

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LEMARE HOLDINGS LTD., LEMARE LAKE LOGGING LTD., LONE TREE LOGGING LTD., C. & E. ROADBUILDERS LTD., COAST DRYLAND SERVICES LTD., DOMINION LOG SORT LTD. AND CENTRAL COAST INDUSTRIES LTD.

PETITIONERS

AMENDED APPLICATION RESPONSE

Application response of: Lemare Holdings Ltd., Lemare Lake Logging Ltd., Lone Tree Logging, Ltd., C. & E. Roadbuilders Ltd., Coast Dryland Services Ltd., Dominion Log Sort Ltd. and Central Coast Industries Ltd. (the "**application respondents**")

THIS IS A RESPONSE TO the notice of application of Her Majesty the Queen in right of the Province of British Columbia (the "**Crown**") filed August 23, 2012.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: NIL.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in paragraphs 1-3 of Part 1 of the notice of application.

Further, the Petitioners object to the admissibility of Affidavits # 1 and #2 of Jason Kruger, both sworn July 19, 2012, on the basis that their filing constitutes a breach of the order of Mr. Justice Ehrcke pronounced March 26, 2012.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: NIL.

Part 4: FACTUAL BASIS

Background

1. On May 23, 2012, the Crown issued to the Petitioners a proposal to assess (the “**Proposal**”) under Part 11.1 of the *Forest Act*, R.S.B.C. 1996, c. 57 (“**Forest Act**”), which included a 100 percent penalty, alleging wilful contravention of the *Forest Act*.
2. Pursuant to the *Forest Act*, an assessment will be issued after a review and audit is conducted by the Ministry of Finance, Income Taxation Branch, Forest Revenue Audit Program (“FRAP”).
3. It was the Proposal that precipitated these proceedings. On June 21, 2012, the Petitioners applied for and were granted an Initial Order pursuant to the provisions of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (“**CCAA**”), pronounced by the Honourable Mr. Justice Grauer, which granted relief, including, *inter alia*, a stay of proceedings (the “**Stay**”) until 11:59 p.m. on July 20, 2012.
4. On July 20, 2012, the Honourable Mr. Justice Grauer pronounced an order granting an extension of, *inter alia*, the Stay, to September 28, 2012.
5. In addition to their trade creditors, whose claims totalled approximately \$1.1 million as at June 21, 2012, the Petitioners are facing two extremely significant claims (the “**Claims**”), namely the Lemare Loan and the Proposed Assessment (as those terms are defined in Affidavit #1 of Eric Dutcyvich, sworn June 20, 2012).
6. As disclosed at the hearing of the application for the Initial Order, Lemare Lake Logging Ltd. (“**Lemare Lake**”) holds a mortgage (the “**Mortgage**”) as security for the Lemare Loan. However, the Mortgage cannot be called upon until there is a default in the Lemare Loan, after which Lemare Lake would have to follow the strict foreclosure process in Saskatchewan before seeing any recovery. Consequently, Lemare Lake is facing a payment obligation pursuant to the Lemare Loan before it could recover anything pursuant to the Mortgage and upon which recovery is unclear.
7. The Crown initially proposed to “hold in abeyance” the Proposed Assessment for 30 days from May 23rd, 2012. In other words, the Crown proposed to assess on June 23, 2012. The Petitioners filed for CCAA protection within the initial 30 day period of the Proposal so as to not be seen to be taking advantage of the extension when they were planning to seek creditor protection.
8. Neither Lemare Lake nor any of the other Petitioners have sufficient funds to pay the Lemare Loan.

9. Neither Lemare Lake nor any of the other Petitioners have sufficient funds to pay the Proposed Assessment.

The Forest Act Scheme

10. At the time an assessment is issued, it becomes akin to a judgment, and can be recovered in court as a debt due to the government.

