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
November 1, 2023 AT 1:00 PM ON THE COMMERCIAL LIST

TABLE OF AUTHORITIES

TAB 1

Companies' Creditors Arrangement Act

R.S.C. 1985, c. C-36, s. 11 | Federal

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Federal Statutes (English) | Companies' Creditors Arrangement Act
Jurisdiction:	Federal

Delivery Details

Date:	November 11, 2023 at 12:27 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11.General power of court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Currency

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

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Companies' Creditors Arrangement Act

R.S.C. 1985, c. C-36, s. 11.3 | Federal

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Jurisdiction:	Federal

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R.S.C. 1985, c. C-36, s. 11.3

s 11.3

Currency

11.3

11.3(1)Assignment of agreements

On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

11.3(2)Exceptions

Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

11.3(3)Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

11.3(4)Restriction

The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

11.3(5)Copy of order

The applicant is to send a copy of the order to every party to the agreement.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107; 2007, c. 36, ss. 65, 112(17)

Currency

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R.S.C. 1985, c. C-36, s. 36 | Federal

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Delivery Details

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Client ID:	A33002.1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Obligations and Prohibitions [Heading added 2005, c. 47, s. 131.]

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

s 36.

Currency

36.

36(1)Restriction on disposition of business assets

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2)Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3)Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4)Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5)Related persons

For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

36(6)Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7)Restriction — employers
The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

36(8)Restriction — intellectual property
If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History
2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269

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Companies' Creditors Arrangement Act

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

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Date:	November 11, 2023 at 12:27 p.m.
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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.]
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

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Companies' Creditors Arrangement Act

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

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Jurisdiction:	Federal

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Client ID:	A33002.1

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

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Companies' Creditors Arrangement Act

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

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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

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Companies' Creditors Arrangement Act

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

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Client ID:	A33002.1

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

Federal English Statutes reflect amendments current to June 20, 2023
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Companies' Creditors Arrangement Act

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

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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

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Companies' Creditors Arrangement Act

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

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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

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Companies' Creditors Arrangement Act

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

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Client ID:	A33002.1

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
Federal English Statutes reflect amendments current to June 20, 2023
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R.S.C. 1985, c. C-36, s. 51 | Federal

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Canada Federal Statutes
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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
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R.S.C. 1985, c. C-36, s. 52 | Federal

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Canada Federal Statutes
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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

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

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Canada Federal Statutes
Companies' Creditors Arrangement Act
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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
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Companies' Creditors Arrangement Act

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

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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.]
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

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Companies' Creditors Arrangement Act

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

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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

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

Companies' Creditors Arrangement Act

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

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KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Federal Statutes (English) | Companies' Creditors Arrangement Act
Jurisdiction:	Federal

Delivery Details

Date:	November 11, 2023 at 12:27 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1

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 June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

Companies' Creditors Arrangement Act

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

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Federal Statutes (English) | Companies' Creditors Arrangement Act
Jurisdiction:	Federal

Delivery Details

Date:	November 11, 2023 at 12:27 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1

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. 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

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

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Companies' Creditors Arrangement Act

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

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Federal Statutes (English) | Companies' Creditors Arrangement Act
Jurisdiction:	Federal

Delivery Details

Date:	November 11, 2023 at 12:27 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1

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

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

Companies' Creditors Arrangement Act

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

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Federal Statutes (English) | Companies' Creditors Arrangement Act
Jurisdiction:	Federal

Delivery Details

Date:	November 11, 2023 at 12:27 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1

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

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

Companies' Creditors Arrangement Act

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

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Federal Statutes (English) | Companies' Creditors Arrangement Act
Jurisdiction:	Federal

Delivery Details

Date:	November 11, 2023 at 12:27 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1

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

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

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Companies' Creditors Arrangement Act

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

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Federal Statutes (English) | Companies' Creditors Arrangement Act
Jurisdiction:	Federal

Delivery Details

Date:	November 11, 2023 at 12:27 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1

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 June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

TAB 2

Ontario Supreme Court
Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25

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.

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

***Farley J.*:**

[1] I have had the opportunity to reflect on this matter which involves an aspect of the recent amendments to the insolvency legislation of Canada, which amendments have not yet been otherwise dealt with as to their substance. The applicant, Babcock & Wilcox Canada Ltd. ("BW Canada"), a solvent company, has applied for an interim order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA"):

> (a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;
>
> (b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;
>
> (c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

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

TAB 3

MtGox Co., Re

2014 ONSC 5811, 2014 CarswellOnt 13871 | Ontario Superior Court of Justice [Commercial List] | Ontario | October 6, 2014

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2014 ONSC 5811, 2014 CarswellOnt 13871, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307, 245 A.C.W.S. (3d) 280

Outline

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 12:30 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

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

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.

APPLICATION by bankruptcy trustee for initial recognition order pursuant to Part XIII of *Bankruptcy and Insolvency Act*.

***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.

18 In the circumstances it is appropriate to recognize the Japan bankruptcy proceeding as a foreign proceeding.

TAB 4

Hollander Sleep Products, LLC et al., Re

2019 ONSC 3238, 2019 CarswellOnt 8720 | Ontario Superior Court of Justice [Commercial List] | Ontario | May 30, 2019

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2019 ONSC 3238, 2019 CarswellOnt 8720, 307 A.C.W.S. (3d) 462, 72 C.B.R. (6th) 140

Outline

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 12:32 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

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

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.

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

***Hainey J.*:**

BACKGROUND

b) Managerial functions for Hollander Canada, including finance, buying, logistics, marketing, and strategic decisions, are provided from Hollander's U.S. head office by Hollander Sleep Products;

c) Hollander Canada is almost wholly dependent on Hollander's U.S. office for administrative functions such as overhead services, accounting, and IT, which are provided by Hollander Sleep Products in the U.S.;

d) Data for Hollander Canada's operations is housed within IT systems, located and operated out of the U.S.;

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:

a) The U.S. Court has appropriately taken jurisdiction over the Chapter 11 Cases, so comity will be furthered by this Court's recognition of and support for the Chapter 11 Cases already under way in the United States;

b) Coordination of proceedings in the two jurisdictions will ensure equal and fair treatment of all stakeholders, whether they are in the United States or Canada;

c) Given the close connection between Hollander and the United States, it is reasonable and sensible for the U.S. Court to have principal control over the insolvency process. This will produce the most efficient restructuring for the benefit of all stakeholders;

d) The Chapter 11 Debtors must act quickly because of the expeditious timetable established under the Plan for their restructuring. It is imperative that there be a centralized and co-ordinated process for these insolvency proceedings to maximize the prospect of a successful restructuring and preserve value for stakeholders; and

e) The Canadian and U.S. operations of Hollander are highly integrated.

Should the DIP ABL Charge be Granted?

44 The Chapter 11 Debtors are facing a liquidity crisis and require DIP financing to fund their operations while they pursue a restructuring pursuant to the Plan or a sale in accordance with the marketing process to be conducted as part of the Chapter 11 proceeding. The ability of the Chapter 11 Debtors, including Hollander Canada, to maintain and finance their operations requires working capital from the DIP Facilities. If interim financing through the DIP Facilities is not obtained, neither the Chapter 11 Debtors as a whole, nor Hollander Canada on a standalone basis, have the funds to finance going-concern operations.

45 The DIP ABL Facility includes an initial creeping roll-up provision pursuant to which the Chapter 11 Debtors will use receipts from their operations to pay down pre-filing obligations pending the issuance of the Final DIP Order. The amount borrowed under the DIP ABL Facility is proposed to be secured by, among other things, a court-ordered charge on Hollander Canada's property and the property of the other Chapter 11 Debtors in Canada (the "DIP ABL Charge").

46 This court has concluded in previous proceedings that there is no impediment to granting approval of interim DIP financing including a full roll-up provision in foreign recognition proceedings under Part IV of the CCAA [3] .

47 In *Hartford*, an application under Part IV of the CCAA, this court recognized a DIP facility authorized by the U.S. Court that included a full roll-up, and emphasized the importance of comity in foreign recognition proceeding as follows:

The Information Officer and Chapter 11 Debtors recognize that in CCAA proceedings, a partial "roll up" provision would not be permissible as a result of s.11.2 of the CCAA, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

Section 49 of the CCAA provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.

It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding"....

TAB 5

Purdue Pharma L.P., Re.

2019 ONSC 7042, 2019 CarswellOnt 21242 | Ontario Superior Court of Justice [Commercial List] | Ontario | December 30, 2019

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2019 ONSC 7042, 2019 CarswellOnt 21242, 313 A.C.W.S. (3d) 467, 76 C.B.R. (6th) 308

Outline

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 12:34 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

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

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.

MOTION by P Inc., in its capacity as foreign representative of itself, and 23 other debtors in possession, 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.

***Hainey J.*:**

Overview

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 stakeholders which is exactly what a stay of proceedings against third parties is intended to prevent. In order to cooperate to the maximum extent possible with the Bankruptcy Court I have concluded that I must grant the Related Party Stay Order with respect to all opioid-related actions in Canada, including the Quebec Opioid Class Action.

25 I agree with the Foreign Representative's submission that at this early stage in these proceedings I should not allow a single stakeholder to frustrate a collective process that may benefit a much larger group of stakeholders. In my view, excluding the Quebec Plaintiff from the Related Party Stay Order would do just that.

