, and were undertaken with efficiency and reasonableness in the interests of the Company's stakeholders generally.

F. The Time to File a Proposal and the Stay of Proceedings Should be Extended

105. Currently, Tool Shed must file a proposal on or before April 15, 2024, or it will be deemed to be bankrupt pursuant to the BIA.
106. Under s 50.4(9) of the BIA, the Court may grant an extension of a stay of proceedings where: (a) the debtor satisfies the Court that it 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.¹²⁰
107. The following factors support granting the Extended Stay Period:
- (a) the Extended Stay Period is required to implement the Transaction;¹²¹
 - (b) Tool Shed has acted and continues to act in good faith and with due diligence to advance these proceedings. The Extended Stay Period is necessary to continue to maintain stability and protect value for the Company's stakeholders while the Company works to close the Transaction;
 - (c) Tool Shed anticipates having sufficient funds during the Extended Stay Period to continue operations;¹²²
 - (d) the Proposal Trustee supports the Extended Stay Period; and

¹²⁰ BIA, s 50.4(9) [TAB 1].

¹²¹ Fourth Costello Affidavit at para 64.

¹²² Fourth Costello Affidavit at para 65.

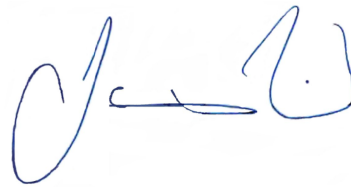
(e) no creditor will be materially prejudiced as a result of this extension.

108. The Proposal Trustee is of the view that the Company is acting in good faith and with due diligence and considers the requested Extended Stay Period to be reasonable.¹²³

PART V - CONCLUSION

109. For the reasons set out above, the Company requests that this Honourable Court grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th day of April, 2024

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a horizontal line and a 'W'.

Miller Thomson LLP
Per: James W. Reid and Bryan A. Hosking
Counsel for Tool Shed Brewing Company
Inc.

¹²³ Second Report at para 49.

TABLE OF AUTHORITIES

<u>TAB</u>	<u>AUTHORITIES</u>
1	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3, as amended [excerpts of]
2	<i>Royal Bank of Canada v Soundair Corp.</i> , [1991] OJ No 1137, 4 OR (3d) 1
3	<i>Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al.</i> , 2022 ONSC 6354
4	<i>Re Terrance Bay Pulp Inc.</i> , 2012 ONSC 4247
5	<i>Arrangement relatif à Blackrock Metals Inc.</i> , 2022 QCCS 2828
6	<i>Re Bellatrix Exploration Ltd.</i> , 2020 ABQB 332
7	<i>Re PaySlate Inc.</i> , 2023 BCSC 608
8	<i>Re Harte Gold Corp.</i> , 2022 ONSC 653
9	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36, as amended [excerpts of]
10	<i>ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.</i> , 2008 ONCA 587
11	<i>Re Canadian Airlines Corp.</i> , 2000 ABQB 442
12	<i>Re Green Relief Inc.</i> , 2020 ONSC 6837
13	<i>Re Lydian International Limited.</i> , 2020 ONSC 4006
14	<i>Re Target Canada Co.</i> , 2016 ONSC 3651
15	<i>Re Nortel Networks Corp.</i> , 2010 ONSC 1708
16	<i>Lovingly Made Ingredients Ltd.</i> , Unpublished Order of Feasby J., October 24, 2023. Court File No. 25-2993758/B201 993758
17	<i>In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc.</i> , Unpublished Endorsement of Penny J., December 20, 2021. Court File No. 31-2774500
18	<i>Re Target Canada Co.</i> , 2015 ONSC 7574