No. S-124409
Vancouver Registry

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

APPLICATION RESPONSE

Application response of: The Toronto-Dominion Bank (the "**Bank**") and TD Equipment Finance Canada Inc. ("**TD Equipment Finance**") (collectively, the "**Application Respondents**")

THIS IS A RESPONSE TO the notice of application of Her Majesty the Queen in the right of the Province of British Columbia (the "**Province**") filed 23/Aug/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: None.

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.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents take no position on the granting of the orders set out in paragraphs [N/A] of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The Bank and TD Equipment Finance repeat and rely upon the facts as set out in the Petition and the Application Response filed by the Petitioners on August 31, 2012.

Part 5: LEGAL BASIS

The Petitioners are Insolvent under the CCAA

2. The Province has argued that the Petitioners are not *debtor companies* with the meaning of the CCAA. The Province advances this argument on the basis that the decision in *Stelco Inc.* was wrongly decided, but this argument cannot be sustained.

3. It is well settled that the decision in *Stelco Inc.* accurately states the law and the meaning of *insolvency* as it is used in the CCAA.

> Although it is common practice to refer to the definition of "insolvent person" in s. 2(1) of the BIA in referring to insolvency in the context of the CCAA, the test for insolvency under the CCAA differs from that under the BIA in order to meet the special circumstances and objectives of the CCAA. In *Re Stelco Inc.* (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused (2004), 2004 CarswellOnt 2936 (C.A.), Farley J. held that "insolvent" should be given an expanded meaning under the CCAA in order to give effect to the rehabilitative goal of the Act. The court concluded that it would defeat the purpose of the CCAA to limit or prevent an application until the financial difficulties of the applicant are so advanced that the applicant would not have sufficient financial resources to successfully complete its restructuring. Under this approach, a court should determine whether there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity condition or crisis that will result in the applicant running out of money to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection. How far forward the court should look will vary according to the complexity of and time required to complete a restructuring.
>
> L.W. Houlden, G.B. Morawetz and J.P. Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2011), online: Westlaw at N§12.

4. The test for *insolvency* as set out in *Re Stelco Inc.* is beyond doubt and has been repeatedly affirmed by courts across Canada and as recently as June 26, 2012 by Mr. Justice Morawetz in *Re Cinram International* [2012] O.J. No. 3034 at paragraph 52.

5. The evidence advanced at the hearing of the Initial Order supports the Petitioners' claim that they are insolvent and debtor companies as that term is used in the *CCAA*.

The Court's Discretion

6. The Province has argued that this Honourable Court should exercise its discretion and "carve out" any claims made under the *Forest Act* from this CCAA proceeding. This approach, however, disregards the clear intention of Parliament to have a "collective proceeding" when a company is insolvent rather than the "free for all" that would prevail if creditors were permitted to pursue their claims individually.

7. It has been recognized by the courts and Parliament that dealing with all claims against an insolvent company is preferable as it is controlled in a single forum, puts creditors on an equal footing, and facilitates negotiations between creditors.

Century Services Inc. v. Canada (Attorney General) [2010] S.C.J. 60 at para. 22.

8. Despite the Province's argument to the contrary, the Initial Order does not allow the Petitioners to ignore the enforcement scheme set out in Part 11.1 of the *Forest Act*, it simply allows these claims to be dealt with in an orderly way within the CCAA proceeding.

9. The Province has argued that their allegations against the Petitioners are akin to allegations of fraud and should not be dealt with in the CCAA forum. In support of its argument, the Province relies on three decisions relating to consumer bankruptcies which are clearly distinguishable from the present case, not least because these decisions relate to discharge applications within the consumer bankruptcy context.

Scope and Effect of the Stay

10. The Province has argued that the "legal requirements for a stay of proceedings against the Province have not been met in any event". In making this argument, the Province relies upon section 11.1 of the CCAA and states that "the inspection and audit steps taken by FRAP up to this point, and any further inspection or audit steps that may be taken ... are not the 'enforcement of a payment ordered' and should not be precluded by [the Initial Order] issued under section 11.02 of the *CCAA*".