26 I do not accept the Quebec Plaintiff's submission that the Quebec Purdue Defendants are not Related Parties within the meaning of the Chapter 11 Proceedings. In the Chapter 11 Complaint a Related Party is defined to include "associated entities of the Debtors". The Quebec Purdue Defendants are clearly associated entities of the Chapter 11 Debtors through their common ownership.

TAB 6

Xerium Technologies Inc., Re

2010 ONSC 3974, 2010 CarswellOnt 7712 | Ontario Superior Court of Justice [Commercial List] | Ontario | September 28, 2010

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2010 ONSC 3974, 2010 CarswellOnt 7712, 193 A.C.W.S. (3d) 1066, 71 C.B.R. (5th) 300

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 12:37 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2010 ONSC 3974
Ontario Superior Court of Justice [Commercial List]

Xerium Technologies Inc., Re

2010 CarswellOnt 7712, 2010 ONSC 3974, 193 A.C.W.S. (3d) 1066, 71 C.B.R. (5th) 300

IN THE MATTER OF the Companies' Creditors Arrangement ACT, R.S.C. 1985, c. C-36, AS AMENDED

XERIUM TECHNOLOGIES, INC., IN ITS CAPACITY AS THE FOREIGN REPRESENTATIVE OF XERIUM TECHNOLOGIES, INC., HUYCK LICENSCO INC., STOWE WOODWARD LICENSCO LLC, STOWE WOODWARD LLC, WANGNER ITELPA I LLC, WANGNER ITELPA II LLC, WEAVEXX, LLC, XERIUM ASIA, LLC, XERIUM III (US) LIMITED, XERIUM IV (US) LIMITED, XERIUM V (US) LIMITED, XTI LLC, XERIUM CANADA INC., HUYCK.WANGNER AUSTRIA GMBH, XERIUM GERMANY HOLDING GMBH, AND XERIUM ITALIA S.P.A. (collectively, the "Chapter 11 Debtors") (Applicants)

C. Campbell J.

Heard: May 14, 2010
Judgment: September 28, 2010
Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Foreign Proceedings — Debtors commenced proceedings in U.S. under Chapter 11 of U.S. Bankruptcy Code ("U.S. Code") — Recognition order was granted in Canada recognizing Chapter 11 Proceedings as foreign main proceeding in respect of Debtors, pursuant to Pt. IV of Companies' Creditors Arrangements Act ("CCAA") — U.S. Bankruptcy Court made various orders in respect of Debtors' ongoing business operations ("Orders") and confirmed Debtors' Joint Plan of Reorganization ("Plan") under U.S. Code ("Confirmation Order") — Applicant company, Foreign Representative of Debtors, brought motion to have Orders, Confirmation Order and Plan recognized and given effect in Canada — Motion granted — Provisions of Plan were consistent with purposes set out in s. 61(1) of CCAA — Plan was critical to restructuring of Debtors as global corporate unit — Recognition of Confirmation Order was necessary to ensure fair and efficient administration of cross-border insolvency — U.S. Bankruptcy Court concluded Plan complied with U.S. Bankruptcy principles, and that Plan was made in good faith; did not breach any applicable law; was in interests of Debtors' creditors and equity holders; and would not likely be followed by need for liquidation or further financial reorganization of Debtors — Such principles also underlay CCAA, and thus dictated in favour of Plan's recognition and implementation in Canada.

MOTION by applicant for orders recognizing and giving effect to certain orders of U.S. Bankruptcy Court in Canada.

***C. Campbell J.*:**

1 The Recognition Orders sought in this matter exhibit the innovative and efficient employment of the provisions of Part IV of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "CCAA") to cross border insolvencies.

2 Each of the "Chapter 11 Debtors" commenced proceedings on March 30, 2010 in the United States under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings.")

16 The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

17 Under the Plan, the notional value of the Chapter 11 Debtors' outstanding indebtedness will be reduced from approximately U.S.$640 million to a notional value of approximately U.S.$480 million, and the Chapter 11 Debtors will have improved liquidity as a result of the extension of maturity dates under the Credit Facility and access to an U.S. $80 million Exit Facility.

18 The Plan provides substantial recoveries in the form of cash, new debt and equity to its secured lenders and swap counterparties and provides existing equity holders with more than $41.5 million in value.

19 Xerium has been unable to restructure its secured debt in any other manner than by its secured lenders voluntarily accepting equity and the package of additional consideration proposed to be provided to the secured lenders under the Plan.

20 The Plan benefits all of the Chapter 11 Debtors' stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.

21 I conclude that the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Chapter 11 Debtors.

22 On April 1, 2010, the Recognition Order granted by this Court provided, among other things:

> (a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;
>
> (b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;
>
> (c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;
>
> (d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;
>
> (e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;
>
> (g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and
>
> (h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

23 I am satisfied that this Court does have the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA. The recognition sought is precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

24 Section 44 identifies the purpose of Part IV of the CCAA. It states

> 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.

25 I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:

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.

26 In *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

27 The applicable factors from *Babcock & Wilcox Canada Ltd., Re* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum:

(a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;

(b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;

(c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and well established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;

(d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;

(e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;

(f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

28 Additionally, the Plan is consistent with the purpose of the CCAA. By confirming the Plan, the U.S. Bankruptcy Court has concluded that the Plan complies with applicable U.S. Bankruptcy principles and that, *inter alia*:

(a) it is made in good faith;

(b) it does not breach any applicable law;

(c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and

(d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

These are principles which also underlie the CCAA, and thus dictate in favour of the Plan's recognition and implementation in Canada.

29 In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion to the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

30 The Order proposed relieved the Applicant from the publication provisions of s. 53(b) of the CCAA. Based on the positive impact for creditors in Canada of the Plan as set out in paragraph 27 above, I was satisfied that given the cost involved in publication, the cost was neither necessary nor warranted.

31 The requested Order is to issue in the form signed.

Motion granted.

Footnotes

1 Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.

End of Document

TAB 7

AbitibiBowater, Re

2010 QCCS 1742, 2010 CarswellQue 4082 | Quebec Superior Court | Quebec | May 3, 2010

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2010 QCCS 1742, 2010 CarswellQue 4082, 190 A.C.W.S. (3d) 679, 71 C.B.R. (5th) 220, J.E. 2010-962, EYB 2010-173333

Find Details

Jurisdiction:	Quebec

Delivery Details

Date:	November 11, 2023 at 12:39 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2010 QCCS 1742
Quebec Superior Court

AbitibiBowater, Re

2010 CarswellQue 4082, 2010 QCCS 1742, 190 A.C.W.S. (3d) 679, 71 C.B.R. (5th) 220, J.E. 2010-962, EYB 2010-173333

In the Matter of A Plan of Compromise or Arrangement of: AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor) and The Land Registrar for the Land Registry Office for the Registration Division of Montmorency, The Land Registrar for the Land Registry Office for the Registration Division of Portneuf, The Land Registrar for the Restigouche County Land Registry Office, The Land Registrar for the Thunder Bay Land Registry Office and The Registrar of the Register of Personal and Movable Real Rights (mis en cause)

Clément Gascon, J.C.S.

Heard: April 26, 2010
Judgment: May 3, 2010
Docket: C.S. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors
Me Avram Fishman for the Monitor
Me Robert E. Thornton for the Monitor
Me Serge F. Guérette for the Term Lenders
Me Nicolas Gagné for Ville de Beaupré
Me Éric Vallière for the Intervenor, American Iron & Metal LP
Me Marc Duchesne for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Me Frederick L. Myers for the Ad hoc Committee of Bondholders
Me Bertrand Giroux for the Intervenor, Recyclage Arctic Béluga Inc.

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Pulp and paper corporation experienced financial problems and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — In context of its restructuring, it contemplated sale of four closed mills to American bidder — While most parties supported and recommended contemplated sale, including monitor, unsuccessful bidder objected to it — Corporation brought motion seeking approval of sale — Motion granted — Court had jurisdiction to approve sale of assets in course of CCAA proceedings — Criteria for determining whether sale should be approved were established in previous decision of Ontario Court of Appeal — Here, evidence showed that over sixty potential purchasers were contacted and provided with bid package during sale process — Evidence also showed that proposed transaction reflected current fair market value of assets — Court was of view that sale process was beyond reproach and that corporation sought to achieve best possible results — Therefore, nothing justified refusing corporation's request and setting aside monitor's recommendation.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Pulp and paper corporation experienced financial problems and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — In context of its restructuring, it contemplated sale of four closed mills to American bidder — While most parties supported and recommended contemplated sale, including monitor, unsuccessful bidder objected to it — Corporation brought motion seeking approval of sale — Motion granted — As was decided by previous decision of Ontario

Court of Appeal, when deciding upon sale approval motion, court should consider best interests of parties who have direct interest in proceeds of sale, i.e. creditors — Author recently confirmed validity of that precedent in both CCAA and US proceedings — Here, none of creditors supported unsuccessful bidder's contestation — As such, unsuccessful bidder's interest was merely commercial and its contestation actually delayed sale process — Therefore, unsuccessful bidder's legal standing appeared to be most probably inexistent.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Société papetière a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, elle a considéré la possibilité de vendre quatre usines désaffectées à un soumissionnaire américain — Tandis que la plupart des parties intéressées, y compris le contrôleur, étaient en faveur de la vente en question et la recommandaient, un soumissionnaire déçu s'y est opposé — Société a déposé une requête visant à obtenir l'approbation de la vente — Requête accueillie — Tribunal avait la compétence pour approuver la vente des actifs dans le cadre de procédures entamées sous le régime de la Loi — Test servant à déterminer si une vente devrait être approuvée a été établi dans une décision antérieure de la Cour d'appel de l'Ontario — En l'espèce, la preuve démontrait qu'on avait contacté plus de soixante acheteurs potentiels et qu'on leur avait fourni une trousse d'appel d'offres au cours du processus de la vente — Preuve démontrait également que l'opération proposée reflétait la juste valeur marchande des actifs — Tribunal était d'avis que le processus de vente était sans reproche et que la société visait à obtenir les meilleurs résultats possibles — Par conséquent, rien ne justifiait que l'on refuse la demande de la société et que l'on fasse fi de la recommandation du contrôleur.

