

# Court of King's Bench of Alberta

**Citation: Tool Shed Brewing Company Inc (Re), 2024 ABKB 234**



**Date:**  
**Docket:** B301 038201  
**Registry:** 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

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**Reasons for Decision  
of the  
Honourable Justice EJ Sidnell**

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## **Introduction**

[1] Tool Shed Brewing Company Inc (Tool Shed) seeks approval of a reverse vesting order for a stalking horse bid (the Stalking Horse Bid) made by 2582568 Alberta Inc, a company controlled by Tool Shed's current CEO, James Costello (the Costello Company).

[2] Tool Shed's application is opposed by two individual Tool Shed investors, who are also secured creditors, John Donovan and Juliana Bourne (collectively, the Investors). The Investors are also owners of 2594617 Alberta Ltd (the Donovan Group), which submitted a competing bid.

[3] Tool Shed brews craft beer and operates a restaurant. Tool Shed sells its alcoholic and non-alcoholic beverages through retailers and other restaurants and similar establishments. Tool Shed has nine non-transferable licenses and permits issued by the Alberta Gaming, Liquor and Cannabis Commission (the AGLC). Tool Shed submits that these licenses and permits are the key asset of its business. Tool Shed submits that a reverse vesting order is the only way to preserve the non-transferrable permits and licenses.

[4] In addition to amounts owed to trade and judgment creditors, lenders and other investors, Tool Shed owes a significant amount to the Canada Revenue Agency (CRA) in relation to source deductions dating back to January 2020.

[5] In 2023, under financial strain, Tool Shed obtained financing from, among others, the Investors, who became secured creditors.

[6] Tool Shed attempted to re-structure its debt and sought a sale of, or new investment in, the business. There were no offers arising from these efforts.

[7] On January 9, 2024, the CRA notified Tool Shed that it had obtained a writ against it in the amount of \$564,237.84 and that, as of January 9, 2024, the CRA was owed \$571,091.70.

[8] On January 31 2024, the CRA took steps to garnish Tool Shed's account with the AGLC. On that same day, Tool Shed filed a notice of intention to make a proposal under s 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3 (*BIA*) (the NOI Proceedings). KPMG Inc was appointed as Tool Shed's proposal trustee (the Proposal Trustee).

### **The SISP Order**

[9] On February 12, 2024, Lema J, granted an order (the SISP Order) which, among other things:

- (a) extended the time for Tool Shed to file a proposal to its creditors to April 15, 2024;
- (b) approved an administration charge as security for the professional fees and disbursements of the Proposal Trustee and Tool Shed's counsel (the Administration Charge);
- (c) approved an interim loan between Tool Shed and the Costello Company to a maximum of \$250,000, together with a charge on the property of Tool Shed as security for the interim loan;
- (d) approved a stalking horse sales and investment solicitation process (the SISP), which:
  - (i) was to be conducted in the manner described in Schedule A to the SISP Order (the SISP Process);
  - (ii) attached to the SISP Process the Stalking Horse Bid in the form of a "Stalking Horse Agreement" between Tool Shed and the Costello Company;
  - (iii) declared that the SISP Process was commercially reasonable and was ratified and approved;
  - (iv) authorized and directed Tool Shed and the Proposed Trustee "to do all things reasonably necessary to implement, conduct and give full effect to the SISP and to carry out the obligations thereunder, including taking any additional steps or executing additional documents as may be necessary or desirable in order to carry out and complete the SISP and a transaction"; and
  - (v) authorized Tool Shed to apply to the Court to approve the Stalking Horse Bid or a Superior Offer.

[10] Tool Shed brought an application, returnable on April 15, 2024 (the Approval Application), for a period of one hour, where it sought, among other things:

- (a) an extension for Tool Shed to file a proposal to its creditors to May 6, 2024;
- (b) approval of the transaction involving the Stalking Horse Bid;
- (c) releasing certain parties from claims;
- (d) annulling, or permitting the withdrawal of, Tool Shed's NOI Proceedings on the closing of the Stalking Horse Bid transaction;
- (e) approving the Proposal Trustee's First Report and Second Report; and
- (f) sealing two confidential appendices to the Proposal Trustee's Second Report.

#### **Applications heard April 15 and 16, 2024**

[11] Tool Shed would have become bankrupt on April 16, 2024, without a further extension of the time to file a proposal to its creditors. That portion of the Approval Application was urgent and heard on April 15, 2024. Tool Shed was granted an extension to May 6, 2024, to file a proposal.

