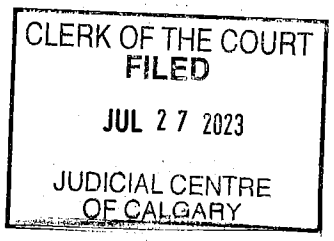
Clerk's stamp:



COURT FILE NUMBER:	2301-07385
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended AND IN THE MATTER OF CYXTERA TECHNOLOGIES, INC., CYXTERA CANADA, LLC, CYXTERA COMMUNICATIONS CANADA, ULC and CYXTERA CANADA TRS, ULC
APPLICANT	CYXTERA TECHNOLOGIES, INC.
DOCUMENT	**BOOK OF AUTHORITIES OF THE FOREIGN REPRESENTATIVE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 421 7 Ave SW Suite 1600 Calgary, AB T2P 4K9 **Attn: Tom Cumming/Sam Gabor/and Stephen Kroeger** Ph. 1 403 298 1946 File No.: A171290

APPLICATION BEFORE THE HONOURABLE JUSTICE D. B. NIXON
JULY 31st, 2023 AT 9:00 a.m. ON THE COMMERCIAL LIST

TABLE OF AUTHORITIES

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.2

s 11.2

Currency

11.2

11.2(1)Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2)Priority — secured creditors

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.2(3)Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4)Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.2(5)Additional factor — initial application

When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138

Currency
Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Purpose [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 44

s 44. Purpose

Currency

44.Purpose
The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

Amendment History
2005, c. 47, s. 131

Currency
Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Interpretation [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 45

s 45.

Currency

45.

45(1)Definitions

The following definitions apply in this Part.

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding. *("tribunal étranger")*

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. *("principale")*

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding. *("secondaire")*

"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. *("instance étrangère")*

"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding.

("représentant étranger")

45(2)Centre of debtor company's main interests

For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

R.S.C. 1985, c. C-36, s. 46

s 46.

Currency

46.

46(1)Application for recognition of a foreign proceeding

A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

46(2)Documents that must accompany application

Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

46(3)Documents may be considered as proof

The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

46(4)Other evidence

In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

46(5)Translation

The court may require a translation of any document accompanying the application.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 47

s 47.

Currency

47.

47(1)Order recognizing foreign proceeding

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

47(2)Nature of foreign proceeding to be specified

The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Amendment History

2005, c. 47, s. 131

Currency

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Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 48

s 48.

Currency

48.

48(1)Order relating to recognition of a foreign main proceeding

Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

48(2)Scope of order

The order made under subsection (1) must be consistent with any order that may be made under this Act.

48(3)When subsection (1) does not apply

Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

48(4)Application of this and other Acts

Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

R.S.C. 1985, c. C-36, s. 49

s 49.

Currency

49.

49(1)Other orders

If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

49(2)Restriction

If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

49(3)Application of this and other Acts

The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023
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End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 50

s 50. Terms and conditions of orders

Currency

50.Terms and conditions of orders

An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

Amendment History

2005, c. 47, s. 131

Currency

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End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 51

s 51. Commencement or continuation of proceedings

Currency

51.Commencement or continuation of proceedings

If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Obligations [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 52

s 52.

Currency

52.

52(1)Cooperation — court

If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

52(2)Cooperation — other authorities in Canada

If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

52(3)Forms of cooperation

For the purpose of this section, cooperation may be provided by any appropriate means, including

(a) the appointment of a person to act at the direction of the court;

(b) the communication of information by any means considered appropriate by the court;

(c) the coordination of the administration and supervision of the debtor company's assets and affairs;

(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(e) the coordination of concurrent proceedings regarding the same debtor company.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 80

Currency

Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Obligations [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 53

s 53. Obligations of foreign representative

Currency

53.Obligations of foreign representative
If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Amendment History
2005, c. 47, s. 131

Currency
Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Multiple Proceedings [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 54

s 54. Concurrent proceedings

Currency

54.Concurrent proceedings

If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Multiple Proceedings [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 55

s 55.

Currency

55.

55(1)Multiple foreign proceedings

If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

55(2)Multiple foreign proceedings

If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

Amendment History

2005, c. 47, s. 131

Currency

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Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 56

s 56. Authorization to act as representative of proceeding under this Act

Currency

56.Authorization to act as representative of proceeding under this Act
The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Amendment History
2005, c. 47, s. 131

Currency
Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

R.S.C. 1985, c. C-36, s. 57

s 57. Foreign representative status

Currency

57.Foreign representative status

An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

Amendment History

2005, c. 47, s. 131

Currency

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Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 58

s 58. Foreign proceeding appeal

Currency

58.Foreign proceeding appeal

A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

Amendment History

2005, c. 47, s. 131

Currency

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Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 59

s 59. Presumption of insolvency

Currency

59.Presumption of insolvency

For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

Amendment History

2005, c. 47, s. 131

Currency

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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 60

s 60.

Currency

60.

60(1)Credit for recovery in other jurisdictions

In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and

(b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

60(2)Restriction

Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

Amendment History

2005, c. 47, s. 131

Currency

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Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 61

s 61.

Currency

61.

61(1)Court not prevented from applying certain rules

Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

61(2)Public policy exception

Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 81

Currency

Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

TAB 2

2000 CarswellOnt 704
Ontario Superior Court of Justice [Commercial List]

Babcock & Wilcox Canada Ltd., Re

2000 CarswellOnt 704, [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75, 95 A.C.W.S. (3d) 608

In the Matter of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Babcock & Wilcox Canada Ltd.

Farley J.

Heard: February 25, 2000
Judgment: February 25, 2000
Docket: 00-CL-3667

Counsel: *Derrick Tay*, for Babcock & Wilcox Canada Ltd.
Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.iv Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Solvent corporation applied for interim order under s. 18.6 of Companies' Creditors Arrangement Act for stay of actions and enforcements against corporation in respect of asbestos tort claims — Application granted — Application was to be reviewed in light of doctrine of comity, inherent jurisdiction, and aspect of liberal interpretation of Act generally — Proceedings commenced by corporation's parent corporation in United States and other United States related corporations for protection under c. 11 of United States Bankruptcy Code in connection with mass asbestos tort claims constituted foreign proceeding for purposes of s. 18.6 of Act — Insolvency of debtor in foreign proceeding was not condition precedent for proceeding to be foreign proceeding under definition of s. 18.6 of Act — Corporation was entitled to avail itself of provisions of s. 18.6 of Act — Relief requested was not of nature contrary to provisions of Act — Recourse may be had to s. 18.6 of Act in case of solvent debtor — Chapter 11 proceedings in United States were intended to resolve mass asbestos-related tort claims that seriously threatened long-term viability of corporation's parent — Corporation was significant participant in overall international operation and interdependence existed between corporation and its parent as to facilities and services — Bankruptcy Code, 11 U.S.C. 1982, c. 11 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6.

Table of Authorities

Cases considered by *Farley J.*:

Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Ont. Gen. Div.) — applied

ATL Industries Inc. v. Han Eol Ind. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]) — applied

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

BW Canada would fit within "any interested person" to bring the subject application to apply the principles of comity and cooperation. It would not appear to me that the relief requested is of a nature contrary to the provisions of the CCAA.

17 Additionally there is s. 18.6(3) whereby once it has been established that there is a foreign proceeding within the meaning of s. 18.6(1) (as I have concluded there is), then this court is given broad powers and wide latitude, all of which is consistent with the general judicial analysis of the CCAA overall, to make any order it thinks appropriate in the circumstances.

> s. 18.6(3) An order of the court under this Section may be made on such terms and conditions as the court considers appropriate in the circumstances.

This subsection reinforces the view expressed previously that the 1997 Amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.

18 Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution. See *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

19 The Chapter 11 proceedings are intended to resolve the mass asbestos related tort claims which seriously threaten the long term viability of BWUS and its subsidiaries including BW Canada. BW Canada is a significant participant in the overall Babcock & Wilcox international organization. From the record before me it appears reasonably clear that there is an interdependence between BWUS and BW Canada as to facilities and services. In addition there is the fundamental element of financial and business stability. This interdependence has been increased by the financial assistance given by the BW Canada guarantee of BWUS' obligations.

20 To date the overwhelming thrust of the asbestos related litigation has been focussed in the U.S. In contradistinction BW Canada has not in essence been involved in asbestos litigation to date. The 1994 amendments to the U.S. Bankruptcy Code have provided a specific regime which is designed to deal with the mass tort claims (which number in the hundreds of thousands of claims in the U.S.) which appear to be endemic in the U.S. litigation arena involving asbestos related claims as well as other types of mass torts. This Court's assistance however is being sought to stay asbestos related claims against BW Canada with a view to this stay facilitating an environment in which a global solution may be worked out within the context of the Chapter 11 proceedings trust.