Faillite et insolvabilité --- Procédure devant les tribunaux — Divers

Société papetière a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, elle a considéré la possibilité de vendre quatre usines désaffectées à un soumissionnaire américain — Tandis que la plupart des parties intéressées, y compris le contrôleur, étaient en faveur de la vente en question et la recommandaient, un soumissionnaire déçu s'y est opposé — Société a déposé une requête visant à obtenir l'approbation de la vente — Requête accueillie — Tel que l'a décidé la Cour d'appel de l'Ontario dans une décision antérieure, lorsqu'il s'agit de rendre une décision concernant une requête visant l'autorisation d'une vente, le tribunal devrait prendre en considération les meilleurs intérêts des parties qui ont un intérêt direct dans le produit de la vente, soit les créanciers — Auteur a récemment confirmé la validité de ce précédent dans le cadre des procédures instituées sous le régime de la Loi ainsi que sous le régime américain — En l'espèce, aucun créancier n'appuyait l'opposition du soumissionnaire déçu — Comme tel, l'intérêt du soumissionnaire déçu était purement commercial et sa contestation avait en fait retardé le processus de la vente — Par conséquent, l'intérêt pour agir du soumissionnaire déçu était probablement inexistant.

MOTION by corporation seeking Court's approval of sale.

***Clément Gascon, J.C.S*:**

REASONS FOR JUDGMENT AND VESTING ORDER IN RESPECT OF THE BEAUPRÉ, DALHOUSIE, DONNACONA AND FORT WILLIAM ASSETS (#513)

Introduction

1 This judgment deals with the approval of a sale of assets contemplated by the Petitioners in the context of their CCAA restructuring.

2 At issue are, on the one hand, the fairness of the sale process involved and the appropriateness of the Monitor's recommendation in that regard, and on the other hand, the legal standing of a disgruntled bidder to contest the approval sought.

The Motion at Issue

3 Through their Amended Motion for the Issuance of an Order Authorizing the Sale of Certain Assets of the Petitioners (Four Closed Mills)(the "*Motion*"), the Petitioners seek the approval of the sale of four closed mills to American Iron & Metal LP ("*AIM*") and the issuance of two Vesting Orders [1] in connection thereto.

c) each of the Closed Mills faces potential environmental liabilities and other clean-up costs. The Petitioners also incur monthly expenses to maintain the sites in their closed state, including tax, utility, insurance and security costs;

d) the proposed transaction is on attractive terms in the current market and will provide the Petitioners with additional liquidity. In addition to realizing cash proceeds from the Closed Mills and additional proceeds from the sales of the paper machines, the projected sale will also relieve the Petitioners of potentially significant environmental liabilities; and

e) the Petitioners' creditors will not suffer any prejudice as a result of the proposed sale and the issuance of the proposed vesting orders since the proceeds will be remitted to the Monitor in trust and shall stand in the place and stead of the Purchased Assets (as defined in the contemplated Purchase Agreement). As a result, all liens, charges and encumbrances on the Purchased Assets will attach to such proceeds, with the same priority as they had immediately prior to the sale.

14 In its 38th Report dated April 24, 2010, the Monitor supports the Petitioners' position and recommends that the contemplated sale to AIM be approved.

15 Some key creditors, notably the Ad Hoc Committee of the Bondholders, also support the Motion. Others (for instance, the Term Lenders and the Senior Secured Noteholders) indicate that they simply submit to the Court's decision.

16 None of the numerous Petitioners' creditors opposes the contemplated sale. None of the parties that may be affected by the wording of the Vesting Orders sought either.

17 However, Arctic Beluga, one of the unsuccessful bidders in the marketing and sale process of the Closed Mills, intervenes to the Motion and objects to its conclusions.

18 It claims that its penultimate bid[2] for the Closed Mills was a proposal for CDN$22.1 million in cash, an amount more than CDN$8.3 million greater than the amount proposed by the Petitioners in the Motion.

19 According to Arctic Beluga, the AIM bid that forms the basis of the contemplated sale is for CDN$8.8 million in cash, plus 40% of the proceeds from any sale of the machinery (of which only CDN$5 million is guaranteed within 90 days of closing), and is significantly lower than its own offer of over CDN$22 million in cash.

20 Arctic Beluga argues that it lost the ability to purchase the Closed Mills due to unfairness in the bidding process. It considers that the Court has the discretion to withhold approval of the sale where there has been unfairness in the sale process or where there are substantially higher offers available.

21 It thus requests the Court to 1) dismiss the Motion so that the Petitioners may consider its proposal for the Closed Mills, 2) refuse to authorize the Petitioners to enter into the proposed Purchase Agreement and Land Swap Agreement, and 3) declare that its proposal is the highest and best offer for the Closed Mills.

22 The Petitioners reply that Arctic Beluga has no standing to challenge the Court's approval of the sale of the Closed Mills contemplated in these proceedings.

23 Subsidiarily, in the event that Arctic Beluga is entitled to participate in the Motion, they consider that any inquiry into the integrity and fairness of the bidding process reveals that the contemplated sale to AIM is fair, reasonable and to the advantage of the Petitioners and the other interested parties, namely the Petitioners' creditors.

24 To complete this summary of the relevant context, it is worth adding that at the hearing, in view of Arctic Beluga's Intervention, AIM also intervened to support the Petitioners' Motion.

25 It is worth mentioning as well that even though he did not contest the Motion *per se*, the Ville de Beaupré's Counsel voiced his client's concerns with respect to the amount of unpaid taxes [3] currently outstanding in regard to the Beaupré Mill located on its territory.

26 Apparently, part of these outstanding taxes has been paid very recently, but there is a potential dispute remaining on the balance owed. That issue is not, however, in front of the Court at the moment.

Analysis and Discussion

27 In the Court's opinion, the Petitioners' Motion is well founded and the Vesting Orders sought should be granted.

28 The sale process followed here was beyond reproach. Nothing justifies refusing the Petitioners' request and setting aside the corresponding recommendation of the Monitor. None of the complaints raised by Arctic Beluga appears justified or legitimate under the circumstances.

29 On the issue of standing, even though the Court, to expedite the hearing, did not prevent Arctic Beluga from participating in the debate, it agrees with Petitioners that, in the end, its legal standing appeared to be most probably inexistent in this case.

30 This notwithstanding, it remains that in determining whether or not to approve the sale, the Court had to be satisfied that the applicable criteria were indeed met. Because of that, the complaints raised would have seemingly been looked at, no matter what. As part of its role as officer of the Court, the Monitor had, in fact, raised and addressed them in its 38th Report in any event.

31 The Court's brief reasons follow.

The Sale Approval

32 In a prior decision rendered in the context of this restructuring [4], the Court has indicated that, in its view, it had jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale was in the best interest of the stakeholders generally [5].

33 Here, there are sufficient and definite justifications for the sale of the Closed Mills. The Petitioners no longer use them. Their annual holding costs are important. To insure that a purchaser takes over the environmental liabilities relating thereto and to improve the Petitioners' liquidity are, no doubt, valid objectives.

34 In that prior decision, the Court noted as well that in determining whether or not to authorize such a sale of assets, it should consider the following key factors:

- whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- the efficacy and integrity of the process followed;
- the interests of the parties; and
- whether any unfairness resulted from the process.

35 These principles were established by the Ontario Court of Appeal in the *Royal Bank v. Soundair Corp.* [6] decision. They are applicable in a CCAA sale situation [7].

36 The *Soundair* criteria focus first and foremost on the "integrity of the process", which is integral to the administration of statutes like the CCAA. From that standpoint, the Court must be wary of reopening a bidding process, particularly where doing so could doom the transaction that has been achieved [8].

37 Here, the Monitor's 38th Report comprehensively outlines the phases of the marketing and sale process that led to the outcome now challenged by Arctic Beluga. This process is detailed at length at paragraphs 26 to 67 of the Report.

38 The Court agrees with the Monitor's view that, in trying to achieve the best possible result within the best possible time frame, the Petitioners, with the guidance and assistance of the Monitor, have conducted a fair, reasonable and thorough sale process that proved to be transparent and efficient.