Forest Act, s. 130(1)(c)

11. If an assessment is issued, the Crown has a lien on chattels owned by the person who owes the money.

Forest Act, s. 130(1)(d)

12. An appeal of an assessment does not delay collection of the assessment.

Forest Act, s. 142.92

CCAA Provisions

13. With respect to s. 19 of the CCAA, presumably the Crown's investigation was complete, as it not only proposed to impose a reassessment of stumpage, but also a 100% penalty for wilful misrepresentation.
14. In any event, the Petitioners submit that the purpose of s. 19 is to protect regulation of business (such as publicly listed companies and environmental protection) as opposed to the protection of the collection of allegedly unpaid stumpage.
15. In fact, the CCAA specifically provides that the Crown is subject to the CCAA.
16. As for the unsupported allegations of non-disclosure; there has been full disclosure by the Petitioners as required under the *Forest Act*, and by this Court.
17. While irrelevant for the purposes of this application, it is the position of the Petitioners that the full amount of the *Forest Act* assessment is capable of compromise. A fine imposed by the Forest Revenue Audit Branch is not a "fine, penalty...restitution order... imposed by a court, in respect of an offence" under s. 19(2)(a) of the CCAA.

The Petitioners' Financial Situation

18. There is nothing irregular with respect to the financial statements produced by the Petitioners in support of the application for the Initial Order, and the Petitioners complied with the statutory requirements of the CCAA in all respects.
19. At all times in this proceeding, the Monitor, who is the court's officer, has a continuing duty to ensure compliance.

20. The Claims are debts or obligations for the purposes of the CCAA and the Petitioners are insolvent.
21. The Petitioners are facing a looming liquidity crisis that will result in the Petitioners running out of funds to pay their debts as they generally become due in the future without the benefit of the Stay.
22. The granting of the Initial Order was an appropriate exercise of this Honourable Court's discretion.

Part 5: LEGAL BASIS

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and in particular ss. 2, 3, 11 and 19 thereof;
2. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2 ("**BIA**");
3. *Supreme Court Civil Rules*, and in particular Rules 8-1 and 13-1 thereof;
4. *Forest Act*, R.S.B.C. 1996, c. 157 and Parts 7, 11 and 11.1 thereof;
5. the Order of Mr. Justice Ehrcke, pronounced July 7, 2011 in S.C.B.C. Action No. S106702;
6. the Order of Mr. Justice Ehrcke, pronounced March 26, 2012 in S.C.B.C. Action No. S106702;
and
7. the inherent and equitable jurisdiction of this Honourable Court;

Orders without Notice

8. Section 11 of the CCAA expressly authorizes a court to make orders without notice. The applicant must demonstrate to the court the need for urgency and the reason why those against whom relief is sought *ex parte* are not being given notice.

Re Encore Developments, 2009 BCSC 13 at para. 27

9. The Proposal posed an immediate threat to the Petitioners' viability and necessitated the application for the Initial Order without notice to the Crown.

Disclosure Requirements

10. Where an application is made on an *ex parte* basis, full disclosure must be made to the court of all material facts.

Re 229531 B.C. Ltd. (1989), 72 C.B.R. (N.S.) 310 (B.C.S.C.) at para. 34

11. Although there must be full disclosure of all relevant facts, the material does not have to set out all the details of the company's financial position. The disclosure requirements at the first hearing are

not as cumbersome as the requirements in relation to the issue of whether or not any plan is doomed to failure.

Re Philip's Manufacturing Ltd. (1991), 9 C.B.R. (3d) 1 (B.C.S.C.) at para. 19

Re Hayes Forest Services Ltd., 2008 BCSC 1256 at paras. 9-11

Re Hester Creek Estate Winery Ltd. (2004), 50 C.B.R. (4th) 73 (B.C.S.C.) at paras. 9-14

The Petitioners are Insolvent

12. The CCAA should be given a broad and liberal interpretation that serves a broad constituency of interests so as to facilitate successful restructurings and achieve the remedial purpose of the CCAA. The interpretation of the CCAA necessitates the balancing of a plurality of stakeholder interests and the recognition that most parties will be best served by the survival of the applicant company.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at para. 65

Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384 (B.C.C.A.) at 6

Luscar Ltd. v. Smoky River Coal Limited, 1999 ABCA 179 at para. 35

Re Air Canada (2004), 47 C.B.R. (4th) 189 (O.N.S.C.) at para. 27

13. Even though the CCAA is designed to be remedial, it is not designed to be preventative and should not be “the last gasp of a dying company” but should rather be implemented “at a stage prior to the death throe.”