21 In my view, s. 18.6(3) and (4) permit BW Canada to apply to this Court for such a stay and other appropriate relief. Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:

> (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
>
> (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

(c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

(e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed

TAB 3

2014 ONSC 5811
Ontario Superior Court of Justice [Commercial List]

MtGox Co., Re

2014 CarswellOnt 13871, 2014 ONSC 5811, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307, 245 A.C.W.S. (3d) 280

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1992, C. 27, S.2, as Amended

In the Matter of Mtgox Co., Ltd., the Bankrupt in a Proceeding under Japan's Bankruptcy Act before the Tokyo District Court Twentieth Civil Division

Application of Nobuaki Kobayashi, in his capacity as the bankrupcty Trustee of MtGox Co., Ltd. Pursuant to Japan's Bankruptcy Act Under Part XIII of The Bankruptcy and Insolvency Act (Cross-Border Insolvencies)

Newbould J.

Heard: October 3, 2014
Judgment: October 6, 2014
Docket: CV-14-10709-00CL

Counsel: Margaret R. Sims for Applicant

Subject: Insolvency; International

Related Abridgment Classifications

Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.a Jurisdiction of Bankruptcy Court
I.2.a.iv Territorial jurisdiction
I.2.a.iv.A Foreign bankruptcies

Headnote

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies

M Co. was Japanese corporation that operated online exchange for purchase and sale of bitcoins, a form of digital currency — M Co. was located and headquartered in Tokyo, Japan — In February 2014, M Co. halted all bitcoin withdrawals by its customers after it was subject to a massive theft — These events caused M Co. to become insolvent, and eventually led to bankruptcy proceeding in Japan — M Co. was subsequently named as defendant in pending class action filed in Ontario Superior Court of Justice (Ontario Court) — Trustee of M Co. applied to Ontario Court for initial recognition order recognizing bankruptcy proceeding commenced in Japan, declaring trustee as foreign representative, and staying all proceedings against M Co. — Application granted — Japan bankruptcy proceeding was judicial proceeding dealing with creditors' collective interests generally under Japan Bankruptcy Act (JPA), in which M Co.'s property was subject to supervision by Tokyo District Court — Trustee had authority pursuant to JPA and order of Tokyo District Court to administer M Co.'s property and affairs and to act as foreign representative — Accordingly, Japan bankruptcy proceeding constituted "foreign proceeding" and trustee constituted "foreign representative" under s. 268(1) of Bankruptcy and Insolvency Act (BIA) — M Co.'s centre of its main interests was its registered head office in Japan — Accordingly, Japan bankruptcy proceeding was foreign main proceeding, entitling M Co. to automatic stay under s. 271(1) of BIA.

Table of Authorities

Cases considered by *Newbould J.*:

1 Nobuaki Kobayashi, in his capacity as the bankruptcy trustee of MtGox Co., Ltd. applied on October 3, 2014 for an initial recognition order pursuant to Part XIII (section 267 to 284) of the Bankruptcy and Insolvency Act, R.S.C. 1992, c. 27, s.2, as amended ("BIA"):

> (a) declaring and recognizing the bankruptcy proceedings commenced in respect of MtGox pursuant to the Bankruptcy Act of Japan, Act No. 75 of June 2, 2004 before the Tokyo District Court, Twentieth Civil Division as a foreign main proceeding for the purposes of section 270 of the BIA;
>
> (b) declaring that the Trustee is a foreign representative pursuant to section 268(1) of the BIA, and is entitled to bring this application pursuant to section 269 of the BIA; and
>
> (c) staying and enjoining any claims, rights, liens or proceedings against or in respect of MtGox and the property of MtGox.

2 I concluded at the hearing that the relief sought should be granted, for reasons to follow. These are my reasons.

3 MtGox is a Japanese corporation formed in 2011. It is, and always has been, located and headquartered in Tokyo, Japan. From April 2012 to February 2014, its business was the operation of an online exchange for the purchase and sale of bitcoins through its website located at http://www.mtgox.com. Bitcoins are a form of digital currency. At one time, the MtGox Exchange was reported to be the largest online bitcoin exchange in the world.

4 On or about February 10, 2014, MtGox halted all bitcoin withdrawals by its customers after it was subject to what appears to have been a massive theft or disappearance of bitcoins held by it. MtGox suspended all trading on or about February 24, 2014 after it was discovered that approximately 850,000 bitcoins were missing. These events caused, among other things, MtGox to become insolvent and ultimately led to the Japan bankruptcy proceeding.

5 On February 28, 2014, MtGox filed a petition for the commencement of a civil rehabilitation proceeding in the Tokyo Court pursuant to Article 21(1) of the Japan Civil Rehabilitation Act (JCRA), reporting that it had lost almost 850,000 bitcoins. A civil rehabilitation proceeding under the JCRA is analogous to a restructuring proceeding in Canada pursuant to the BIA or the CCAA.

6 Following the filing of the Japan civil rehabilitation petition, MtGox commenced an investigation with regard to the circumstances that led to the Japan civil rehabilitation. However, by mid-April, 2014, the Tokyo Court decided to dismiss the Japan civil rehabilitation petition pursuant to Article 25(3) of the JCRA, recognizing that under the circumstances it would be very difficult for MtGox to successfully prepare and obtain approval of a rehabilitation plan or otherwise successfully carry out the Japan civil rehabilitation.

7 On April 24, 2014, the Tokyo Court entered the Japan bankruptcy order, formally commencing MtGox's Japan bankruptcy proceeding and appointing the applicant as bankruptcy trustee.

8 MtGox has approximately 120,000 customers who had a bitcoin or fiat currency balance in their accounts as of the date of the Japan petition. The customers live in approximately 175 countries around the world.

9 MtGox has been named as a defendant in a pending class action filed in the Ontario Superior Court of Justice. The notice of action and statement of claim were provided to the Trustee under the Hague Convention on August 29, 2014.

Applicable law

10 Various theories as to how multi-national bankruptcies should be dealt with have long existed. Historically many countries adopted a territorialism approach under which insolvency proceedings had an exclusively national or territorial focus that allowed each country to distribute the assets located in that country to local creditors in accordance with its local laws. Universalism is a theory that posits that the bankruptcy law to be applied should be that of the debtor's home jurisdiction, that all

of the assets of the insolvent corporation, in whichever country they are situated, should be pooled together and administered by the court of the home country. Local courts in other countries would be expected, under universalism, to recognize and enforce the judgment of the home country's court. This theory of universalism has not taken hold.

11 There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and cooperation. It has been advanced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency, which Canada largely adopted by 2009 amendments to the CCAA and the BIA.[1] Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

12 In the BIA, the Model Law was introduced by the enactment of Part XIII. Section 267 sets out the policy objectives of Part XIII as follows:

> The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;
>
> (d) the protection and the maximization of the value of debtors' property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

(a) Recognition of foreign proceeding

13 Section 269(1) of the BIA provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to section 270(1) of the BIA, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding and (ii) the applicant is a foreign representative of that proceeding.

14 A foreign proceeding is broadly defined in section 268(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

15 The Japan bankruptcy proceeding is a judicial proceeding dealing with creditors' collective interests generally under the Japan Bankruptcy Act, which is a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo District Court, Twentieth Civil Division. As such, the Japan bankruptcy proceeding is a foreign proceeding pursuant to section 268(1) of the BIA.

16 Section 268(1) of the BIA defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

17 The Trustee has authority, pursuant to the Japan Bankruptcy Act and the bankruptcy order made by the Tokyo District Court in the Japan bankruptcy proceeding, to administer MtGox's property and affairs for the purpose of liquidation and to act as a foreign representative. Thus the Trustee is a foreign representative pursuant to section 268(1) of the BIA.

TAB 4

2019 ONSC 3238
Ontario Superior Court of Justice [Commercial List]

Hollander Sleep Products, LLC et al., Re

2019 CarswellOnt 8720, 2019 ONSC 3238, 307 A.C.W.S. (3d) 462, 72 C.B.R. (6th) 140

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

AND IN THE MATTER OF HOLLANDER SLEEP PRODUCTS, LLC, HOLLANDER SLEEP PRODUCTS CANADA LIMITED, DREAM II HOLDINGS, LLC, HOLLANDER HOME FASHIONS HOLDINGS, LLC, PACIFIC COAST FEATHER, LLC, HOLLANDER SLEEP PRODUCTS KENTUCKY, LLC, AND PACIFIC COAST FEATHER CUSHION, LLC

APPLICATION OF HOLLANDER SLEEP PRODUCTS, LLC UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Hainey J.