39 Suffice it to note in that regard that over sixty potential purchasers were contacted during the course of the initial Phase I of the sale process and provided with bid package information, that the initial response was limited to six parties who submitted bids, three of which were unacceptable to the Petitioners, and that the subsequent Phase II involved the three finalists of Phase I.

40 By sending the bid package to over sixty potential purchasers, there can be no doubt that the Petitioners, with the assistance of the Monitor, displayed their best efforts to obtain the best price for the Closed Mills.

41 Moreover, Arctic Beluga willingly and actively participated in these phases of the bidding process. The fact that it now seeks to nevertheless challenge this process as being unfair is rather awkward. Its active participation certainly does not assist its position on the contestation of the sale approval [9].

42 In point of fact, Arctic Beluga's assertion of alleged unfairness in the sale process is simply not supported by any of the evidence adduced.

43 Arctic Beluga was not treated unfairly. The Petitioners and the Monitor diligently considered the unsolicited revised bids it tendered, even after the acceptance of AIM's offer. It was allowed every possible chance to improve its offer by submitting a proof of funds. However, it failed to do enough to convince the Petitioners and the Monitor that its bid was, in the end, the best one available.

44 Turning to the analysis of the bids received, it is again explained in details in the Monitor's 38th Report, at paragraphs 45 to 67.

45 In short, the Petitioners, with the Monitor's support, selected AIM's offer for the following reasons:

(a) the purchase price was fair and reasonable and subjected to a thorough canvassing of the market;

(b) the offer included a sharing formula, based on future gross sale proceeds from the sale of the paper machines located at the Closed Mills, that provided for potential sharing of the proceeds from the sale of any paper machines;

(c) AIM confirmed that no further due diligence was required;

(d) AIM had provided sufficient evidence of its ability to assume the environmental liabilities associated with the Closed Mills; and

(e) AIM did not have any financing conditions in its offer and had provided satisfactory evidence of its financial ability to close the sale.

46 Both the Petitioners and the Monitor considered that the proposed transaction reflected the current fair market value of the assets and that it satisfied the Petitioners'objective of identifying a purchaser for the Closed Mills that was capable of mitigating the potential environmental liabilities and closing in a timely manner, consistent with Petitioners'on-going reorganization plans.

47 The Petitioners were close to completing the sale with AIM when Arctic Beluga submitted its latest revised bid that ended up being turned down.

63 If anything, this underscored the importance of requesting and appraising evidence of any bidder's financial wherewithal to close the sale.

64 The applicable duty during a sale process such as this one is not to obtain the best possible price at any cost, but to do everything reasonably possible with a view to obtaining the best price.

65 The dollar amount of Arctic Beluga's offer is irrelevant unless it can be used to demonstrate that the Petitioners, with the assistance of the Monitor, acted improvidently in accepting AIM's offer over theirs [16].

66 Nothing in the evidence suggests that this could have been the case here.

67 In that regard, Arctic Beluga's references to the findings of the courts in *Beauty Counsellors of Canada Ltd., Re* [17] and *Selkirk, Re* [18] hardly support its argument.

68 In these decisions, the courts first emphasized that it was not desirable for a purchaser to wait to the last minute, even up to the court approval stage, to submit its best offer. Yet, the courts then added that they could still consider such a late offer if, for instance, a substantially higher offer turned up at the approval stage. In support of that view, the courts explained that in doing so, the evidence could very well show that the trustee did not properly carry out its duty to obtain the best price for the estate.

69 This reasoning has clearly no application in this matter. As stated, the process followed was appropriate and beyond reproach. The bids received were reviewed and analyzed. Arctic Beluga's bid was rejected for reasonable and defendable justifications.

70 That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.

71 A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should.

72 In prior decisions rendered in similar context [19], courts in this province have emphasized that they should intervene only where there is clear evidence that the Monitor failed to act properly. A subsequent, albeit higher, bid is not necessarily a valid enough reason to set aside a sale process short of any evidence of unfairness.

73 In the circumstances, the Court agrees that the Petitioners and the Monitor were "entitled to prefer a bird in the hand to two in the bush" and were reasonable in preferring a lower-priced unconditional offer over a higher-priced offer that was subject to ambiguous caveats and unsatisfactory funding commitments.

74 AIM has transferred an amount of $880,000 to the Petitioners' Counsel as a deposit required under the Purchase Agreement. It has the full financial capacity to consummate the sale within the time period provided for [20].

75 As a result, the Court finds that the Petitioners are well founded in proceeding with the sale to AIM on the basis that the offer submitted by the latter was the most advantageous and presented the fewest closing risks for the Petitioners and their creditors.

76 All in all, the Court agrees with the following summary of the situation found in the Monitor's 38th Report, at paragraph 79:

> (a) the Petitioners have used their best efforts to obtain the best purchase price possible;
>
> (b) the Petitioners have acted in a fair and reasonable manner throughout the sale process and with respect to all potential purchasers, including Arctic Beluga;
>
> (c) the Petitioners have considered the interests of the stakeholders in the CCAA proceedings;

TAB 8

Payless Holdings Inc. LLC, Re

2017 ONSC 2242, 2017 CarswellOnt 5926 | Ontario Superior Court of Justice | Ontario | April 7, 2017

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	2017 ONSC 2242, 2017 CarswellOnt 5926, 278 A.C.W.S. (3d) 234, 47 C.B.R. (6th) 106

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 12:41 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2017 ONSC 2242
Ontario Superior Court of Justice

Payless Holdings Inc. LLC, Re

2017 CarswellOnt 5926, 2017 ONSC 2242, 278 A.C.W.S. (3d) 234, 47 C.B.R. (6th) 106

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

IN THE MATTER OF PAYLESS HOLDINGS INC LLC, PAYLESS SHOESOURCE CANADA INC., PAYLESS SHOESOURCE CANADA GP INC. AND THOSE OTHER ENTITES LISTED ON SCHEDULE "A" HERETO

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

G.B. Morawetz R.S.J.

Heard: April 7, 2017
Judgment: April 7, 2017 *
Docket: CV-17-11758-00CL

Proceedings: reasons in full *Payless Holdings Inc. LLC, Re* (2017), 2017 ONSC 2321, 2017 CarswellOnt 5925, G.B. Morawetz R.S.J. (Ont. S.C.J.)

Counsel: John MacDonald, Patrick Reisterer, for Applicant
Clifton Prophet, Mark Crane, for Ivanhoe Cambridge Inc.
Ashley Taylor, Lee Nicholson, for Alvarez & Marsal Inc., Proposed Information Officer
David Bish, for Cadillac Fairview Corporation Ltd.
Tony Reyes, for Wells Fargo, ABL DIP Lender (Agent)
Linda Galessiere, for 20 Vic, Morguard, SmartREIT, Oxford, RioCan, Triovest, Springwood, Crombie REIT, Blackwood, Southridge Mall

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Debtor was American shoe retailer with related entities in Canada — Debtor entered into reorganization proceedings in America — Debtor brought application for declaration that American proceedings were foreign main proceedings under Companies' Creditors Arrangement Act, stay, and related relief — Application granted — Canadian operations were integrated into American operations — Only one director and one senior executive of Canadian operations resided in Canada — Canadian operations were dependent on American operations and all relevant decisions were made in America — That some partnerships were involved in structure of business did not affect order — Stay of proceedings was necessary and appropriate.

HEARING regarding order under *Companies' Creditors Arrangement Act*.

***G.B. Morawetz R.S.J.*:**

1 At the conclusion of the hearing, the record was endorsed:

> The requested relief for an Interim Recognition Order proceeded on an unopposed basis. Initial Recognition Order granted, with the exception of paragraph 6 of the Draft Order. Paragraphs 6-10 and 12 of the Supplemental Order also granted. The

26 The Applicant takes the position that the COMI of each of the Payless Canada Group entities is in the U.S.

27 In determining the COMI for Canadian entities that are part of a larger corporate group, the relevant factors to consider include, among others:

(a) the location of the debtor's headquarters, head office functions, or nerve centre;

(b) the location of the debtor's management; and

(c) the location that significant creditors recognize as being the centre of the company's operations

(see: *Lightsquared LP, Re*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List]) and *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201 (Ont. S.C.J.)).

28 A review of the foregoing factors is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

29 In my view, the following factors support a finding that the COMI of the entities in the Payless Canada Group is in the United States and that the Chapter 11 cases should be recognized as a "foreign main proceeding" in Canada:

(a) the Payless Canada Group's operations are fully integrated with Payless U.S. operations;

(b) only one of the senior executives, and only one of the directors, of the entities in the Payless Canada Group reside in Canada;

(c) all corporate, strategic, financial, inventory sourcing and other major decision-making occurs in the U.S.;

(d) the Payless Canada Group is entirely reliant on U.S. managerial functions; and

(e) Payless Canada Group is entirely dependent on the other Chapter 11 Debtors for all of their licencing agreements, design partnerships, and company owned lands.

30 I therefore find that the COMI of each entity the Payless Canada Group is in the United States.

31 In the result, I am satisfied that Chapter 11 Cases should be recognized as a "foreign main proceeding".

32 The relief requested in the Initial Recognition Order is granted, with the exception of paragraph 6 of the Draft Order which relates to certain directions to be provided to the Information Officer.