[12] Given the financial condition of Tool Shed, the Court accommodated the parties by scheduling an additional two hours on April 16, 2024, to address the SISP transaction.

[13] Tool Shed was aware that the SISP transaction was opposed by the Donovan Group.

[14] In addition to two reports of the Proposal Trustee, both the Costello Company and the Donovan Group filed substantial briefs, the Costello Group relied on four affidavits, and the Donovan Group relied on one affidavit. One hour was clearly not enough time to hear the SISP transaction application, let alone the entirety of the Approval Application.

[15] Counsel for Tool Shed submitted that only one hour was booked for the Approval Application because that was all that was available on the Commercial List. However, on February 12, 2024, Tool Shed was granted the SISP Order so it knew then that an application for approval, even if not opposed, would be required. At that time, there would have been ample availability on the Commercial List in mid-April.

[16] Scheduling time on the Commercial List requires planning ahead because the number and length of available time slots increase with advance notice and the availability of counsel and other parties must be considered. Without knowing the particular constraints in this case, I will only comment that counsel should not create problems by knowingly booking insufficient court time.

[17] While many members of the bar carefully consider the amount of time required for their applications, booking insufficient time on the Commercial List is an invasive problem and reflects poorly on those who knowingly perpetrate it. Counsel should be aware of the procedure for booking and, if necessary, requesting adequate Court time on an urgent basis.

[18] In addition, agreed statements of fact are woefully underused. This hearing could have been more efficient, and required less time, if an agreed statement of facts had been prepared for the non-contentious background and chronology.

[19] These are my reasons on the proposed SISP transaction. I have considered all of the material relied on by the parties, but given the urgency, I will not set out the facts in detail. Rather, I will focus on the particular facts that the parties rely on as being pivotal.

[20] The unaddressed portions of the Approval Application are adjourned *sine die*. Tool Shed is at liberty to bring those portions back on the Commercial List with appropriate notice to all parties on the service list.

### **Standing**

[21] At the initial hearing on April 15, 2024, the Court raised the issue of standing as it had not been addressed in the materials or briefs of the parties, and, in particular, the commentary in *Skyepharma plc v Hyal Pharmaceutical Corp*, [2000] OJ No 467, at paras 25 and 26.

[22] Notwithstanding that a brief was filed on behalf of the losing bidder, Donovan Group, and not the Investors themselves, counsel for the Donovan Group and the Investors submitted that the Investors had standing as secured creditors of Tool Shed and that a distinction should not be made between them.

[23] Tool Shed submitted that there was no issue with granting the Investors and the Donovan Group standing.

[24] Based on Tool Shed's admission, and having heard no objection, the application continued on the basis that the Investors and the Donovan Group had standing.

[25] At the commencement of the hearing on April 16, 2024, the Donovan Group submitted that, in addition to the materials already provided, it also relied on *Bloom Lake, gpl (Arrangement relatif à)*, 2015 QCCS 1920, para 85. In that case, the Court queried who would raise the issues of fairness and integrity if the losing bidder, sometimes referred to as the "bitter bidder", has no standing and cannot raise them. One option suggested by that Court, at para 86, was to have the objections given to the CCAA Monitor in that case. However, in *Bloom Lake*, the CCAA Monitor had already filed its report by the time the objections were raised and did not address them. As a result, the Court in *Bloom Lake* found the submissions of the losing bidder useful. That is different from this case in that the Proposal Trustee addressed the issues raised by the Donovan Group in its correspondence attached to the affidavits and in its Second Report.

[26] The Investors and the Donovan Group also note that in *Royal Bank of Canada v Keller & Sons*, 2016 MBCA 46, at para 13, the Court recognized that the unfairness of the process itself could prevent a party from obtaining a material interest in the sale process such that it did not have standing. However, the Court did not decide the issue. In this case, the SISP Process was set out in detail in the SISP Order, which was not appealed. The SISP Process cannot now be impugned. The Investors and the Donovan Group acknowledge the finality of the SISP Order but assert that the manner in which the SISP Process was implemented was unfair and lacked integrity.

[27] Based on Tool Shed's April 15, 2024 admission on standing, the further submissions of the Investors and the Donovan Group on standing were not made in full.

[28] For ease of reference, from this point forward, I refer only to the Donovan Group as the Investors' position was entirely aligned with the position of the Donovan Group.

[29] Towards the end of the hearing on April 16, 2024, counsel for the Costello Company said he had submitted the *Skyepharma* decision, together with two other decisions, before the hearing. However, they had not been sent to the Commercial Coordinator, or my office, and I did not receive any materials from the Costello Company. In any event, by the time this was raised, the points raised in *Skyepharma* had already been canvassed by the Court and the standing issue had already been addressed.