Heard: May 23, 2019
Judgment: May 30, 2019
Docket: CV-19-620484-00CL

Counsel: Shawn Irving, Marc Wasserman, for Applicant
Virginie Gauthier, for KSV Kofman Inc.
L. Joseph Latham, for Wells Fargo
Milly Chow, Kelly Bourassa, for Barings Finance LLC

Subject: Civil Practice and Procedure; Insolvency; International
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.viii Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
Company manufactured bedding products — Company had US and Canadian offices, with registered head office in Vancouver — Canadian branch was not profitable — Company sought restructuring as due to outstanding indebtedness and limited access to credit, it was facing severe liquidity constraints — Company brought application for several orders pursuant to Companies' Creditors Arrangement Act including Ch. 11 cases — Ruling was made — Chapter 11 cases, pursuant to US Bankruptcy Code was foreign proceedings for Canadian purposes — Company was appointed foreign representative by US courts in Ch. 11 cases — Company's centre of main interests (COMI) was in United States, which meant that COMI of all Ch. 11 debtors was in United States — Therefore Ch. 11 cases were recognized as foreign main proceedings — Stay of proceedings was necessary in order to implement proposed restructuring — First day order were recognized as Canadian and US operations of company were highly integrated — DIP order was approved.
Table of Authorities
Cases considered by *Hainey J.*:

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 115, 2011 CarswellBC 124, 76 C.B.R. (5th) 317 (B.C. S.C. [In Chambers]) — followed

Hartford Computer Hardware Inc., Re (2012), 2012 ONSC 964, 2012 CarswellOnt 2143, 94 C.B.R. (5th) 20 (Ont. S.C.J. [Commercial List]) — considered

Massachusetts Elephant & Castle Group Inc., Re (2011), 2011 ONSC 4201, 2011 CarswellOnt 6610, 81 C.B.R. (5th) 102 (Ont. S.C.J.) — considered

Payless Holdings Inc. LLC, Re (2017), 2017 ONSC 2321, 2017 CarswellOnt 5925, 47 C.B.R. (6th) 117 (Ont. S.C.J.) — distinguished

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 45(1) "foreign proceeding" — considered

s. 45(2) — considered

ss. 46-49 — referred to

s. 46(1) — considered

s. 47 — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48 — considered

s. 48(1) — considered

s. 49 — considered

s. 52(1) — considered

RULING with respect to procedure under creditors' restructuring legislation including proceedings commenced under US bankruptcy laws.

***Hainey J.*:**

BACKGROUND

1 On May 23, 2019 I granted the application brought by Hollander Sleep Products, LLC ("Hollander Sleep Products"), for orders pursuant to Section 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"). I made the following orders:

a) Recognition of the Chapter 11 Cases as foreign main proceedings pursuant to *Part IV of the CCAA;*

b) Recognition of certain First Day Orders;

e) Hollander Canada is reliant on the purchasing power and supplier relationships of the Hollander enterprise, and on its own could not replicate the supply arrangements necessary for its continued functioning;

f) Hollander Canada's books and records are maintained at Hollander's head office in Boca Raton, Florida;

g) All of Hollander Canada's directors reside in the United States;

h) Canadian revenues make up only 10.7% of Hollander's revenues;

i) Hollander Canada is entirely dependent on the U.S. Chapter 11 Debtors for the majority of licensing agreements, design partnerships, and company-owned brands;

j) Substantially all of the trademarks and intellectual property relied on by Hollander Canada are owned by the U.S. Chapter 11 Debtors;

k) The Chapter 11 Debtors, including Hollander Canada, operate an integrated, centralized cash management system; and

l) Hollander Canada is dependent on the U.S. Chapter 11 Debtors for the establishment, maintenance, and administration of certain customer promotional programs involving Hollander Canada's key customers.

36 Since all the Chapter 11 Debtors except Hollander Canada have registered offices in the United States, and since a review of Hollander Canada's business indicates that its COMI is in the United States, The COMI of all the Chapter 11 Debtors is in the United States and therefore the Chapter 11 Cases should be recognized as "foreign main proceedings".

SHOULD THE INITIAL RECOGNITION ORDER AND SUPPLEMENTAL ORDER BE GRANTED?

Is a Stay of Proceedings Required and Appropriate?

37 Section 48(1) of the CCAA provides that once the Court has found that a foreign proceeding is a "foreign main proceeding", it is required to grant certain mandatory relief, including a stay of proceedings:

38 In addition to the automatic relief provided for in s. 48, s.49 of the CCAA grants me the broad discretion to make any appropriate order if I am satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors.

39 Section 52(1) of the CCAA requires that if an order recognizing a foreign proceeding is made, the Court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."

40 Because of the circumstances facing Hollander, Hollander Canada and the other Chapter 11 Debtors, I am satisfied that a stay of proceedings is necessary in order to implement the proposed restructuring.

Should the First Day Orders be Recognized?

41 The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

42 Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their location.

43 I am satisfied that the First Day Orders should be recognized for the following reasons:

TAB 5

2019 ONSC 7042
Ontario Superior Court of Justice [Commercial List]

Purdue Pharma L.P., Re.

2019 CarswellOnt 21242, 2019 ONSC 7042, 313 A.C.W.S. (3d) 467, 76 C.B.R. (6th) 308

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

AND IN THE MATTER OF A PLAN OF AND IN THE MATTER OF PURDUE PHARMA L.P., PURDUE PHARMA INC., RHODES ASSOCIATES L.P., PAUL LAND INC., RHODES TECHNOLOGIES, RHODES PHARMACEUTICALS L.P., UDF LP, SVC PHARMA INC., BUTTON LAND L.P., SVC PHARMA LP, QUIDNICK LAND L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMACEUTICALS L.P., PURDUE PHARMA MANUFACTURING L.P., ALDON THERAPEUTICS L.P., IMBRIUM THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., NAYATT COVE LIFESCIENCE INC., PURDUE NEUROSCIENCE COMPANY, PURDUE PHARMACEUTICALS PRODUCTS L.P.

Hainey J.

Heard: November 28, 2019
Judgment: December 30, 2019
Docket: CV-19-00627656-00CL

Counsel: David Byers, Ashley Taylor, Lee Nicholson, for Foreign Representative
Grant Moffat, Reidar Mogerman, for Province of British Columbia
Alex MacFarlane, Cindy Clark, for Purdue Pharma Inc., as the General Partner of Purdue Pharma Limited Partnership (Ontario) and Purdue Pharma Limited Partnership (Ontario)
David Bish, for Ernst & Young, Information Officer
Raymond Slattery, for Directors and Officers
Natalie Renner, for McKesson Canada Corporation and McKesson Corporation
Mark Meland, Avram Fishman, Tina Silverstein, for Quebec Class Action Plaintiff, Riccardo Camarda
Jonathan Lisus, Nadia Campion, for Sackler Family

Subject: Civil Practice and Procedure; Insolvency; International
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
P Inc., in its capacity as foreign representative of itself, and 23 other debtors in possession, moved for order recognizing and enforcing U.S. Preliminary Injunction Order in Canada, and granting stay of proceedings in favour of certain related parties in Canada — Motion granted — At this early stage in proceedings, court should not allow single stakeholder to frustrate collective process that may benefit much larger group of stakeholders — Excluding Quebec Plaintiff from Related Party Stay Order would do just that.
Table of Authorities
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Representative argues that I should respect that intent. Further, none of the other parties in Canada oppose this motion except the Quebec Plaintiff. The Foreign Representative further submits that I should not allow the Quebec Opioid Class Action to proceed because this would result in a single stakeholder frustrating a collective process that may benefit a much larger number of stakeholders.

18 The Quebec Plaintiff submits that I should not stay the Quebec Opioid Class Action because it is the only one of the Pending Actions in Canada that does not assert a claim against any of the Chapter 11 Debtors or the Chapter 11 Debtors' Related Parties. It is, therefore, the "only action which is totally outside of the parameters of any order made by the U.S. Bankruptcy Court" and should be excluded on the basis that it is unique in comparison to the other Pending Actions in Canada. According to the Quebec Plaintiff, to grant a stay of proceedings of the Quebec Opioid Class Action in these recognition proceedings under the *CCAA* would be "a bridge too far" because the Quebec proceeding is unrelated to the Chapter 11 Proceedings. The Quebec Plaintiff submits that the Quebec Opioid Class Action should be permitted to proceed to a certification hearing in the Quebec Superior Court without any interference by the unrelated Chapter 11 Proceedings.

Analysis

19 The motion seeking the Related Party Stay Order is unopposed by all parties in Canada except the Quebec Plaintiff. I am satisfied that I should grant the order with respect to the other actions in Canada to support the Bankruptcy Court's primary goal of achieving a global resolution of all of the opioid-related claims. The only issue that I must decide is whether I should exclude the Quebec Plaintiff from the order.

20 Despite counsel for the Quebec Plaintiff's able argument, I have concluded that I should grant the Related Party Stay Order sought by the Foreign Representative and not exclude the Quebec Opioid Class Action from that order for the following reasons.