33 The Applicant also sought a Supplemental Order, in accordance with the provisions of section 49 of the CCAA, which provides that the court may, at its discretion, make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor's property or the interest of one or more creditors. Section 50 provides that the Order under Part IV may be made on any terms and conditions that the court considers appropriate in the circumstances.

34 Section 52(1) provides 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 proceedings".

35 In the context of cross-border insolvencies, Canadian courts have consistently encouraged comity and cooperation between courts in various jurisdictions in order to enable enterprises to restructure on a cross-border basis (see: *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) at paras. 11 and 11; *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 9.)

TAB 9

Ultra Petroleum Corp., Re

2017 YKSC 23, 2017 CarswellYukon 38 | Yukon Territory Supreme Court | Yukon | March 27, 2017

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2017 YKSC 23, 2017 CarswellYukon 38, [2017] B.C.W.L.D. 3276, 278 A.C.W.S. (3d) 469

Find Details

Jurisdiction:	Yukon

Delivery Details

Date:	November 11, 2023 at 12:42 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2017 YKSC 23
Yukon Territory Supreme Court

Ultra Petroleum Corp., Re

2017 CarswellYukon 38, 2017 YKSC 23, [2017] B.C.W.L.D. 3276, 278 A.C.W.S. (3d) 469

ULTRA PETROLEUM CORP. (Petitioner)

L.F. Gower J.

Judgment: March 27, 2017
Docket: Whitehorse S.C. 16-A0023

Counsel: Paul W. Lackowicz, for Petitioner

Subject: Civil Practice and Procedure; Insolvency; International

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Enforcement of orders

Petitioner, Yukon company, and number of subsidiaries commenced voluntary reorganization proceedings in United States bankruptcy court by filing voluntary petition for relief under chapter 11 of United States Code — Notice of chapter 11 proceedings were served on over 6,000 creditors or potential creditors — US bankruptcy court granted number of orders, including order authorizing company to act as foreign representative of itself for purposes of application made to this court — This court granted order appointing company as foreign representative of itself pursuant to s. 45 of Companies' Creditors Arrangement Act (CCAA) in respect of chapter 11 proceedings; recognized chapter 11 proceedings; granted stay of proceedings against company, its officers and directors; and restrained persons with agreements with company for supply of goods and services from discontinuing, altering or terminating supply of such goods and services during stay — Company applied for order recognizing and giving full force and effect to claims bar order granted by US bankruptcy court nunc pro tunc, and confirmation order granted by US bankruptcy court — Application granted — Claims bar order had been fully complied with by chapter 11 debtors including company, and potential Canadian creditors had been given notice of application — It was appropriate that claims bar order be recognized by court notwithstanding that recognition was nunc pro tunc — Recognition would ensure certainty with regard to effect of claims bar order in Canada, and recognition would foster comity and cooperation between this court and US bankruptcy court, as well as supporting global reorganization of chapter 11 debtors — Confirmation order was made in good faith and in interests of chapter 11 debtors, as well as creditors and equity holders; it did not breach any applicable Canadian law; it would not likely be followed by need for liquidation or further financial reorganization of chapter 11 debtors; and plan complied with US bankruptcy principle — All holders of claims and interests in chapter 11 debtors were given notice and opportunity to vote on and object to plan — It was appropriate to recognize confirmation order to ensure that purposes of CCAA were satisfied and that chapter 11 debtors had best opportunity to restructure their affairs.

APPLICATION by company for order recognizing and giving full force and effect to claims bar order and confirmation order granted by United States bankruptcy court.

***L.F. Gower J.*:**

INTRODUCTION

1 This is an application by Ultra Petroleum Corp. ("Ultra Petroleum") in its capacity as a foreign representative of itself pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"), for an order recognizing and giving full force and effect to: (1) a Claims Bar Order granted by the United States Bankruptcy Court, Southern District of Texas, Houston Division (the "US Bankruptcy Court") on May 3, 2016, *nunc pro tunc*; and (2) a Confirmation Order granted by the US Bankruptcy Court on March 14, 2017 (the "Confirmation Order").

2 Ultra petroleum is a Yukon corporation incorporated pursuant to the laws of the Yukon Territory, with a registered office located in Whitehorse, Yukon. Through its direct and indirect wholly owned subsidiaries it owns oil and gas properties in Wyoming, Utah and Pennsylvania, in the United States.

3 On April 29, 2016, Ultra Petroleum and a number of its subsidiaries (the "Chapter 11 debtors") commenced voluntary reorganization proceedings in the US Bankruptcy Court by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the *United States Code*. Notice of the Chapter 11 proceedings was served upon over 6000 creditors or potential creditors of the Chapter 11 debtors. Three of those potential creditors are in Canada: Emera Energy Services Inc., Mowbrey Gil LLP and Enerplus Resources (USA) Corporation. None has filed proofs of claim in the Chapter 11 proceedings.

4 On May 3, 2016, the US Bankruptcy Court granted a number of orders, including an order authorizing Ultra Petroleum to act as a foreign representative of itself for the purposes of the application made to this Court on May 13, 2016.

5 On May 17, 2016, Veale J. of this Court granted an order which, among other things:

a) appointed Ultra Petroleum as foreign representative of itself pursuant to s. 45 of the *CCAA* in respect of the Chapter 11 proceedings;

b) recognized the Chapter 11 proceedings;

c) granted a stay of proceedings against Ultra Petroleum;

d) restrained persons with agreements with Ultra Petroleum for the supply of goods and services from discontinuing, altering or terminating the supply of such goods and services during the stay of proceedings; and

e) granted a stay of proceedings against the former, current and future officers and directors of Ultra Petroleum.

ISSUES

6 There are two issues in this application:

1) Should the Claims Bar Order be recognized and given full force and effect in Canada by this Court, *nunc pro tunc*?

2) Should the Confirmation Order be recognized and given full force and effect in Canada by this Court?

ANALYSIS

1. The Claims Bar Order

7 The purpose of Part IV of the *CCAA* is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders under this Part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions and to promote the fair and efficient administration of cross-border insolvencies. This also protects the interests of debtors, creditors and other interested persons. See: *Horsehead Holding Corp., Re*, 2016 ONSC 958 (Ont. S.C.J. [Commercial List]), at para. 15; and s. 44 of the *CCAA*.

8 In cross-border insolvencies, Canadian and US courts have made efforts to complement, coordinate and, where appropriate, accommodate the proceedings of the other in order to enable cross-border enterprises to restructure. Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty. See *Babcock & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786 (Ont. S.C.J. [Commercial List]), at paras. 9 and 10.

9 When a court considers whether it will recognize a foreign order, including Chapter 11 proceeding orders, it considers the following factors:

> a) The recognition of comity and cooperation between courts of various jurisdictions is 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 sufficiently 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) Plans that allow the enterprise to reorganize globally, especially where there is an established interdependence on a transnational basis, should be promoted. To the extent reasonably practicable, one jurisdiction should take charge of the principle administration of the enterprises organization, were such principal type approach will facilitate a potential reorganization and will respect the claims of stakeholders and does not detract from the net benefits that may be available from alternative approaches.
>
> e) The recognition that the appropriate level of court involvement depends to a significant degree upon the court's nexus to the enterprise. Where one jurisdiction has an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the re-organizational efforts in the foreign jurisdiction. Further, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.
>
> f) Notice as effective as is reasonably possible should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into court to review the granted order and seek its variation.

See: *Babcock*, cited above, at para. 21; and *Xerium Technologies Inc., Re*, 2010 ONSC 3974 (Ont. S.C.J. [Commercial List]), at paras. 26 and 27.

10 The second affidavit of Garland Shaw confirms that the Claims Bar Order has been fully complied with by the Chapter 11 debtors, including Ultra Petroleum.

11 Further, as stated above, the three potential creditors of Ultra Petroleum that have addresses in Canada, have been given notice of this application.

12 As such, it is appropriate that the Claims Bar Order be recognized by this Court, notwithstanding that the recognition is *nunc pro tunc*. This recognition will ensure certainty with regard to the effect of the Claims Bar Order in Canada, with respect to creditors of Ultra Petroleum. Such recognition will also foster comity and cooperation between this Court and the US Bankruptcy Court, as well as supporting the global reorganization of the Chapter 11 debtors.

13 I note that the Court of Queen's Bench of Alberta also recently recognized, *nunc pro tunc*, a claims bar order granted by the US Bankruptcy Court in an application by C&J Energy Production Services-Canada Ltd., Court File No. 1601-08740.