### **SISP Process**

[30] Section 24 of the SISP Process sets out the requirements for a “Qualified Bid”, emphasis in the original:

A Bid will be considered a Qualified Bid only if it is submitted by a Qualified Bidder and the Bid complies with, among other things, the following (a “Qualified Bid”):

- (a) Timing: it is submitted on or before the Bid Deadline;
- (b) Sale Proposal: in the case of a Sale Proposal, it contains the following:
  - (i) a duly authorized and executed definitive and binding asset purchase agreement, together with all completed schedules thereto, which includes all or substantially all of the material terms and conditions of the transaction, including identification of the Business or the Property to be acquired, the obligations to be assumed, the purchase price for the Business or Property to be acquired in Canadian dollars, and key assumptions supporting the valuation;
  - (ii) a specific indication of the financial capability of the Qualified Bidder and the structure and financing of the transaction; and
  - (ii) any other terms or conditions of the Sale Proposal that the Qualified Bidder believes are material to the transaction;
- . . .
- (k) Unconditional Bid: it is not conditional upon:
  - (i) the outcome of unperformed due diligence by the Qualified Bidder;
  - (ii) obtaining financing; or
  - (iii) any other material closing conditions;
- (l) Superior Offer: the bid constitutes a Superior Offer; and

. . .

[31] The SISP Process incorporates a definition of “Assumed Liabilities” by referencing the Stalking Horse Agreement, which defines “Assumed Liabilities” as those set out in Schedule E, together with other specified liabilities. Pertinent to this Application are the following Assumed Liabilities listed in Schedule E:

1. All Priority Payments, including but not limited to all amounts due and owing by the Company on account of source deductions to the Canada Revenue Agency, in the approximate amount of \$571,091.70.

...

5. All amounts owing to Miller Thomson LLP for pre-filing work prior to the Proposal Proceedings being approximately \$80,000.00.

[32] After the bid deadline, initially March 11, 2024, under s 28 and 29 of the SISP Process, the Proposal Trustee, in consultation with Tool Shed, is obliged to assess the Qualified Bids and if there is a Qualified Bid which is a Superior Offer, then an auction process is launched:

28. Following the Bid Deadline, the Proposal Trustee, in consultation with the Company, will assess the Qualified Bids.

29. If the Proposal Trustee, in consultation with the Company, determines that one or more of the Qualified Bids constitutes a Superior Offer, the Proposal Trustee shall provide the parties making Superior Offers and the Stalking Horse Bidder the opportunity to make further bids through the auction process set out below (the "Auction").

[33] I note here that there appears to be some inconsistency in the drafting of the SISP Process. In s 24(l), a Qualified Bid is required to be a Superior Offer and in s 46 the Proposal Trustee is permitted to issue a waiver, except to the requirement that a Qualified Bid be a Superior Offer. On the other hand, s 28 and 29 require an assessment and determination as to whether a Qualified Bid is a Superior Offer. To give effect to s 27, 28 and 29 of the SISP Process, I find that the only reasonable interpretation is that the s 24(l) requirement that a Qualified Bid be a Superior Offer is premature and that each Qualified Bid must be assessed in accordance with s 28 and 29 of the SISP Process to determine if it is a Superior Offer.

[34] Relevant to determining whether there is a Qualified Bid, s 46 of the SISP Process grants the Proposal Trustee the authority to waive non-compliance. Further, under s 25, the Proposal Trustee has the right to reject bids:

46. 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).

25. All Bids will be considered, but the Proposal Trustee, in consultation with the Company, reserves the right to reject any and all Bids in its sole discretion.

[35] If there is another Qualified Bid, then a determination must be made as to whether there is a "Superior Offer", which is defined as follows:

"Superior Offer" means a credible, reasonably certain and financially viable third party offer for the investment in, or acquisition of some or all of the Property, the Company, or the Business, the terms of which offer are, in the determination of the Proposal Trustee, in consultation with the Company, no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse

Agreement, and which at a minimum includes: (i) payment in cash of the Purchase Price, the Recoverable Expenses, the Break Fee, one Minimum Incremental Overbid, any amounts outstanding under the Administration Charge and Interim Lender's Charge at the closing of such transaction; and (ii) assumption or satisfaction of the Assumed Liabilities.