21 The principles of comity, cooperation and accommodation with foreign courts guide *CCAA* courts in cross-border insolvency cases. Section 52(1) of the *CCAA* provides as follows:

> 52(1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

22 Section 49(1) of the *CCAA* clearly provides me with jurisdiction to make the Related Party Stay Order if I am satisfied that it is necessary for the "protection of the debtor company's property or the interests of a creditor or creditors". I am satisfied that the order is necessary for this reason.

23 It is clear to me that the Bankruptcy Court intended to pause all of the opioid-related litigation against Purdue, the Chapter 11 Debtors and the Related Parties so that they could pursue a global resolution of all claims in the interests of all stakeholders. Following a full day hearing the Bankruptcy Court concluded that the Chapter 11 Debtors had satisfied the "extraordinary burden" for a stay of proceedings against the Related Parties in the United States. In granting the stay of proceedings the Bankruptcy Court stated as follows:

> But again, this is a limited preliminary injunction. I believe that while I certainly respect the objecting states' interest in laying out the facts and in ultimate determination and in information sharing, I believe that interest here is outweighed on a preliminary basis by the benefits to all the parties to this case who are creditors in pursuing an overall reorganization that I would hope would include reasonable and lasting and binding, as I believe only a bankruptcy plan can bind the parties to, means to use the resources of these Debtors for the maximum benefit to the states, communities and individuals who the Debtors acknowledge have suffered from the opioid crisis.

24 The Related Party Stay Order sought by the Foreign Representative is intended to accomplish the same purpose as the Preliminary Injunction granted by the Bankruptcy Court in the U.S. The stay of proceedings against the Related Parties in Canada will temporarily pause the existing litigation here to allow stakeholders to focus on a global resolution. If I do not grant the stay of proceedings in Canada, Canadian creditors will have an advantage over U.S. creditors by continuing to pursue their actions against Related Parties here while U.S. claimants are at a standstill. This will result in an uneven playing field among

TAB 6

2020 BCSC 1845
British Columbia Supreme Court

Quest University Canada (Re)

2020 CarswellBC 3030, 2020 BCSC 1845, 325 A.C.W.S. (3d) 466, 84 C.B.R. (6th) 226

In the Matter of the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

And In the Matter of the SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54

And In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA (Petitioner)

Fitzpatrick J.

Heard: November 3, 2020
Judgment: November 26, 2020
Docket: Vancouver S200586

Counsel: J.R. Sandrelli, T. Jeffries, for Petitioner
V.L. Tickle, for Monitor PricewaterhouseCoopers Inc.
P. Rubin, G. Umbach, for Primacorp Ventures Inc.
K. Jackson, for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.
P. Reardon, K. Strong, for Southern Star Developments Ltd.
C.D. Brousson, for Vanchorverve Foundation
D. Lawrenson, for Halladay Education Group
K. Mak, for Capilano University
G. Barr, R. McKenna, for Confidential Party (Development Partner #1)
J. Sanders, for Quest University Faculty Union
S.A. Poisson, for Bank of Montreal
A. Welch, for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training
K.E. Siddall, for 1114586 B.C. Ltd.
L. Hiebert, for Association for the Advancement of Scholarship

Subject: Insolvency; Public
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor was not-for profit post-secondary educational institution with complex asset holdings, which relied on donations and was not self-sustaining financially — Initial order granted under Companies' Creditors Arrangement Act (Can.) — Debtor brought petition for claims process order, to identify and determine claims against it, order for meeting of creditors to present plan of arrangement, transaction approval and vesting order to approve proposed purchase and sale transaction — Petition granted with respect to claims process and creditor meeting, and regarding breakup fee — Transaction at issue provided for

sufficient funds to pay all debtor's secured creditors' claims, including claims secured by charges under Act, funding for plan of arrangement, funds for insolvency proceedings, and working capital facility, as well as marketing and recruiting support to permit debtor to become self-sustaining as post-secondary institution — Timeline set for claims process was ambitious however, negative claims process in relation to many of unsecured creditors ameliorated any concerns — Secured creditors were aware of proceedings since outset — Requirement that secured creditors file proof of claims would flush out any issues well ahead of intended closing of transaction, if approved — Approval of claims process was important step forward allowing debtor to identify and quantify claims — Creditor meeting approved — Plan was not doomed to fail — Plan properly classified affected creditors in one class for voting purposes — Transaction was not true stalking horse bid in sense that debtor sought approval of transaction with breakup fee and with expectation that debtor would use that bid to entice other proposals — Breakup fee and related charge was appropriate in circumstances, particularly given factors including fee was approved by debtor's board of directors, fee was not driven by purchase price and would only be material for short period of time — Proceedings regarding transaction order adjourned.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 450, 2011 CarswellBC 841, 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]) — referred to

Boutique Euphoria inc., Re (2007), 2007 CarswellQue 14279, 65 C.B.R. (5th) 57, 2007 QCCS 7129 (C.S. Que.) — referred to

Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — referred to

Bul River Mineral Corp, Re (2014), 2014 BCSC 645, 2014 CarswellBC 1010, 12 C.B.R. (6th) 57, 26 B.L.R. (5th) 278 (B.C. S.C.) — referred to

Bul River Mineral Corp., Re (2014), 2014 BCSC 1732, 2014 CarswellBC 2702, 16 C.B.R. (6th) 173 (B.C. S.C.) — referred to

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 623, 19 C.B.R. (4th) 12 (Alta. Q.B.) — referred to

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC. (2020), 2020 ONSC 3565, 2020 CarswellOnt 8331 (Ont. S.C.J.) — referred to

Mosaic Group Inc., Re (2004), 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40, [2004] O.T.C. 476 (Ont. S.C.J.) — referred to

Nelson Financial Group Ltd., Re (2011), 2011 ONSC 2750, 2011 CarswellOnt 3100, 79 C.B.R. (5th) 307 (Ont. S.C.J.) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4838, 56 C.B.R. (5th) 224 (Ont. S.C.J. [Commercial List]) — referred to

Quest University Canada (Re) (2020), 2020 BCSC 318, 2020 CarswellBC 568, 77 C.B.R. (6th) 117 (B.C. S.C.) — referred to

Quest University Canada (Re) (2020), 2020 BCSC 860, 2020 CarswellBC 1425 (B.C. S.C.) — referred to

Quest University Canada (Re) (2020), 2020 BCSC 921, 2020 CarswellBC 1536, 81 C.B.R. (6th) 109, 39 B.C.L.R. (6th) 396 (B.C. S.C.) — referred to

ScoZinc Ltd., Re (2009), 2009 NSSC 136, 2009 CarswellNS 229, 53 C.B.R. (5th) 96, 277 N.S.R. (2d) 251, 882 A.P.R. 251 (N.S. S.C.) — followed

ScoZinc Ltd., Re (2009), 2009 NSSC 163, 2009 CarswellNS 283, 55 C.B.R. (5th) 205 (N.S. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288, 204 O.A.C. 216, 78 O.R. (3d) 254 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to
Timminco Ltd., Re (2014), 2014 ONSC 3393, 2014 CarswellOnt 9328, 14 C.B.R. (6th) 113 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 6 — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

s. 22(1) — considered

s. 22(2) — considered

PETITION by debtor for approval of order.

***Fitzpatrick J.*:**

INTRODUCTION

1 The petitioner, Quest University Canada ("Quest"), seeks a number of orders on this application, all steps toward what it considers will be a successful restructuring of its affairs under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "*CCAA*").

2 Quest seeks: a Claims Process Order, to identify and determine claims against it; a Meeting Order, to allow Quest to present a plan of arrangement to its creditors; and, a Transaction Approval and Vesting Order ("TAVO") to approve the proposed purchase and sale transaction between it and Primacorp Ventures Inc. ("Primacorp").

3 There is minor opposition to the granting of the Claims Process Order and Meeting Order.

4 There is substantial opposition to the granting of the TAVO. To allow the opposing parties further time to develop their materials, the Court adjourned that aspect of the application to November 12 — 13, 2020. In the meantime, however, Quest seeks approval of its agreement to pay Primacorp a Break Up Fee and that the Court grant a Break Up Fee Charge to secure those amounts. Various parties oppose this relief.

5 At the conclusion of this hearing, I granted the Claims Process Order and the Meeting Order. I also approved Quest's agreement to pay the Break Up Fee and granted the Break Up Fee Charge. These are my reasons for those orders.

BACKGROUND FACTS

6 On January 16, 2020, these proceedings began with the granting of the Initial Order.

7 Quest's restructuring has been unique in many respects. Quest is a not-for-profit post-secondary educational institution, a status that bears on its options in this proceeding. Quest has never really been self-sustaining financially; rather, it has historically relied on donations, secured loans and land sales to supplement its revenue.