2. The Confirmation Order

14 The Confirmation Order in this application satisfies the numerous factors set out in the case authorities just cited. The Order was made in good faith and in the interests of the Chapter 11 debtors, as well as the creditors and equity holders. It does not breach any applicable Canadian law. It will not likely be followed by a need for liquidation or further financial reorganization of the Chapter 11 debtors. The plan complies with US bankruptcy principles, as the US bankruptcy Court has confirmed. All holders of claims and interests in the Chapter 11 debtors, including holders of claims and interests in Ultra Petroleum who were entitled to vote on the Plan of Reorganization, have been given notice of, and the opportunity to vote on and object to,

TAB 10

CITATION: Lightsquared Inc. (Re), 2015 ONSC 2309
COURT FILE NO.: CV12-9719-00CL
DATE: 2015-04-10

SUPERIOR COURT OF JUSTICE - ONTARIO

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

APPLICATION OF LIGHTSQUARED LP UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO LIGHTSQUARED INC., LIGHTSQUARED INVESTORS HOLDINGS INC., ONE DOT FOUR CORP., ONE DOT SIX CORP., SKYTERRA ROLLUP LLC, SKYTERRA ROLLUP SUB LLC, SKYTERRA INVESTORS LLC, TMI COMMUNICATIONS DELAWARE, LIMITED PARTNERSHIP, LIGHTSQUARED GP INC., LIGHTSQUARED LP, ATC TECHNOLOGIES, LLC, LIGHTSQUARED CORP., LIGHTSQUARED FINANCE CO., LIGHTSQUARED NETWORK LLC, LIGHTSQUARED INC. OF VIRGINIA, LIGHTSQUARED SUBSIDIARY LLC, LIGHTSQUARED BERMUDA LTD., SKYTERRA HOLDINGS (CANADA) INC., SKYTERRA (CANADA) INC. AND ONE DOT SIX TVCC CORP. (COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *John Salmas and Sara-Ann Van Allen*, for the Foreign Representative and Canadian Counsel to the Chapter 11 Debtors

Brian Empey, for the Information Officer Alvarez & Marsal Canada Inc.

Sean Zweig, for certain Secured Lenders and DIP Lenders

HEARD and RELEASED: April 9, 2015

ENDORSEMENT

[1] The Foreign Representative seeks, among other things, the recognition in Canada of the following orders of the United States Bankruptcy Court for the Southern District of New York (the `U.S. Bankruptcy Court") entered or sought in the cases commenced by the Chapter 11 Debtors in the U.S. Bankruptcy Court under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Chapter 11 Cases") (collectively, the "Foreign Orders"):

(a) Order Confirming Modified Second Amended Joint Plan Pursuant To Chapter 11 Of Bankruptcy Code [U.S. Bankruptcy Court Docket No. 2276] (the "Confirmation Order");

(b) Order, Pursuant to 11 U.S.C. § 105(A) and 363, Authorizing LightSquared to (A) Enter into and Perform Under Letters Related to $1,515,000,000 Second Lien Exit Financing Arrangements, (B) Pay Fees and Expenses in Connection Therewith, and (C) Provide Related Indemnities [U.S. Bankruptcy Court Docket No. 2273] (the "Jefferies Exit Financing Order");

(c) Order Authorizing Payment of Alternative Transaction Fee in Connection with Proposed Plan of Reorganization [U.S. Bankruptcy Court Docket No. 2275] (the "Alternative Transaction Fee Order");

(d) Order (A) Authorizing Use of Cash Collateral, if any, Through Plan Effective Date, (B) Establishing that Prepetition Secured Parties are Adequately Protected and (C) Modifying Automatic Stay [to be entered by the 'U.S. Bankruptcy Court]; and

(e) Order Amending Final Order (A) Authorizing DIP Obligors To Obtain Eighth Replacement Superpriority Senior Secured Priming Postpetition Financing, (B) Granting Superpriority Liens and Providing Superpriority Administrative Expense Status, (C) Granting Adequate Protection, and (D) Modifying Automatic *Stay* [U.S. Bankruptcy Court Docket No. 2300] (the "Amended Eighth Replacement DIP Order").

[2] The motion was not opposed.

[3] On December 18, 2014, the Chapter 11 Debtors filed initial versions of the (i) *Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* (as amended, modified or supplemented, the "Joint Plan"), and (ii) *Specific Disclosure Statement for Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* (the "Specific Disclosure Statement").

[4] The confirmation hearing in respect of the Joint Plan (the "Confirmation Hearing") commenced at 10:00 am on March 9, 2015 before the U.S. Bankruptcy Court.

[5] At the time of commencement of the Confirmation Hearing, numerous stakeholders had filed objections to the Joint Plan.

[6] The ongoing negotiations and resolution of objections resulted in various modifications to the Joint Plan and, on March 26, 2015, the Chapter 11 Debtors filed the Modified Second Amended Plan.

[7] On March 26, 2015, Her Honor Judge Chapman of the U.S. Bankruptcy Court issued a decision which, among other things, confirmed the Modified Second Amended Plan.

[8] On April 7, 2015, the U.S. Bankruptcy Court entered the Amended Eighth Replacement DIP Order.

[9] Section 49(1) of the CCAA provides that, if an order recognizing a foreign proceeding is made, the court may, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors, make any order that it considers appropriate.

[10] Section 50 of the CCAA provides that an order under Part IV may be made on any terms and conditions that the court considers appropriate in the circumstances.

[11] The Chapter 11 Cases were described by Judge Chapman in her bench decision as a "bankruptcy battle [of] biblical proportions.

[12] In my view, the recognition of the Foreign Orders is consistent with the purpose of the CCAA and Part IV in particular. It promotes the fair and efficient administration of the Chapter 11 Debtors' cross-border proceedings.

[13] The Record establishes that the Modified Second Amended Plan provides for the payment in full, including postpetition interest, of all general unsecured creditors, including Canadian unsecured creditors. In the absence of the Modified Second Amended Plan, it is expected that there would be no distributions to such creditors.

[14] The Record also establishes that the unsecured creditors are expected to receive no recoveries in the event of the liquidation of the Chapter 11 Debtors pursuant to Chapter 7 of the U.S. Bankruptcy Code. As such, but for the contributions contemplated by the Modified Second Amended Plan, those creditors senior to the unsecured creditors would not be paid anywhere near in full and there would be no value flowing to any of the unsecured creditors, including the Canadian unsecured creditors.

[15] The Record further establishes that the Eighth Replacement DIP Facility is a necessary and integral component of the Modified Second Amended Plan, which provides for the payment in full, including postpetition interest, of all general unsecured creditors, including Canadian unsecured creditors. In the absence of the Modified Second Amended Plan, and the corresponding amended Eighth Replacement DIP Facility, it is expected that there would be no distributions to such creditors.

[16] I am satisfied that there will be no material prejudice to Canadian creditors if the Amended Eighth Replacement DIP Order is recognized by this Court. In my view, the

amendments to the Eighth Replacement DIP Order do not increase the amount of the DIP obligations that rank ahead of such unsecured claims (see: *Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964, para 13, [Hartford]). In making this determination, I have taken into account that the Information Officer does not believe that the relief sought is contrary to Canadian public policy.

[17] The Foreign Representative submits that the recognition of the Foreign Orders by the Canadian Court is in the best interests of the Canadian estates of the Chapter 11 Debtors. The Information Officer recommends that the relief be granted.

[18] I accept these statements and have concluded it is appropriate to recognize the Foreign Orders.

[19] The Information Officer also sought approval of its Twenty-Third and Twenty-Fourth Reports, together with its Supplemental Report to the Twenty-Fourth Report. The relief was not opposed. The Reports are, accordingly, approved.

[20] In the result, the requested relief is granted and the Order has been signed in the form presented.

Regional Senior Justice G.B. Morawetz

Date: April 10, 2015

TAB 11

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205 | Ontario Court of Appeal | Ontario | July 3, 1991

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178, 46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

Find Details

Search Query:	advanced: NA(Royal /3 Bank /3 of /3 Canada /3 v /3 Soundair /3 Corp)
Jurisdiction:	Ontario

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Date:	November 11, 2023 at 2:33 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the

TAB 12

Digital Domain Media Group Inc., Re

2012 BCSC 1567, 2012 CarswellBC 3245 | British Columbia Supreme Court [In Chambers] | British Columbia | September 25, 2012

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2012 BCSC 1567, 2012 CarswellBC 3245, [2013] B.C.W.L.D. 675, 222 A.C.W.S. (3d) 13

Find Details

Jurisdiction:	British Columbia

Delivery Details

Date:	November 11, 2023 at 12:54 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2012 BCSC 1567
British Columbia Supreme Court [In Chambers]

Digital Domain Media Group Inc., Re

2012 CarswellBC 3245, 2012 BCSC 1567, [2013] B.C.W.L.D. 675, 222 A.C.W.S. (3d) 13

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

In the Matter of certain proceedings taken in the United States Bankruptcy Court for the District of Delaware with respect to the companies listed on Schedule "A" hereto (the "Debtors") Application of Digital Domain Media Group, Inc. under Part IV of the Companies' Creditors Arrangement Act (Cross-Border Insolvencies) Petitioner

Fitzpatrick J.