Re Inducon Development Corp. (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at para. 13

14. Any exceptions to a stay granted under the CCAA should be narrowly interpreted to accord with the purpose of the CCAA.

Re Northstar Aerospace Inc., 2012 ONSC 4423 at para. 51

15. The Petitioners are insolvent since they are facing a “looming liquidity crisis” that will result in the Petitioners running out of cash to pay their debts as they generally become due without the benefit of the Stay.

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.); leave to appeal to C.A. refused (2004), 2004 CarswellOnt 2936 (C.A.) (“**Stelco**”) at para. 40

Re Prizm Income Fund, 2011 ONSC 2061 at para. 21

16. A “claim” under the CCAA means indebtedness, liability or obligation that would be provable under the *BIA*.

CCAA, s. 2(1)

17. Contingent claims are “claims” for the purposes of the CCAA.

Stelco at paras. 52 and 56

Re SemCanada Crude Company (Celtic Exploration Ltd. #2), 2012 ABQB 489 at para. 33

Re Nortel Networks Corporation, 2010 ONSC 1304 at para. 40

18. The Claims are not “problematic and uncertain” and are not based on possibilities rather than probabilities. In particular, the Proposed Assessment is the result of a presumably comprehensive investigation by the Crown.

Les Oblats de Marie Immaculee du Manitoba (Re), 2004 MBQB 71 at para. 42

19. The Petitioners are “affiliated debtor companies” whose claims, including the Claims, total more than \$5 million and are thus eligible for CCAA protection, including the Stay.

CCAA is Appropriate Forum for Claim Determination

20. The CCAA provides a flexible, judicially supervised regime that allows for creative and effective decisions. The CCAA judge is given broad discretion due to the fact-based nature of the proceedings that require ongoing monitoring and quick decision making.

Re Indalex Limited, 2011 ONCA 265 at para. 155

21. The CCAA claims process is the appropriate forum for the determination of the Claims. Contingent claims are determined in the CCAA even in the most complicated of litigation.

Re Air Canada, 2004 CanLII 6674 (O.N.S.C.);

22. A CCAA court may invoke the doctrine of paramountcy to override provincial statutes where the application of provincial legislation would frustrate the company’s ability to restructure.

Pacific National Lease Holding Corporation, 15 C.B.R. (3d) 265 (B.C.C.A.) at para. 28

Re Timminco Limited, 2012 ONCA 552 at para. 4

Skeena Cellulose Inc. v. Clear Creek Contracting Ltd., 2003 BCCA 344 at para. 42

23. The Claims relate to debts or liabilities, present or future, to which the Petitioners were subject at the date of the initial application, therefore the Claims are eligible for compromise under the CCAA.

CCAA, s. 19

Appropriate Exercise of Judicial Discretion

24. The CCAA is intended to prevent manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage over the other creditors. As stated above, the role of the CCAA judge is to balance the interests of various the stakeholders.
25. The Crown has not shown any prejudice it would suffer in proceeding under the CCAA.
26. Taking into account its remedial and flexible nature and the fact that the CCAA provides a structured environment for the negotiation of the Claims to the benefit of all of the Lemare Group's stakeholders, the CCAA is the appropriate forum for the determination of the Claims and the Initial Stay was an appropriate exercise of judicial discretion.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Eric Dutcyvich, made June 20, 2012;
2. Affidavit #3 of Eric Dutcyvich, made July 17, 2012;
3. Initial Order made June 21, 2012;
4. Order made July 20, 2012;
5. The pleadings and other materials filed herein; and
6. Such further and other material as counsel may advise and this Honourable Court may allow.

The application respondents estimate that the application will take one day.

The application respondents have filed in this proceeding a document that contains the application respondents' address for service.

August 31, 2012

Dated



Signature of lawyer for application respondent
Davis LLP (Mary I.A. Buttery/H. Lance Williams)

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VANCOUVER REGISTRY

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PETITIONERS

AMENDED APPLICATION RESPONSE

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