[36] If no Qualified Bid is a Superior Offer, then the Stalking Horse Bid is successful:

27. If none of the Qualified Bids received by the Proposal Trustee constitute a Superior Offer, the Stalking Horse Bidder shall be declared the Successful Bidder and the Stalking Horse Agreement shall be declared the Successful Bid.

### **Test to be applied**

[37] Tool Shed submits that the non-exclusive factors set out in s 65.13(4) of the *BIA* for approval of disposition of Tool Shed have been met, and that considering those factors ensures that the principles set out in *Royal Bank of Canada v Soundair Corp*, 1991 CanLII 2727 (ONCA) are also assessed. In any event, Tool Shed submits that the *Soundair* principles are satisfied.

[38] The Donovan Group submits that the *Soundair* principles have not been met, that approval of the Stalking Horse Bid is not the best option for Tool Shed and that it should be rejected. In addition, the Donovan Group asserts that it should be entitled to seek approval of its bid at a subsequent application.

[39] As demonstrated in my analysis of the factors set out in s 65.13(4), below, Tool Shed conflates process with substance. The SISP Order approval of the SISP Process addressed the process considerations set out in s 65.13(4) of the *BIA*. The *Soundair* principles must be addressed independently.

[40] In applying the *Soundair* principles, I find the comments of the Manitoba Court of Appeal in *Keller & Sons*, at para 11, before referring to *Soundair* and *Crown Trust Co v Rosenberg*, 1986 CanLII 2760 (ONSC), helpful to set the scope of the analysis:

The motion judge owed the decision of the Receiver significant deference. While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. The court should not intervene in the decision of the receiver except in an exceptional case. ...

[41] I find these comments equally applicable to this case were there is a proposal trustee rather than a receiver.

### **Consideration of s 65.13(4) of the BIA**

[42] This Approval Application is not an opportunity to make a collateral attack on the SISP Order which was granted on February 12, 2024. Section 65.13(3) required the secured creditors

to have notice of the application to approve the SISP Process. The SISP Order was not appealed and the SISP Process cannot now be impugned.

[43] The Donovan Group submits that does not take issue with the structure of the SISP Process, rather the implementation of it. Contrary to this assertion, some of the submissions made by the Donovan Group did address the fairness of the underlying SISP Process.

**Whether the process leading to the proposed sale was reasonable in the circumstances**

[44] The SISP Process is detailed and incorporated into the SISP Order. This factor is met.

**Whether the Proposal Trustee approved the process leading to the proposed sale**

[45] As the SISP Process was granted as part of the SISP Order and the Proposal Trustee was involved in its implementation, I find that this factor has been met to the extent it relates to implementation of the SISP Process.

**Whether the Proposal Trustee filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy**

[46] This would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order. I find that this factor is not relevant to this Approval Application.

**The extent to which the creditors were consulted**

[47] In relation to the SISP Process, this would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order.

[48] In relation to the implementation of the SISP Process, there does not appear to have been any consultation with the creditors, but then the SISP Process does not contemplate any involvement of the creditors in the implementation of the SISP Process.

[49] I find that this factor has been met.

**The effects of the proposed sale on the creditors and other interested parties**

[50] No one suggested that the SISP Process or Stalking Horse Agreement was not known to the parties in advance of the February 12, 2024 application. The SISP Order contemplated that Tool Shed could be sold in accordance with the Stalking Horse Agreement and that is what is now proposed.

[51] This would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order. I find that this factor is not relevant to this Approval Application.

**Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value**

[52] In approving the Stalking Horse Bid, this would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order. I find that this factor is not relevant to this Approval Application.



### **Soundair principles**

[53] In *Soundair*, Galligan JA, with McKinlay JA concurring in the result and on this point, followed *Crown Trust Co v Rosenberg* and set out four enquiries that an approving court should consider. This well-known analysis is applied when a court is considering an application for the approval of a sale: *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433, at para 10, and *1705221 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144, at para 19. I find that this analysis is applicable in the context of the NOI Proceedings and this Approval Application.

[54] At the hearing, counsel for Tool Shed, the Donovan Group, the Proposal Trustee, the Costello Company, and the CRA, all made submissions. The main issues raised by those parties are set out below. Given the urgency of a decision on the SISP transaction application, I have not addressed every detailed point here but I have considered all of the parties' submissions.

#### **1. Were there sufficient efforts to get the best price without acting improvidently?**

[55] The SISP Process contemplated an advertising process to encourage interest in Tool Shed. Steps were taken by the Proposal Trustee in that regard and no issue is taken with them.