18 The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They include, as defined in the Monitor's Fourth Report, the Primacorp Purchase and Sale Agreement (the "Primacorp PSA"), the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms include that Primacorp will:

a) Purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the Residence Lands, chattels and vehicles;

b) Lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Provide marketing and recruiting expertise and sufficient working capital to allow Quest to continue as a university;

d) Fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under a plan of arrangement. In addition, the Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales; and

e) Provide Quest with a $20 million secured credit facility.

19 All of the transaction documents are in settled form and the signed documents are in escrow. Primacorp and Quest are working towards a closing date in late December 2020.

CLAIMS PROCESS

20 The remedial objective of the *CCAA* is to facilitate a restructuring of a debtor company. Section 11 of the *CCAA* imbues the supervising judge with a broad statutory authority to make such orders as are appropriate toward achieving that objective: *Bul River Mineral Corp., Re*, 2014 BCSC 1732 (B.C. S.C.) at para. 29 ("*Bul River #2*").

21 Establishing a claims process toward determining claims to be advanced under the *CCAA* is a recognized step in proceedings across Canada: *ScoZinc Ltd., Re*, 2009 NSSC 136 (N.S. S.C.) at para. 23; and *Bul River #2* at paras. 31-32.

22 In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.) at paras. 41 — 44, Regional Senior Justice Morawetz (as he then was) discussed "first principles" from the *CCAA* in relation to claims process orders and the establishment of a claims bar date. He stated:

[41] It is also necessary to return to first principles with respect to claims-bar orders. The *CCAA* is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the *CCAA*, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

23 Quest submits that a claims process is necessary to enable it to implement a plan and close the Primacorp transaction.

24 Quest indicates that there are five secured creditors holding approximately $30.7 million in debt. Quest estimates that there are 446 unsecured creditors holding approximately $2 million in debt. If the Court upholds the Southern Star disclaimers, Southern Star will also be entitled to advance a claim against Quest as an unsecured creditor.

25 Quest developed the proposed claims process with input and support from the Monitor. The features of the proposed claims process are:

a) The claims process will not address claims arising post-filing, save for a Restructuring Claim and amounts secured by *CCAA* Charges;

b) The claims process addresses claims against Governors and Officers in relation to a pre-filing claim or Restructuring Claims;

TAB 7

2014 BCSC 1732
British Columbia Supreme Court

Bul River Mineral Corp., Re

2014 CarswellBC 2702, 2014 BCSC 1732, [2014] B.C.W.L.D. 6764, [2014] B.C.W.L.D. 6765, [2014] B.C.W.L.D. 6771, [2014] B.C.W.L.D. 6779, 16 C.B.R. (6th) 173, 245 A.C.W.S. (3d) 333

In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57 and the Business Corporations Act, R.S.A. 2000, c. B-9

In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation, Petitioners

Fitzpatrick J.

Heard: September 3, 5, 2014
Judgment: September 15, 2014
Docket: Vancouver S113459

Counsel: Colin D. Brousson for Petitioners
William C. Kaplan, Q.C., Peter Bychawski for CuVeras, LLC
J. Roger Webber, Q.C. for Eldon Clarence Stafford
Robert M. Curtis, Q.C. for Gordon Preston and Carol Preston
Tevia R.M. Jeffries for Monitor, Deloitte Restructuring Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Torts
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.1 Provable debts
IX.1.g Claims of director, officer or shareholder of bankrupt corporation
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Commercial law
I Agency
I.3 Creation of agency
I.3.a General principles
Contracts
XIII Novation
XIII.2 Proof of novation
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — Applicable law was amended to require debt claims to be paid in full, before any equity claims were to be paid out — P claimed that their claim was transferred into debt claim — However, claim was for recovery of own capital instead of return on capital, as was true in case relied upon by P — Other preferred shareholders were in same situation, despite not having judgment — It would be against policy objective to treat these shareholders differently — Treatment of claim as equity claim was not collateral attack on judgment given elsewhere — For S claim, intentions of parties were unclear as principal of owners was dead, and S was incapacitated — Documents between parties had to be examined — S advanced loan to principal personally, and not to his companies — There was no assignment of loan agreement — As no novation occurred, S could not characterize claim as debt claim — No agency relationship was created between parties.

Commercial law --- Agency — Creation of agency — General principles

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — No agency relationship was created between parties.

Contracts --- Novation — Proof of novation

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — For S claim, intentions of parties were unclear as principal of owners was dead, and S was incapacitated — Documents between parties had to be examined — S advanced loan to principal personally, and not to his companies — There was no assignment of loan agreement — As no novation occurred, S could not characterize claim as debt claim — No agency relationship was created between parties.

Bankruptcy and insolvency --- Proving claim — Provable debts — Claims of director, officer or shareholder of bankrupt corporation

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — Applicable law was amended to require debt claims to be paid in full, before any equity claims were to be paid out — P claimed that their claim was transferred into debt claim — However, claim was for recovery of own capital instead of return on capital, as was true in case relied upon by P — Other preferred shareholders were in same situation, despite not having judgment — It would be against policy objective to treat these shareholders differently — Treatment of claim as equity claim was not collateral attack on judgment given elsewhere.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 12, 259 A.R. 30, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 2000 ABQB 4, 15 C.B.R. (4th) 169 (Alta. Q.B.) — considered

Bul River Mineral Corp, Re (2014), 2014 CarswellBC 1010, 2014 BCSC 645, 12 C.B.R. (6th) 57 (B.C. S.C.) — referred to

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1992), 5 Alta. L.R. (3d) 193, [1992] 3 S.C.R. 558, 16 C.B.R. (3d) 154, 7 B.L.R. (2d) 113, *(*sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 131 A.R. 321, *(*sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 25 W.A.C. 321, 1992 CarswellAlta 790, 97 D.L.R. (4th) 385, *(*sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 16 C.B.R. (3d) 14, 1992 CarswellAlta 298 (S.C.C.) — followed

Central Capital Corp., Re (1995), 29 C.B.R. (3d) 33, 1995 CarswellOnt 31, 22 B.L.R. (2d) 210 (Ont. Gen. Div. [Commercial List]) — referred to

Central Capital Corp., Re (1996), 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, *(*sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161, 1996 CarswellOnt 316, 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88 (Ont. C.A.) — referred to

Dexior Financial Inc., Re (2011), 75 C.B.R. (5th) 298, 2011 BCSC 348, 2011 CarswellBC 624 (B.C. S.C. [In Chambers]) — considered

EarthFirst Canada Inc., Re (2009), 2009 ABQB 316, 2009 CarswellAlta 1069, 56 C.B.R. (5th) 102 (Alta. Q.B.) — referred to

Excelsior Electric Dairy Machinery Ltd., Re (1922), 1922 CarswellOnt 42, 2 C.B.R. 599, 52 O.L.R. 225, [1923] 3 D.L.R. 1176 (Ont. S.C.) — referred to

Farm Credit Corp. v. Holowach (Trustee of) (1988), 86 A.R. 304, 59 Alta. L.R. (2d) 279, 51 D.L.R. (4th) 501, [1988] 5 W.W.R. 87, 68 C.B.R. (N.S.) 255, 1988 CarswellAlta 293 (Alta. C.A.) — referred to

Farm Credit Corp. v. Holowach (Trustee of) (1989), 100 A.R. 395 (note), 66 Alta. L.R. (2d) xlvii (note), [1989] 4 W.W.R. lxx (note), 73 C.B.R. (N.S.) xxvii (note), 60 D.L.R. (4th) vii (note), 102 N.R. 236 (note) (S.C.C.) — referred to

I. Waxman & Sons Ltd., Re (2008), 89 O.R. (3d) 427, 39 E.T.R. (3d) 49, 44 B.L.R. (4th) 295, 2008 CarswellOnt 1245, 40 C.B.R. (5th) 307, 64 C.C.E.L. (3d) 233 (Ont. S.C.J. [Commercial List]) — followed

Mills v. Triple Five Corp. (1992), 6 Alta. L.R. (3d) 105, 11 C.P.C. (3d) 34, 136 A.R. 67, 1992 CarswellAlta 172 (Alta. Master) — referred to

Negus v. Oakley's General Contracting (1996), 40 C.B.R. (3d) 270, 152 N.S.R. (2d) 172, 442 A.P.R. 172, 1996 CarswellNS 229 (N.S. S.C.) — referred to

Nelson Financial Group Ltd., Re (2010), 71 C.B.R. (5th) 153, 75 B.L.R. (4th) 302, 2010 ONSC 6229, 2010 CarswellOnt 8655 (Ont. S.C.J. [Commercial List]) — followed

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018, 83 C.B.R. (5th) 123 (Ont. S.C.J. [Commercial List]) — considered

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (2012), 2012 ONCA 10, 2012 CarswellOnt 103, 90 C.B.R. (5th) 141 (Ont. C.A.) — referred to

Royal Bank v. Netupsky (1999), 1999 BCCA 561, 130 B.C.A.C. 61, 211 W.A.C. 61, 1999 CarswellBC 2309, 9 B.C.T.C. 320 (B.C. C.A.) — followed