11. In short, the Province appears to be arguing that (i) the stay imposed under the Initial Order exceeds that permitted under the CCAA; and (ii) that it should be permitted to continue with its assessment of (and any subsequent order for) the amounts that it claims are owing by the Petitioners. However, in making these arguments, the Province misstates and misinterprets the Initial Order, overstates subsection 11.1(2), and ignores subsection 11.1(3).

12. There is nothing in the Initial Order which affects the Province's rights or ability to undertake activities permitted within subsection 11.1(2) of the CCAA. Indeed, the Initial Order makes a provision which carves out regulatory matters from the stay:

> 15. Until and including July 20, 2012, or such later date as this Court may subsequently order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal, and for greater certainty including without limitation any action, suit or proceeding by the Province of British Columbia in relation to claims for unpaid stumpage...shall be commenced or continued except with the written consent of the Petitioners and the Monitor ... or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or Property are hereby stayed and suspended pending further Order of this Court.
>
> ...
>
> 17. Nothing in this Order, including paragraphs 15 and 16, shall ...(ii) affect such investigations, actions suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA ...(emphasis added).

13. However, and notwithstanding the above, what the Province is seeking to do is characterize the assessment and audit procedure as a regulatory matter rather than one which is purely financial in nature and exceeds that permitted by section 11.1(2).

14. Section 11.1(2) of the CCAA is designed to ensure that regulatory bodies are able to continue regulatory functions such as issuing orders relating health, safety, security and public order. This section of the CCAA cannot be used by the regulators as a mechanism for removing its monetary orders and claims from the CCAA process.

AbitibiBowater inc. [2010] Q.J. No. 4006 (S.C.) at paras. 151-159, and 277-278.

Re Nortel Netwoks [2012] O.J. No. 1115 (S.C.J.) at paras 105-106 and 121-124.

15. This issue has already been considered in the context of environmental regulators, and the Courts have determined that a regulatory authority will not be permitted to proceeding with a financial claim under the guise that such claim is a regulatory order. The Courts will consider the effect of the step taken by the regulator, and if the effect of such step is creation of a monetary claim against the petitioners, such step will be caught by the stay and the regulator will be treated as a creditor rather than a regulator.

Re Nortel Netwoks [2012] O.J. No. 1115 (S.C.J.)

AbitibiBowater inc. [2010] Q.J. No. 4006 (S.C.)

16. In *AbitibiBowater inc.*, the court made the following comments about an environmental regulator seeking to characterize its orders as regulatory rather than financial in an

attempt to remove such claims from the claims process order issued in that CCAA proceeding:

> 171. The broad *CCAA* and *BIA* provisions referred to above contain no comfort for a regulatory authority seeking to limit the Claims Procedure Order from impacting their plainly financially material actions with artificial distinctions about "regulatory" orders and "financial" ones...
>
> ...
>
> 174. With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.
>
> 175. This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good...
>
> 176. ... it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.

AbitibiBowater inc. [2010] Q.J. No. 4006 (S.C.) at paras. 171-174.

17. Finally, even if the procedure taken by the Province is regulatory in nature, section 11.1(3) provides that the Court may order that subsection 11.1(2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body.

Part 6: MATERIAL TO BE RELIED ON

18. Affidavit #1 of Eric Dutcyvich sworn on June 20, 2012;

19. Initial Order pronounced on June 21, 2012;

20. The pleadings and other materials filed herein; and

21. Such further an additional material as counsel may advise and this Court may allow.

The Application Respondents estimate that the application will take 1 day.

☐ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

☒ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR

SERVICE is:

Farris, Vaughan, Wills & Murphy LLP
Barristers & Solicitors
2500 - 700 West Georgia Street
Vancouver, British Columbia V7Y 1B3
Fax: 604-661-9349

Dated: 04/Sep/2012

Signature

☐ Application respondent

☒ Lawyer for Application Respondents

Rebecca M. Morse

THIS APPLICATION RESPONSE is prepared and delivered by the firm Farris, Vaughan, Wills & Murphy LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. Facsimile: (604) 661-9349. **Attention: Rebecca M. Morse**.