#### **Access to Tool Shed information**

[56] The Donovan Group asserts that it did not have timely, or full, access to the Tool Shed information. The Donovan Group further asserts that the information it received was summary and piecemeal.

[57] The Donovan Group also submits that it was at a disadvantage because it made its informational requests through the Proposal Trustee but the information actually came from Mr. Costello. The Donovan Group asserts that, due to Mr. Costello's role in providing information, it had asymmetrical access to information. In other words, the Costello Company had better access to information than the Donovan Group. As an example of this, counsel for the Donovan Group said that after the hearing on April 15, 2024, she received information from the Department of Justice that there was a \$370,000 debt owed by Tool Shed for source deductions and GST accounts. The Donovan Group asserted that this was a deemed trust liability that had not been disclosed by Tool Shed.

[58] The Donovan Group's main concerns arise from Mr. Costello's dual role as CEO of Tool Shed and as an investor in the Costello Company which provided the Stalking Horse Bid. This tension between the individual insider (Mr. Costello) and the proponent of the Stalking Horse Bid (the Costello Company) is what runs through almost all of the issues raised by the Donovan Group. The difficulty with addressing this tension, and possible conflict of interest, on an application for approval of the SISP transaction, is that they are inherent in the SISP Process which has already been approved.

[59] On March 14, 2024, in what it referred to as its "Preliminary Bid", the Donovan Group articulated the points as follows:

As the Proposal Trustee and the Company are aware, the principal of the Stalking Horse Bidder was interim CEO of the Company until January 1, 2024, when he became the CEO. This raises two issues.

First, there is a significant information imbalance as between the Stalking Horse Bidder and the Bidder. The Bidder should be on an even playing field with the

Stalking Horse Bidder in this regard, and therefore, the Company should take care to provide the same level of information to the Bidder as is available to the Stalking Horse Bidder.

Second, the integrity of the SISP is affected by the fact that the person in control of the Stalking Horse Bidder is also informing the conduct of the SISP, the Company's responses to due diligence requests, and the Company's review of bids in the SISP. In our view, the CEO's involvement in the bid process puts him in a conflict of interest in conducting the SISP on behalf of the Company.

[60] Whether the integrity of the SISP Process is affected by the Costello Company providing the Stalking Horse Bid is something that the Donovan Group should have raised on the application where the SISP Process was approved. I do not think it is appropriate to raise this submission on this Approval Application as it seeks to undermine the SISP Order. As to the imbalance of information, this was asserted but not proven. The Proposed Trustee asserts that the Donovan Group had the same records that were available to the Costello Company.

[61] The Proposal Trustee submits that it worked diligently with Tool Shed "management" to provide information to the Donovan Group. Given the scarce resources that Tool Shed had at its disposal, I accept, for the purposes of the Donovan Group's submissions, that Mr. Costello was actively involved in the information provided by Tool Shed "management".

[62] The Proposal Trustee said in its Second Report that it populated and maintained a virtual data room (VDR) for the SISP Process and that:

... Management and the Proposal Trustee worked diligently to respond to all inquiries and provide company documents requested from the Donovan Group. Due to [Tool Shed] resource constraints, in particular a lack of adequate accounting and bookkeeping functions for the business, and due to the state of [Tool Shed's] records, certain inquiries and requests from the Donovan Group were unable to be fulfilled, although all available due diligence information was made available to the Donovan Group in the VDR.

[63] The Donovan Group submits that it is satisfied that the Proposal Trustee passed on the requests it made for further information and obtained all of the information that it was able to obtain in response to its requests. The Donovan Group casts no aspersions on the Proposal Trustee or the role it performed in the SISP Process.

[64] In its Preliminary Bid, on March 14, 2024, the Donovan Group set out a further request for due diligence information. The Proposal Trustee responded to that request on March 18, 2024, well after the initial and extended deadline. However, as can be seen in the Proposal Trustee's March 18, 2024 letter in response, there was no new substantive information provided; rather, a confirmation of previously provided information and a confirmation of the unavailability of further or better information.

[65] I find that the Donovan Group has not shown that the Costello Company had any different or better information upon which to base the Stalking Horse Bid which was incorporated into the SISP Order on February 12, 2024.

[66] In *River Rentals Group Ltd v Hutterian Brethren Church of Codesa*, 2010 ABCA 16, at para 13, the Alberta Court of Appeal said that in considering the first *Soundair* principle the Court should consider:

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

[67] Because the SISP Order contemplated a Stalking Horse Bid, the considerations set out in (a), (c) and (d) have already been addressed.