Sino-Forest Corp., Re (2012), 2012 ONSC 4377, 2012 CarswellOnt 9430, 92 C.B.R. (5th) 99 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2012), 114 O.R. (3d) 304, 98 C.B.R. (5th) 20, 299 O.A.C. 107, 2012 ONCA 816, 2012 CarswellOnt 14701 (Ont. C.A.) — followed

Spidell v. LaHave Equipment Ltd. (2014), 2014 NSSC 255, 2014 CarswellNS 559 (N.S. S.C.) — followed

Ted Leroy Trucking Ltd., Re (2010), *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2014), 14 C.B.R. (6th) 113, 2014 ONSC 3393, 2014 CarswellOnt 9328 (Ont. S.C.J.) — followed

0487826 B.C. Ltd., Re (2012), 97 C.B.R. (5th) 105, 2012 CarswellBC 3079, 2012 BCSC 1501 (B.C. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable" — considered

s. 2 "creditor" — considered

s. 54(2)(d) — considered

s. 60(1.7) [en. 1992, c. 27, s. 24(1)] — considered

s. 95 — referred to

s. 101 — referred to

s. 121(1) — considered

s. 135 — considered

Business Corporations Act, S.B.C. 2002, c. 57

s. 193(2) — considered

s. 193(4) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "claim" — considered

s. 2(1) "equity claim" — considered

s. 2(1) "equity claim" (a)-(c) — referred to

s. 2(1) "equity interest" (a) — considered

s. 6 — referred to

s. 6(8) — considered

s. 11 — considered

s. 22.1 [en. 2007, c. 36, s. 71] — considered

s. 36.1 [en. 2007, c. 36, s. 78] — referred to

Words and phrases considered:

equity claim

The effect of the amendments was considered by Pepall J. (as she then was) in Nelson Financial Group Ltd., Re, 2010 ONSC 6229 (Ont. S.C.J. [Commercial List]). In that case, the court had no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the CCAA.

HEARING to determine nature of claims brought by creditors, against petitioner owners of mining companies.

31 Claims process orders are an important step in most restructuring proceedings. In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.), Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

32 The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *0487826 B.C. Ltd., Re*, 2012 BCSC 1501 (B.C. S.C.) [hereinafter Steels Products] are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60at paras. 24 and 47.

33 Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

34 This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

TAB 8

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI

would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank

TAB 9

2019 BCSC 1234
British Columbia Supreme Court

Miniso International Hong Kong Limited v. Migu Investments Inc.

2019 CarswellBC 2208, 2019 BCSC 1234, 308 A.C.W.S. (3d) 465, 71 C.B.R. (6th) 250

MINISO INTERNATIONAL HONG KONG LIMITED, MINISO INTERNATIONAL (GUANGZHOU) CO. LIMITED, MINISO LIFESTYLE CANADA INC., MIHK MANAGEMENT INC., MINISO TRADING CANADA INC., MINISO CORPORATION and GUANGDONG SAIMAN INVESTMENT CO. LIMITED (Petitioners) and MIGU INVESTMENTS INC., MINISO CANADA INVESTMENTS INC., MINISO (CANADA) STORE INC., MINISO (CANADA) STORE ONE INC., MINISO (CANADA) STORE TWO INC., MINISO (CANADA) STORE THREE INC., MINISO (CANADA) STORE FOUR INC., MINISO (CANADA) STORE FIVE INC., MINISO (CANADA) STORE SIX INC., MINISO (CANADA) STORE SEVEN INC., MINISO (CANADA) STORE EIGHT INC., MINISO (CANADA) STORE NINE INC., MINISO (CANADA) STORE TEN INC., MINISO (CANADA) STORE ELEVEN INC., MINISO (CANADA) STORE TWELVE INC., MINISO (CANADA) STORE THIRTEEN INC., MINISO (CANADA) STORE FOURTEEN INC., MINISO (CANADA) STORE FIFTEEN INC., MINISO (CANADA) STORE SIXTEEN INC., MINISO (CANADA) STORE SEVENTEEN INC., MINISO (CANADA) STORE EIGHTEEN INC., MINISO (CANADA) STORE NINETEEN INC., MINISO (CANADA) STORE TWENTY INC., MINISO (CANADA) STORE TWENTY-ONE INC. and MINISO (CANADA) STORE TWENTY-TWO INC. (Respondents)

Fitzpatrick J.

Heard: July 12, 2019
Judgment: July 12, 2019
Written reasons: July 29, 2019
Docket: Vancouver S197744

Counsel: K.M. Jackson, G.P. Nesbitt, for Petitioners
V.L. Tickle, D.R. Shouldice, for Respondents

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Petitioners, secured creditors, were owners of "M" Japanese lifestyle product brand — Respondent debtor companies were Canadian owners and operators who has licensed to use of M brand in Canada, and they also purchased products from creditors for resale in Canada — Creditors advanced US$2.4 million demand loan to debtors, and debtors received substantial amount of M products valued at approximately $17.5 million which were not paid for — Creditors demanded payment of amounts owing under demand loan, earlier account receivable and amounts owing for further supply of M products — Total indebtedness owing by debtors to creditors was approximately $35.5 million, creditors terminated debtors' right to sell and market M brand in Canada and it would not deliver further products — Creditors brought proceedings pursuant to Companies' Creditors Arrangement Act (CCAA) — Petition granted — Debtor companies were each "company" existing under laws of Canada or province, claims

against them exceeded $5 million, and debtors were unable to meet their liabilities as they came due and were insolvent and "debtor company" within meaning of CCAA — CCAA expressly granted standing to creditors to commence proceedings in respect of debtor company — Debtors could not proceed with their business operations without ongoing support of creditors — Stakeholders required relief sought in initial order on urgent basis in order to allow debtors to continue operating their business, and initial order was best option toward preserving debtors' enterprise value for benefit of stakeholders — It was appropriate to grant stay that temporarily enjoyed debtors' creditors from proceeding with claims against them — Proposed monitor was appropriate and was appointed — Factors set out in s. 11.2(4) of CCAA supported approval of $2 million interim financing and granting of charge to secure amounts advanced — Intention was to develop and prepare restructuring transaction, and it was clear that financing was required to continue operations which would allow debtors to maintain value of enterprise while they pursued restructuring — Interim financing would be used only by debtors in accordance with direct supervision of monitor — Restructuring charges including maximum $1 million administration charge and maximum $1 million directors' and officers' charge were necessary, appropriate, fair and reasonable — Restructuring charges were ranked in priority with administration charge first, interim financing charge second, and directors' and officers' charge last Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.2.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — considered

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147, 1991 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 N.R. 196 (note) (S.C.C.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 2012 CarswellOnt 1263, 95 C.C.P.B. 48, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 2 "debtor" — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "debtor company" — considered

s. 3(1) — referred to

ss. 4-5 — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(3) [en. 2005, c. 47, s. 128] — referred to

s. 11.51(4) [en. 2005, c. 47, s. 128] — referred to

s. 11.52 [en. 2005, c. 47, s. 128] — considered

PETITION by secured creditors seeking relief under *Companies' Creditors Arrangement Act*.

***Fitzpatrick J.*:**

INTRODUCTION

1 The petitioners bring these proceedings pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "*CCAA*"). Unlike the usual circumstance where the debtor companies commence the proceedings, the petitioners are the secured creditors of the respondent debtor companies, resulting in a creditor-driven *CCAA* proceeding.

2 The petitioners, collectively described as the "Miniso Group", are the owners of the "Miniso" Japanese lifestyle product brand. The Miniso Group manufactures products and operates a number of Miniso stores in Asia where those products are sold. The Miniso Group licenses the "Miniso" name for use in other parts of the world and sells products to those entities.

3 The respondent debtor companies, collectively described as the "Migu Group", are the Canadian owners and operators who have licensed the use of the "Miniso" brand in Canada. The Migu Group also purchases products from the Miniso Group for resale here in Canada.

4 On July 12, 2019, I granted an initial order in this matter (the "Initial Order") with reasons to follow. These are those reasons.

BACKGROUND FACTS

5 The evidence at the hearing consisted of the Affidavit #1 of Qihua Chen, an employee of one entity within the Miniso Group, sworn July 11, 2019.

6 The Miniso Group manufacture lifestyle products under the "Miniso" brand name and distribute those products, under licence, to retail outlets selling "Miniso" branded inventory to the public.

7 The Miniso Group, through a related entity, Miniso Hong Kong Limited, holds all applicable trademarks related to the "Miniso" brand (respectively, the "Miniso Trademarks" and the "Miniso Brand"), including in Canada.

8 The Migu Group are a group of corporations formed primarily to sell "Miniso" branded products in Canada under a licensing agreement with the Miniso Group.