Heard: September 25, 2012
Oral reasons: September 25, 2012 *
Docket: Vancouver S126501

Counsel: D. Grieve, D. Ward, K. Gerra, D. Grassgreen, R. Feinstein, J. Rosell for Petitioner
K. Lenz for Respondent, Galloping Horse America, LLC
T. Jeffries for Respondent, Searchlight Capital LP
P. Rubin for Respondent, Tenor Opportunity Master Fund, Ltd., others
M. Buttery for Information Officer

Subject: Insolvency; International

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Debtors were group of related companies — Debtors commenced creditor protection proceedings in US in September 2012 — US court permitted quick sale of assets and debtor-in-possession financing — Debtors applied for relief under Companies' Creditors Arrangement Act later that month — US proceeding was recognized as main proceeding — Auction process in US resulted in high bid of $30.2 million US — Sale was approved by US court — Debtors brought application for order recognizing and implementing US court's sale approval order — Application granted — Sale process had been in compliance with court orders — Sale process, while expedited, had fully canvassed market for appropriate offers — Sale proceeds would be held in trust pending further considering in US proceeding — Canadian creditors would be fully able to participate in US proceeding and so would not suffer prejudice by reason of quick sale.

APPLICATION by debtors for order recognizing and implementing sale approval order issued by US court.

***Fitzpatrick J.*:**

I. Background

1 This is a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The proceedings with respect to the petitioner, Digital Domain Media Group, Inc. ("Digital Domain"), and other members of its corporate group began by way of Chapter 11 proceedings in the United States commencing September 11, 2012. At that time, Digital Domain and various other members of the corporate group filed petitions with the United States Bankruptcy Court for the District of Delaware.

11 I am advised that the sale to Galloping Horse includes the assets of Digital Domain Productions (Vancouver) Ltd. ("Digital Vancouver"), which is the only Canadian company in this group, and which assets are located in this jurisdiction. I am advised that the Galloping Horse sale will provide certain benefits to Canadian stakeholders. In particular, there will be an assumption of various contracts. The Information Officer also advises that cure payments of Cdn$1 million will be made to thirty of Digital Vancouver's creditors. Various obligations in the amount of Cdn$425,000 owed by Digital Vancouver to its employees are to be assumed by Galloping Horse. Approximately 220 Canadian jobs will be saved.

12 Unfortunately, what is not addressed by reason of this sale, at least in the Canadian proceedings, is approximately Cdn $245,000 of unsecured claims, together with approximately Cdn$675,000 owed for HST. I am also advised that there may be certain equipment lease issues that have not yet been sorted out, given the speed with which these proceedings have taken place.

II. Issue

13 This application is for an order recognizing and implementing in Canada the order of the United States Bankruptcy Court, as pronounced by Judge Shannon yesterday. The order sought also includes additional provisions with respect to vesting the Canadian assets in Galloping Horse in accordance with the asset purchase agreement dated September 24, 2012.

III. Discussion

14 The applicable statutory provision on this application is s. 49(1) of the *CCAA*, the same provision I considered on the earlier application. This provision provides that having recognized a foreign proceeding, I may make further orders as I consider appropriate 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.

15 It is well taken that this Court and other Canadian courts have recognized sale orders granted within United States Chapter 11 proceedings, particularly where those proceedings have been found to be foreign main proceedings. Counsel for Digital Domain has referred me to the leading authority in Canada with respect to sales of assets: *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). In that case, in assessing the reasonableness of a proposed sale of assets, the court considered various factors: whether the party conducting the sale had made sufficient efforts to get the best price and had not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers were obtained; and whether there had been any unfairness in the sales process.

16 As I have already stated, the bid procedures were dictated by the exigent circumstances of the Digital Domain group. Nevertheless, it appears that many of the stakeholders, both in Canada and in the United States, have worked very hard to implement a process that, while expedited, fully canvassed the market for appropriate offers. Again, those bid procedures were approved in the Bid Procedures Order granted by Judge Shannon and were recognized by me earlier this month. The Information Officer in its report to the court sets out the sales process; it concludes that the auction was conducted in a fair manner and that the sale and vesting order is appropriate under the circumstances. The evidence indicates, and I find, that the approved sales process which resulted in the Galloping Horse sale was in compliance with those orders.

17 It remains a consideration as to whether recognition of the sale order is necessary for the protection of the Digital Domain group's property or the interests of a creditor or creditors. I would note that the net sale proceeds are to be held in trust pending a potential review of the security held by the DIP lender and the pre-petition secured creditor. The Information Officer also points out that it understands that the distribution of the net sale proceeds will be subject to further consideration within the Chapter 11 proceedings.

18 It appears that if that security is valid, then the entirety of the sale proceeds will be required to repay both the DIP facility and some portion of the pre-petition debt. To that extent, unsecured creditors, both in Canada and in the United States, will find that there is no recovery for them. There is, of course, some recovery for those parties who will remain within the context of the business operations, to the extent that they are to be satisfied by Galloping Horse, and they continue to do business with the new entity.

TAB13

Court File No. CV-12-9719-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE REGIONAL SENIOR JUSTICE MORAWETZ	)))	THURSDAY, THE 9th DAY OF APRIL, 2015

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

APPLICATION OF LIGHTSQUARED LP UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO LIGHTSQUARED INC., LIGHTSQUARED INVESTORS HOLDINGS INC., ONE DOT FOUR CORP., ONE DOT SIX CORP., SKYTERRA ROLLUP LLC, SKYTERRA ROLLUP SUB LLC, SKYTERRA INVESTORS LLC, TMI COMMUNICATIONS DELAWARE, LIMITED PARTNERSHIP, LIGHTSQUARED GP INC., LIGHTSQUARED LP, ATC TECHNOLOGIES, LLC, LIGHTSQUARED CORP., LIGHTSQUARED FINANCE CO., LIGHTSQUARED NETWORK LLC, LIGHTSQUARED INC. OF VIRGINIA, LIGHTSQUARED SUBSIDIARY LLC, LIGHTSQUARED BERMUDA LTD., SKYTERRA HOLDINGS (CANADA) INC., SKYTERRA (CANADA) INC. AND ONE DOT SIX TVCC CORP. (COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

Applicant

ORDER
(PLAN CONFIRMATION)

THIS MOTION, made by LightSquared LP in its capacity as the foreign representative (the "**Foreign Representative**") of the Chapter 11 Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order recognizing and approving orders granted by the Honourable Judge Shelley C. Chapman of the

United States Bankruptcy Court for the Southern District of New York (the "**U.S. Bankruptcy Court**") which, among other things, confirm the Debtors' *Modified Second Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code*, dated March 26, 2015 (as may be further amended, supplemented, or modified pursuant to the terms thereof, the "**Plan**"), in the cases commenced by the Chapter 11 Debtors under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Chapter 11 Cases**"), and for certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Amended Notice of Motion, dated April 6, 2015, the Affidavit of Elizabeth Creary sworn April 2, 2015, the Supplemental Affidavit of Elizabeth Creary, sworn April 6, 2015, the Affidavit of Sara-Ann Van Allen, sworn April 8, 2015, the Twenty-Fourth Report of Alvarez & Marsal Canada Inc., in its capacity as court-appointed information officer of the Chapter 11 Debtors (the "**Information Officer**"), dated April 6, 2015 (the "**Twenty-Fourth Report**"), the Supplemental Report to the Twenty-Fourth Report of the Information Officer, dated April 8, 2015 (the "**Supplemental Report**"), the Factum and Book of Authorities of the Foreign Representative, dated April 8, 2015, and on hearing the submissions of counsel for the Foreign Representative, counsel for the Information Officer, and counsel to certain lenders of the Chapter 11 Debtors, no one else appearing although duly served as appears from the affidavits of service of Joanna Lewandowska, sworn April 6, 2015 and April 8, 2015, filed, and the affidavit of service of Sara-Ann Van Allen, sworn April 6, 2015, filed,

DEFINITIONS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan or Confirmation Order (as defined below).

SERVICE

2. **THIS COURT ORDERS** that the timing and method of service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today.

RECOGNITION OF FOREIGN ORDERS

3. **THIS COURT ORDERS** that the following orders (collectively, the "**Foreign Orders**") of the U.S. Bankruptcy Court made in the Chapter 11 Cases are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

(a) *Order Confirming Modified Second Amended Joint Plan Pursuant To Chapter 11 Of Bankruptcy Code* (the "**Confirmation Order**") [U.S. Bankruptcy Court Docket No. 2276];

(b) *Order, Pursuant to 11 U.S.C. §§ 105(A) and 363, Authorizing LightSquared to (A) Enter into and Perform Under Letters Related to $1,515,000,000 Second Lien Exit Financing Arrangements, (B) Pay Fees and Expenses in Connection Therewith, and (C) Provide Related Indemnities* [U.S. Bankruptcy Court Docket No. 2273];

(c) *Order Authorizing Payment of Alternative Transaction Fee in Connection with Proposed Plan of Reorganization* [U.S. Bankruptcy Court Docket No. 2275];

(d) *Order (A) Authorizing Use of Cash Collateral, if any, Through Plan Effective Date, (B) Establishing that Prepetition Secured Parties are Adequately Protected and (C) Modifying Automatic Stay* [U.S. Bankruptcy Court Docket No. 2304]; and

(e) *Order Amending Final Order (A) Authorizing DIP Obligors To Obtain Eighth Replacement Superpriority Senior Secured Priming Postpetition Financing, (B) Granting Superpriority Liens and Providing Superpriority Administrative Expense Status, (C) Granting Adequate Protection, and (D) Modifying Automatic Stay* [U.S. Bankruptcy Court Docket No. 2300];

attached hereto as Schedules "A-E" provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to the Chapter 11 Debtors' current and future assets, undertakings, and properties of every nature and kind whatsoever in Canada.