[68] With regard to whether circumstances indicate that insufficient time was allowed for the making of bids, given the set schedule in the SISP Process, the question is more of whether the Proposal Trustee adequately granted an extension to the deadline to permit further bids.

**Did the Proposal Trustee grant appropriate extensions?**

[69] The SISP Process set the initial deadline for bids as March 11, 2024.

[70] On March 7, 2024, the Donovan Group requested a two-week extension of the bid deadline on the basis that Tool Shed's due diligence information was inadequate. The Proposal Trustee consulted with Tool Shed and determined that, given Tool Shed's limited liquidity, a three-day extension, to March 14, 2024, would be granted.

[71] In its Second Report, the Proposal Trustee states that to avoid delays relating to requests for information, it asked the Donovan Group to submit all of its requests no later than March 11, 2024. The Proposal Trustee states that one request was received from the Donovan Group on March 11, 2024 and that it was responded to by Tool Shed on March 12 2024.

[72] The Donovan Group submitted its Preliminary Bid on March 14, 2024. The Donovan Group clearly identified its bid as conditional on "due diligence inquiries". The Donovan Group said that the due diligence inquiries "include items that the [Donovan Group] requested prior to the March 11, 2024 12:00 p.m. deadline set by the Proposal Trustee, and items arising from new information provided by [Tool Shed] in response to the [Donovan Group's] requests".

[73] The Proposal Trustee said in its Second Report that the Donovan Group's Preliminary Bid was rejected for the following reasons:

- (a) it was conditional, contrary to s 24(k) of the SISP Process;
- (b) it required 50% of Tool Shed's full-time employees to accept offers of employment with the Donovan Group, a condition which Tool Shed and the Proposal Trustee were unable to enforce;
- (c) there was a reduction in the amount payable to the CRA by approximately \$116,000, which meant that it could not be a Superior Offer as it did not assume all of the Assumed Liabilities, which included a payment to the CRA of approximately \$571,091.70; and
- (d) did not include payment of professional fees of \$80,000 owed to Miller Thompson LLP for pre-NOI Proceeding services, which meant that it could not be a Superior Offer as it did not assume all of the Assumed Liabilities.

[74] On March 14, 2024, the Donovan Group also requested a further extension to the deadline to March 22, 2024, so that it could submit an unconditional bid. This request was denied. As discussed above, at paragraph [64], the Donovan Group made a further request for due diligence information which, notwithstanding the deadline had passed for making such requests, was responded to on March 18, 2024.

[75] In the absence of any Qualified Bid, the Proposal Trustee declared the proponent of the Stalking Horse Bid to be the successful bidder and, on March 19, 2024, advised the Costello Company of that result.

[76] In the absence of any Qualified Bid, there was no need for the Proposal Trustee to consider whether there was a Superior Offer or to undertake an auction as set out in the SISP Process.

[77] However, as the counsel for the Proposal Trustee explained in a March 28, 2024 letter to counsel for the Donovan Group, the Proposal Trustee was prepared to consider another bid from the Donovan Group:

... on a further request from the [Donovan Group], the Proposal Trustee agreed to consider a further bid, noting it would be weighed as a late bid and in light of the Proposal Trustee's obligation to maintain a fair process.

[78] On March 22, 2024, the Donovan Group submitted an unconditional bid (the Revised Donovan Bid).

[79] Notwithstanding that it was submitted after the deadline, the Proposal Trustee reviewed the Revised Donovan Bid. However, the Revised Donovan Bid was rejected by the Proposal Trustee. Quoting directly from its Second Report, the Proposal Trustee states that the Revised Donovan Bid was rejected for the following reasons:

- a) prejudice to the Stalking Horse Bidder after having been informed its bid was declared the Successful Bid in the SISP;
- b) failure to comply with the SISP and the Extended Bid Deadline, in contravention of the integrity of the overall process;
- c) while the Revised Donovan Bid contemplated a purchase price in excess of the Stalking Horse Bid, it is the Proposal Trustee's view that it was not sufficiently greater to justify the contravention of the integrity of the overall process;
- d) the late filing of the Revised Donovan Bid would deprive the Stalking Horse Bidder of the opportunity to better its offer in the proposed auction;
- e) the Revised Donovan Bid reduced the amount payable to the CRA by approximately \$116,000, in contravention of the [SISP Order];
- f) the Revised Donovan Bid removed the payment of fees incurred prior to the NOI Proceedings [\$80,000 to Miller Thomson LLP] in section 5 of Schedule "E" – Assumed liabilities, in contravention of the [SISP Order]; and
- g) while as a secured creditor the Donovan Group would realize some benefit in regards to the credit bid portion of their secured debt amount, other stakeholders, namely the CRA, the Proposal Trustee, the Proposal Trustee's

counsel, and the Company's counsel, would see a reduction of amounts paid when compared to the Stalking Horse Agreement. As such, the Revised Donovan Group Bid is not considered a superior transaction for all involved stakeholders.