34 The Migu Group is current in respect of its obligations to pay employee wages and related remittances. However, it is possible that some or all employees are owed accrued and unused vacation pay. The Migu Group does not have a pension plan for their employees.

35 It is uncertain if the Migu Group's provincial sales tax remittances are current.

36 As noted, all of the premises from which the Migu Group operates across Canada are leased. The Migu Group currently remits monthly rents of approximately $1.79 million. Some of the July rental payments (for 20 stores) have been paid; however, rent for the remainder of the premises, totalling approximately $1.16 million, has not been paid.

37 The Migu Group owes approximately $2 million in other accrued and unpaid unsecured liabilities, including to suppliers and service providers. It is anticipated that the Migu Group will honour outstanding gift card and credit notes during these *CCAA* proceedings and honour existing warranty and return policies.

38 The Migu Group's consolidated assets, as at May 31, 2019, had a book value of approximately $53.3 million.

39 The Migu Group's value is almost entirely derived from their ability to sell and market Miniso Products under the Miniso Brand in Canada through the various agreements with the Miniso Group and importantly, their licence agreements with the Miniso Group. As of this date, the Miniso Group has terminated the Migu Group's right to sell and market the Miniso Brand in Canada and the Miniso Group will not deliver further product, save on terms acceptable to the Miniso Group. As such, the Migu Group is no longer able to market and sell the Miniso Brand. In addition, the Miniso Product in the possession of the Migu Group is the property of the Miniso Group until it is paid for.

40 The result is obvious - the Migu Group cannot operate their business and generate revenue without the cooperation and support of the Miniso Group.

CCAA ISSUES

41 I will briefly discuss the various issues that arose on this application for the Initial Order.

Statutory Requirements

42 The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total amount of claims against the debtor or its affiliates exceeds $5 million: CCAA, s. 3(1). "Debtor company" is defined in s. 2 of the CCAA to include any company that is bankrupt or insolvent.

43 I am satisfied that each of the companies within the Migu Group is a "company" existing under the laws of Canada or one of the provinces and that the claims against them exceed $5 million.

44 Further, I am satisfied that the Migu Group, either individually or collectively, are unable to meet their liabilities as they come due and are therefore insolvent, and thus each is a "debtor company" within the meaning of the *CCAA*: see Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2; *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) at paras. 21-22; leave to appeal ref'd, [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. ref'd [2004] S.C.C.A. No. 336 (S.C.C.).

45 The *CCAA* expressly grants standing to creditors, such as the Miniso Group, to commence proceedings in respect of a debtor company: CCAA, ss. 4-5; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at para. 34.

Objectives of the CCAA

46 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court provided a detailed analysis of the purpose and policy behind the *CCAA*. Of particular note were the Court's comments that:

> a) the purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets (para. 15); and
>
> b) the *CCAA*'s distinguishing feature is a grant of broad and flexible authority to the supervising court to use its discretion to make the order necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The courts have used its *CCAA* jurisdiction in increasingly creative and flexible ways (para. 19).

47 The commencement of *CCAA* proceedings is a proper exercise of creditors' rights where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario: *Citibank Canada v. Chase Manhattan Bank of Canada*, [1991] O.J. No. 944 (Ont. Gen. Div.) at para. 49; *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) at paras. 33 and 40.

48 The imperatives facing both the Miniso Group and the Migu Group here are stark.

49 Without the cooperation of the Miniso Group, including access to immediate interim financing from the Miniso Group, the Migu Group will be unable to meet their liabilities as they become due and it will not be able to continue their operations and preserve their assets. The Migu Group is facing numerous claims from creditors other than the Miniso Group.

50 In addition, the Migu Group's ability to repay the indebtedness owed to the Miniso Group will be severely compromised in the event of a receivership and liquidation.

51 Simply put, the Migu Group cannot proceed with its business operations without the ongoing support of the Miniso Group.

52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.

53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here.

54 In addition, I was satisfied that the stakeholders require the relief sought in the Initial Order on an urgent basis in order to allow the Migu Group to continue operating their business. The need for cash was immediate and without access to interim financing and the stay of proceedings, the Migu Group was not be able to preserve the value of their business or even ensure the coordinated realization of their assets. As such, the Initial Order was the best option toward preserving the Migu Group's enterprise value for the benefit of their stakeholders.

55 After considering all of the circumstances, I am satisfied that these *CCAA* proceedings can assist in preserving value for the stakeholders, until a longer term solution is found.

The Stay of Proceedings

56 In addressing the granting of a stay of proceeding in an initial order under the *CCAA*, Justice Farley in *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) stated:

> [5] ... a judge has the discretion under the CCAA to make [an] order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

> [6] ... It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain the approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed ...
>
> 7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors ...

57 I was satisfied that it was appropriate to exercise my discretion under s. 11.02(1) of the CCAA to grant a stay that temporarily enjoins the Migu Group's creditors from proceeding with claims against the debtor companies. This stay of proceedings will prevent any creditor from gaining any advantage that might otherwise be obtained. It will also facilitate the ongoing operations of the Migu Group's business to preserve value and provide the Group with the necessary breathing room to carry out a restructuring or organized sales process.

58 The Miniso Group sought a stay not only against the Migu Group, but also with respect to other entities that are not parties to this proceeding, namely the JV Store Affiliates. The JV Store Affiliates are the general partner companies or partnerships formed to operate the Outlet Stores.

59 The Court has broad jurisdiction under s. 11.02(1) of the CCAA to impose stays of proceedings where it is just and reasonable to do so, including with respect to third party non-applicants.

60 In *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]), the court discussed circumstances that could justify extending the stay to third party non-applicants:

> [64] The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:
>
> a. where it is important to the reorganization process;
>
> b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA (such as partnerships that are not "companies" under the CCAA);
>
> c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
>
> d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

61 As noted in *Cinram International Inc.*, there is specific authority to grant a stay of proceedings against entities within a limited partnership context, where the business operations of the debtor companies are intertwined within that corporate/partnership structure: *Lehndorff General Partner Ltd.* at paras. 12, 16-21; *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at paras. 33-34.

62 I found that it was just and appropriate to extend the stay in these proceedings to include the JV Store Affiliates in the circumstances. The business operations of the Outlet Stores are intertwined with the JV Store Affiliates. There is also some intertwining of the financial obligations of the Migu Group and that of the JV Store Affiliates.

63 The draft Initial Order sought a stay for 10 days until July 22, 2019. It appears that the length of the stay was set at 10 days in light of the uncertainty with respect to amendments proposed to the *CCAA* by the Budget Implementation Act, 2019, No. 1 Part 4 ("Bill C-97") tabled in Parliament in March 2019.

TAB 10

2017 ONSC 673
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2017 CarswellOnt 1122, 2017 ONSC 673, 275 A.C.W.S. (3d) 696, 44 C.B.R. (6th) 289

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

Newbould J.

Heard: January 12, 2017
Judgment: January 27, 2017
Docket: 09-CL-7950

Counsel: Jessica A. Kimmel for Monitor
Susan Philpott for Former Nortel employees
Lily Harmer for Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Byron Shaw for Administrator of the Nortel Networks Managerial and NonNegotiated Pension Plan and Nortel Networks Negotiated Pension Plan
Thomas McRae for Nortel Canadian continuing employees
Michael E. Barrack, D.J Miller for Nortel Networks UK Pension Trust Limited and Board of the Pension Protection Fund
Adam Slavens for Nortel Networks Inc.
Michael Wunder for Unsecured Creditors Committee
Gavin H. Finlayson, Amanda C. McLachlan for Ad Hoc Group of Bondholders
Matthew-Milne Smith for EMEA Debtors
John Salmas for Indenture Trustee, Wilmington Trust, N.A.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.g Monitor
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor
Passing accounts — Telecommunications company N, which had over 140 corporate entities in 60 jurisdictions, became insolvent — Canadian N debtors filed for Companies' Creditors Arrangement Act (CCAA) protection in 2009 — Monitor was twice granted extraordinary expanded powers, resulting in Monitor and its counsel undertaking significantly greater scope of work than in typical CCAA case — In 2017, Monitor of Canadian debtors brought motion for order passing its accounts in amount of CA$122,972,821.96, accounts of its Canadian legal counsel in amount of CA$99,994,744.85, and accounts of its U.S. legal counsel in amount of $31,352,136.73, incurred between 2009 to 2016 — Motion granted — Accounts approved — Monitor's duties were far more complex than normal due to matrix way in which N's business was operated — Extensive joint discovery process to resolve claims played large role in costs getting out of hand, and was not fault of Monitor — Monitor and counsel tried to be as efficient as possible in difficult circumstances and overall achieved very favourable outcomes for Canadian

creditors — Proceedings were unprecedented in terms of size, complexity, international aspects and vast number of competing interests — Nature, extent and value of assets realized for creditors was significant — Billings over relevant period comprised combined total of 384,652.6 professional hours — Monitor and counsel's professional rates and disbursements were reasonable.