[80] The Proposal Trustee accepted the Revised Donovan Bid after the deadline and reviewed it. Having done so, it is not reasonable to then reject it for prejudice to the proponent of the Stalking Horse Bid, as set out in a), above. Having been accepted, it could not be rejected for failing to comply with the extended deadline as set out in b), above. If it had been rejected for failing to comply with the deadline, it did not need to be accepted or reviewed.

[81] Similarly, having implicitly extended the deadline a second time by accepting and reviewing the Revised Donovan Bid, it is not clear how the reason set out in d), above, has any merit. The SISP Process requires first a determination of whether a bid is a Qualified Bid, and second if it is a Superior Offer. If it is a Superior Offer, the auction process would follow and the proponent of the Stalking Horse Bid would participate.

[82] The evidence on the Approval Application is the Proposal Trustee implemented and followed the SISP Process. Subject to not accepting the Proposal Trustee's reasons for rejection described above, at a) and b), the Proposal Trustee extended the deadline twice for the Donovan Group which was more than fair in the circumstances.

[83] I find that there were sufficient efforts made to get the best price and the Proposal Trustee did not act improvidently.

## **2. Were the interests of all parties considered?**

[84] The interests to be considered related to the losing bidder, the Donovan Group, and the proponent of the Stalking Horse Bid, the Costello Company, together with the creditors: CRA and Miller Thomson LLP. Tool Shed's interests were already considered when the SISP Order deemed the Stalking Horse Bid to be accepted if there was no Superior Offer.

### **Was the Revised Donovan Bid a Qualified Bid?**

[85] The Proposed Trustee also rejected the Revised Donovan Bid for the reasons set out in e) and f), above at paragraph [78].

[86] The Donovan Group submits in its brief, footnotes omitted, that the Revised Donovan Bid complies with the requirement relating to the CRA Assumed Liabilities, set out at paragraph [31], above:

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 [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.

48. Penalties and interest owing on CRA source deductions are not captured by the deemed trust established by s. 227(4) *Income Tax Act*. The Proposal Trustee and Tool Shed reference s. 60(1.1) of the BIA, 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 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 [SISP Order] does not require that any bid assume liability for the CRA source deductions and related penalties and interest. Rather, the [SISP 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 [Revised Donovan Bid] provides for all source deductions owing to the CRA as required by the [SISP Order], not the penalties and interest owing on those amounts.

[87] The CRA was represented at the Approval Application and disagreed with the submissions of the Donovan Group and noted that it supported the approval of the Stalking Horse Bid.

[88] Regardless of whether the wording of the CRA Assumed Liability included "penalties and interest", it included the amount of the liability as being in the "approximate amount of \$571,091.70". The Revised Donovan Bid contains an amount for the CRA Assumed Liability that is materially different than is set out in the SISP Process and the failure to include it negatively impacts the creditor, CRA. The time to have challenged this requirement was at the hearing on February 12, 2024 when the SISP Order was granted; not on the Approval Application.

[89] In relation to the \$80,000 due to Miller Thomson LLP, the Donovan Group submits in its brief, footnotes omitted, that the Revised Donovan Bid complies with the requirement relating to the Miller Thomson Assumed Liabilities, set out at paragraph [31], above:

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 [SISP Order]. The [SISP Order] expressly provides that all fees due to Miller Thomson, both pre- and post-filing are captured by the Administration Charge. As such, the Final Bid is consistent with the [SISP Order], while the Stalking Horse Bid is not.

[90] Paragraph 4 of the SISP Order grants Miller Thomson LLP, as counsel to Tool Shed, security against the Administration Charge:

4. ... counsel to the Company, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Company's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof ("Property"), which charge shall not exceed an aggregate amount of \$250,000, as security for their professional fees and disbursements ... both before and after the making of this Order in respect of these proceedings. ...

[91] While the wording of paragraph 4 of the SISP Order is not as clear as it could be, the final part of the quoted paragraph states that the security is "in respect of these proceedings". These "proceedings" must be taken to mean the NOI Proceedings. As a result, fees of Miller

Thomson LLP incurred for “pre-filing work prior to the Proposal Proceedings” are not covered by the Administration Charge.

[92] I reject the Donovan Group’s submissions on the Miller Thomson LLP fees and find that the Revised Donovan Bid diverges materially from the required Assumed Liabilities by failing to include the \$80,000 for Miller Thomson’s pre-filing fees. This failure negatively impacts the creditor, Miller Thomson. This was a required term under the SISP Process. The time to have challenged this requirement was at the hearing on February 12, 2024 when the SISP Order was granted; not on the Approval Application.

[93] Lastly, the Proposal Trustee, for the reasons set out in c) and g), above at paragraph [78], declined to find that the Revised Donovan Bid was a Qualified Bid or a Superior Offer. These reasons of the Proposed Trustee should be accorded deference.

[94] I find that the Revised Donovan Bid was not a Qualified Bid. As a result, the Donovan Group has no interest to be considered.

### **Was the Revised Donovan Bid a Superior Offer?**

[95] The Revised Donovan Bid is not, and cannot be, a Superior Offer because it was not a Qualified Bid.

### **3. The efficacy and integrity of the SISP Process**

[96] The process itself was set out in the SISP Process and approved by the Court in the SISP Order. The Donovan Group’s concerns regarding the tension, and potential for conflict of interest, between the insider (Mr. Costello) and the Stalking Horse Bidder (the Costello Company) should have been raised when the SISP Process was before the Court on February 12, 2024. Having obtained Court approval for the SISP Process is now too late for the Donovan Group to complain that Mr. Costello should not have been able to take on dual roles, one as CEO and one as an investor in the Costello Company.

[97] There was no evidence of a lack of integrity in the implementation of the SISP Process. The Donovan Group submits it takes no issue with the Proposal Trustee and I have already found that there was no imbalance in the information available to the Donovan Group.

[98] The Donovan Group asserts that Mr. Costello and Mr. Sherman, the former CEO of Tool Shed, used the NOI Process to serve their own interests and not to the benefit of Tool Shed. To support this allegation, the Donovan Group points to certain public statements made by Mr. Costello and Mr. Sherman where they indicate that they will buy-out Tool Shed and take it out of insolvency. I find that the statements do not evidence improper motives and that the Donovan Group’s submissions are without merit.

[99] I find that the SISP Process was put in action when it was approved on February 12, 2024. There is no evidence to suggest that the Proposal Trustee took any improper steps in implementing the SISP Process. I find that the SISP Process has been implemented with efficacy and integrity.

### **4. Whether there has been unfairness in the working out of the process**

[100] When viewed in totality, there is no unfairness. The SISP Process was approved by the Court and then followed by the Proposal Trustee. The Donovan Group takes no issue with the actions of the Proposal Trustee.

[101] When the layers of the submissions are peeled back, the Donovan Group contends that the SISP Process was fundamentally unfair as it set up a potential conflict of interest between Mr. Costello, as CEO, and as an investor in the Stalking Horse Bid proponent, the Costello Company. However, it is too late to revisit the SISP Process as it was approved and not appealed. The other issues raised by the Donovan Group are not meritorious.

[102] I find that the Proposal Trustee met its obligation to implement the SISP Process and to act in a commercially reasonable manner in the circumstances, with a view to obtaining the best price having regard to the competing interests of the parties.

### **Conclusion**

[103] The objection to the SISP transaction cannot succeed. The Revised Donovan Bid is neither a Qualified Bid nor a Superior Bid. In accordance with the SISP Process, the Stalking Horse Bid is successful and the SISP transaction, substantially in the form of the Stalking Horse Agreement, is hereby approved.

### **Costs**

[104] If the parties cannot agree on costs, they may contact me by letter no later than May 2, 2024, to make arrangements for an appearance on May 9 or 10, 2024, at a time to be determined.

Heard on the 15<sup>th</sup> day of April, 2024 and the 16<sup>th</sup> day of April, 2024.

**Dated** at the City of Calgary, Alberta this 23<sup>rd</sup> day of April, 2024.

  
\_\_\_\_\_  
**E.J. Sidnell**  
**J.C.K.B.A.**



**Appearances:**

James W Reid and Bryan A Hosking  
for Tool Shed Brewing Company Inc

Alexis Teasdale  
for 2594617 Alberta Ltd

Catrina Webster  
for the KPMG Inc

Daniel Segal and Bertrand Malo  
for the Canada Revenue Agency

Jeffrey N Thom, KC  
for the 2582568 Alberta Inc