Table of Authorities

Cases considered by *Newbould J.*:

Bank of Nova Scotia v. Diemer (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.) — followed

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed

Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to

Tepper Holdings Inc., Re (2011), 2011 NBQB 311, 2011 CarswellNB 592, 82 C.B.R. (5th) 293, 984 A.P.R. 1, 381 N.B.R. (2d) 1, 2011 CarswellNB 849, 2011 NBBR 311 (N.B. T.D.) — referred to

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — referred to

Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Pensions Act, 1995, c. 26

s. 75 — considered

Pensions Act 2004, 2004, c. 35

Generally — referred to

MOTION by monitor of insolvent company for passing of accounts of monitor and its counsel incurred during *Companies' Creditors Arrangement Act* proceedings.

***Newbould J.*:**

Introduction

1 Ernst & Young Inc. in its capacity as Monitor of Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation, Nortel Networks Global Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the "Canadian Debtors"), moves for an order passing the accounts of the Monitor and of its counsel incurred during the period January 14, 2009, the date these CCAA proceedings were commenced, through to and including May 31, 2016.

2 The background to this sorry saga has been described in a number of decisions. [1]

3 At the time of the filing under the CCAA, Nortel consisted of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA [2] region, as well as the Caribbean and

10 Most of the core parties in the insolvency proceedings do not object to the accounts as proposed by the Monitor being passed. This is due to the final settlement reached by them. The Canadian allocation decision became final after the Court of Appeal refused leave to appeal the decision of this Court. However appeals were brought in the U.S. from the allocation decision of Judge Gross. These appeals and the allocation of the $7.3 billion sale escrow proceeds were finally settled after mediation by a Settlement Agreement on October 12, 2016. It was a term of the Settlement Agreement that no party to it could contest the fees and disbursements of any other party to it.

11 The UKPC at one point in a pre-hearing conference took the position that the Monitor's motion to approve its fees and disbursements should be adjourned until after January 24, 2017, the date on which motions seeking an order sanctioning the Plan of Compromise and Arrangement proposed by the Canadian Debtors and seeking confirmation of the First Amended Joint Chapter 11 Plan of Arrangement proposed by the US Debtors would be heard in a joint hearing by this Court and by Judge Gross of the US Bankruptcy Court. The UKPC said that if the Plans were sanctioned and the Settlement Agreement became effective, it would take no position on the Monitor's fee approval motion. I declined to adjourn the Monitor's motion. At the hearing of the motion, counsel for the UKPC said that no adjournment request was now being made. Thus there is no opposition to the Monitor's motion by the UKPC.

12 The only opposition to the passing of the accounts of the Monitor was by The Bank of New York Mellon, as Indenture Trustee to some of the bonds issued by Nortel. [3] It took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts and offered a suggestion that a practical solution is to refer the matter to a Master, to an Assessment Officer or to an outside expert. Such person could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court. Counsel for the Indenture Trustee later advised that it was not taking a position on the substance of the motion and did not appear at the hearing of the motion. For reasons that will follow, I do not think such a reference is necessary, nor would it be a practical solution.

Considerations on a passing of a Monitor's accounts

13 There are few cases dealing with the factors to consider on a passing of the accounts of a monitor. Most deal with a receiver's accounts. However I agree with Justice Topolniski in *Winalta Inc., Re* (2011), 84 C.B.R. (5th) 157 (Alta. Q.B.) that there should be no difference in dealing with a monitor's accounts and that the onus is on a monitor to make out its case. She stated:

> 30 In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.
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> 32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

14 So far as the test for reviewing a receiver's fees is concerned, the New Brunswick Court of Appeal in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (N.B. C.A.) referred to a number of factors to be considered. These factors have been accepted in Ontario as being a useful guideline but not an exhaustive list as other factors may be material in any particular case. See *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.) at para. 51 ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.) at para. 5, aff'd, (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

15 Justice Pepall further stated:

45 ... That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

16 As stated, The Bank of New York Mellon, as Indenture Trustee took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts. It offered a suggestion that a practical solution is to refer the matter to a Master, an Assessment Officer or an outside expert. I do not agree with this suggestion. In my view there is sufficient evidence to undertake a proper consideration of the accounts of the Monitor taking into account the factors to be considered in arriving at a fair and reasonable result.

17 The time and expense of referring the accounts to someone else would be very time consuming, create further expense and delay completion of this matter that has gone on far too long. The Initial Order directed the accounts to be passed by this Court. That makes sense, particularly as no other person has the familiarity of what has gone on in the Nortel insolvency as the Court has. These considerations have led other courts to decline to send the accounts out for review by others. See *Tepper Holdings Inc., Re* (2011), 381 N.B.R. (2d) 1 (N.B. T.D.) at para. 3; *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83.

18 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund has been involved in these proceedings from the outset in January, 2009 and has been a member of the Canadian Only Creditors Committee (the "CCC"). The Superintendent supports the motion for an order passing the accounts of the Monitor and opposes the appointment of a special fee examiner to review the Monitor's accounts. It takes the position that his would create unnecessary and unwarranted additional expense and potential delay by virtue of the need to educate the examiner with respect to these hugely complex proceedings, particularly if the examiner was independent of the court with additional professional costs. The

Superintendent further states that it is satisfied with a high level assessment of the Monitor's accounts in this case by this Court, given this Court's familiarity with many of the complexities of the proceedings, and by reference to the significantly higher costs incurred by the other Estates.

19 Morneau Shepell Ltd., was appointed the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan in October 2010 and has been actively involved in the CCAA restructuring process. It is one of the largest creditors of the Canadian Debtors. It takes the same position as the Superintendent regarding any attempt to have the accounts of the Monitor examined by some other party. It states that more litigation or court process in relation to the Monitor's accounts should be strongly discouraged and avoided. Far too much time and too much of the Canadian estate's resources have been consumed with seemingly endless litigation. More court process only delays, and may diminish, the distribution of assets available to creditors.

20 Michel E. Campbell is a former engineer employed by Nortel. Since the January 2009 CCAA filing, he has been heavily involved in the proceedings as a court-appointed representative of approximately 21,000 Nortel former employees, as an active member of the Nortel Retirees and Former Employees Protection Canada ("NRPC"), and as a claimant against the Nortel estate for the loss of severance and termination pay. He estimates that he has spent over 4,000 hours on issues in the proceedings relating to employee issues. As one of the former employees and as a court-appointed Representative, he has a financial stake in these proceedings. He too supports the passing of the Monitor's accounts and does not think a referral of the accounts to some third party is desirable. He states in his affidavit:

> 44. Moreover, given the volume and nature of the information provided in the Monitor's materials filed for this motion, and the fact that the fees as disclosed are subject to this Court's approval, I see no reason for another third party review or assessment. In any event, such a third party review would create more expense and delay in these proceedings, and would likely further postpone approval of the Plan of Arrangement and distributions on claims, which is far from desirable. The Former Employees have been waiting now for almost eight years to receive some payment for their losses. Further, it would be difficult for a third party who lacks background knowledge of this case to conduct a reliable, meaningful or accurate assessment of the Monitor's fees without the expenditure of considerable additional time and resources of the Monitor to provide information to the third party reviewer. This Court is by far the more appropriate arbiter of the Monitor's fees.

21 This case requires an overall assessment of the work done and a consideration of the results achieved. A line by line particularization of each particular job and each particular invoice would involve no doubt hundreds of thousands of dollars, taken the amount of activity and time involved in various matters. As well, in this case it is by no means the case that each task was discrete and could easily be separated out. As was stated by Justice Pepall, the value provided should pre-dominate the consideration of what a fair and reasonable amount is appropriate. A detailed assessment in this case would not be practical or serve that purpose.

Consideration of the Monitor's accounts

22 The Monitor engaged Goodmans LLP ("Goodmans") as its Canadian legal counsel, Allen & Overy LLP ("A&O") as its U.S. legal counsel and Buchanan Ingersoll & Rooney PC ("BIR") as its Delaware local legal counsel. A large number of professionals from the Monitor's firm E & Y, from Goodmans and from A&O were involved throughout these proceedings. The accounts from each of those firms are included in the passing of accounts with affidavits supporting the accounts.

23 The Monitor seeks approval of its accounts in the amount of CA$122,972,821.96, inclusive of applicable taxes. This amount includes billings for 200,065.4 professional hours at an average hourly rate of CA$540.

24 The Monitor also seeks to pass the accounts of Goodmans in the amount of CA$99,994,744.85, inclusive of applicable taxes. This amount includes billings for 134,562.4 professional hours at an average hourly rate of CA$643.

25 The Monitor also seeks to pass the accounts of A&O in the amount of $31,352,136.73, inclusive of applicable taxes. This amount includes billings for 46,448.4 professional hours at an average hourly rate of $639.