IMPLEMENTATION OF PLAN

4. **THIS COURT ORDERS** that the Chapter 11 Debtors are authorized, directed and permitted to take all such steps and actions, and do all things necessary or appropriate to implement the Plan and the transactions contemplated thereby in accordance with and subject to the terms of the Plan, and to enter into, execute, deliver, implement and consummate all the steps, transactions and agreements contemplated by the Plan.

5. **THIS COURT ORDERS AND DECLARES** that, upon the occurrence of the Effective Date, the terms of the Plan and Plan Supplement shall be immediately effective and enforceable and deemed binding upon the Chapter 11 Debtors, the Reorganized Debtors, any and all Holders of Claims or Equity Interests, all Entities that are parties or subject to the settlements, compromises, releases, discharges and injunctions described in the Plan, each Entity acquiring or receiving property under the Plan, and any and all non-Chapter 11 Debtor parties to Executory Contracts or Unexpired Leases with the Chapter 11 Debtors.

6. **THIS COURT ORDERS** that, subject to the terms of the Plan, and effective on the Effective Date, all Executory Contracts and Unexpired Leases listed on the Schedule of Assumed Agreements shall be and remain in full force and effect, unamended, as at the Effective Date, and be enforceable by the Reorganized Debtors, as applicable, in accordance with their terms notwithstanding any provision in such Executory Contract that purports to prohibit, restrict, or condition such assumption and no person shall, following the Effective Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate their obligations under, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such Executory Contract or Unexpired Lease, by reason of:

(a) any event that occurred on or prior to the Effective Date that would have entitled any person thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Chapter 11 Debtors);

(b) the fact that the Chapter 11 Debtors have: (i) sought or obtained relief under the CCAA or the Chapter 11 Cases, or (ii) commenced or completed this proceeding or the Chapter 11 Cases;

(c) the implementation of the Plan, or the completion of any of the steps, transactions or things contemplated by the Plan; or

(d) any compromises, arrangements, transactions, releases or discharges effected pursuant to the Plan.

7. **THIS COURT ORDERS** that, to the extent, (a) all Plan Transactions have occurred or have been consummated prior to or on the Effective Date, and (b) provided by the Confirmation Order and the Plan, from and after the Effective Date, all persons shall be deemed to have waived, (i) any and all defaults then existing or previously committed by the Chapter 11 Debtors, or caused by the Chapter 11 Debtors, and (ii) non-compliance by the Chapter 11 Debtors with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, instrument, credit document, guarantee, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "**Agreement**"), existing between such person and the Chapter 11 Debtors or any other person, and any and all notices of default and demands for payment under any Agreement shall be deemed to be of no further force or effect; provided that nothing in this paragraph shall excuse or be deemed to excuse the Chapter 11 Debtors from performing any of their obligations subsequent to the date of this proceeding, including, without limitation, obligations under the Plan.

8. **THIS COURT ORDERS** that, as of the Effective Date, to the extent all Plan Transactions have occurred or have been consummated prior to or on the Effective Date, each creditor of the Chapter 11 Debtors shall be deemed to have consented and agreed to all of the provisions of the Plan in their entirety and, in particular, each creditor shall be deemed:

(a) to have executed and delivered to the Chapter 11 Debtors all consents, releases or agreements required to implement and carry out the Plan in its entirety; and

(b) to have agreed that if there is any conflict between, (i) the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such creditors and the Chapter 11 Debtors as of the Effective Date, and (ii) the provisions of the Plan and Confirmation Order, the provisions of the Plan

Confirmation Order take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

RELEASES AND INJUNCTIONS

9. **THIS COURT ORDERS** that, without limiting anything in this Order, the releases, exculpations and injunctions set forth in the Confirmation Order and set out in Article VIII of the Plan be, and the same are, hereby approved and shall be effective in Canada immediately or on the Effective Date, as applicable, in accordance with the Confirmation Order and the Plan, without further act or order.

STAY OF PROCEEDINGS

10. **THIS COURT ORDERS** that the Stay Period (as defined in the Initial Recognition Order, dated May 18, 2012 (the "**Initial Recognition Order**") and the Supplemental Recognition Order, dated May 18, 2012 (the "**Supplemental Recognition Order**")) be and is terminated as of the Effective Date.

INITIAL RECOGNITION ORDER AND SUPPLEMENTAL RECOGNITION ORDER

11. **THIS COURT ORDERS** that, except to the extent that the Initial Recognition Order or the Supplemental Recognition Order has been varied by or is inconsistent with this Order or any further Order of this Court, the provisions of the Initial Recognition Order and the Supplemental Recognition Order shall remain in full force and effect until the Effective Date, provided that the protections granted in favour of the Information Officer pursuant to the Initial Recognition Order and the Supplemental Recognition Order shall continue in full force and effect after the Effective Date.

12. **THIS COURT ORDERS** that, despite anything to the contrary herein, nothing in this Order, the Plan, or any order confirmed or made herein prevents a person from seeking or obtaining benefits under a government-mandated workers' compensation system, or a government agency or insurance company from seeking or obtaining reimbursement, contribution, subrogation, or indemnity as a result of payments made to or for the benefit of such

person under such a system or for fees and expenses incurred under any insurance policies, laws, or regulations covering workers' compensation claims.

INFORMATION OFFICER REPORTS

13. **THIS COURT ORDERS** that the Twenty-Third Report of the Information Officer, dated January 30, 2015, the Twenty-Fourth Report, and the Supplemental Report, and the activities of the Information Officer described therein, be and are hereby approved.

AID AND ASSISTANCE

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective agents and advisors in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative, and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Chapter 11 Debtors, the Foreign Representative, and the Information Officer and their respective agents in carrying out the terms of this Order.

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ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 9 - 2015

TAB 14

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 ONCA 587, 2008 CarswellOnt 4811 | Ontario Court of Appeal | Ontario | August 18, 2008

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	2008 ONCA 587, 2008 CarswellOnt 4811, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 12:57 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2008 ONCA 587
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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 COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee
Aubrey E. Kauffman, Stuart Brotman for 4446372 Canada Inc., 6932819 Canada Inc.
Peter F.C. Howard, Samaneh Hosseini for Bank of America N.A., Citibank N.A., Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity, Deutsche Bank AG, HSBC Bank Canada, HSBC Bank

USA, National Association, Merrill Lynch International, Merill Lynch Capital Services, Inc., Swiss Re Financial Products Corporation, UBS AG
Kenneth T. Rosenberg, Lily Harmer, Max Starnino for Jura Energy Corporation, Redcorp Ventures Ltd.
Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)
Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
Mario J. Forte for Caisse de Dépôt et Placement du Québec
John B. Laskin for National Bank Financial Inc., National Bank of Canada
Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.
Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank
Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees
Usman Sheikh for Coventree Capital Inc.
Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.
Neil C. Saxe for Dominion Bond Rating Service
James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP
Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Subject: Insolvency; Civil Practice and Procedure
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues
Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases
Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers

in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.*:**

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, [7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

TAB 15

Kitchener Frame Ltd., Re

2012 ONSC 234, 2012 CarswellOnt 1347 | Ontario Superior Court of Justice [Commercial List] | Ontario | February 3, 2012

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2012 ONSC 234, 2012 CarswellOnt 1347, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 1:10 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2012 ONSC 234
Ontario Superior Court of Justice [Commercial List]

Kitchener Frame Ltd., Re

2012 CarswellOnt 1347, 2012 ONSC 234, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as Amended

In the Matter of the Consolidated Proposal of Kitchener Frame Limited and Thyssenkrupp Budd Canada, Inc. (Applicants)

Morawetz J.

Judgment: February 3, 2012
Docket: CV-11-9298-00CL

Counsel: Edward A. Sellers, Jeremy E. Dacks for Applicants
Hugh O'Reilly — Non-Union Representative Counsel
L.N. Gottheil — Union Representative Counsel
John Porter for Proposal Trustee, Ernst & Young Inc.
Michael McGraw for CIBC Mellon Trust Company
Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — General principles

Applicants KFL and BC were inactive entities with no operating assets and no material liquid assets — Applicants had significant and mounting obligations including pension and other non-pension post-employment benefit (OPEB) obligations to their former employees and surviving spouses of such former employees or others entitled to claim through such persons — Affiliates of BC provided up to date funding for pension and OPEB obligations, however, given that KFL and BC had no active operations status quo was unsustainable — KFL and BC brought motion to sanction amended consolidated proposal — Motion was granted — Proposal was reasonable — Proposal was calculated to benefit general body of creditors — Proposal was made in good faith — Proposal contained broad release in favour of applicants and certain third parties — Release of third-parties was permitted — Release covered all affected claims, pension claims, and existing escrow fund claims — Release did not cover criminal or wilful misconduct with respect to any matters set out in s. 50(14) of Bankruptcy and Insolvency Act — Unaffected claims were specifically carved out of release — No creditors or stakeholders objected to scope of release which was fully disclosed in negotiations — There was no express prohibition in BIA against including third-party releases in proposal — Any provision of BIA which purported to limit ability of debtor to contract with its creditors had to be clear and explicit — Third-party releases were permissible under Companies' Creditors Arrangement Act (CCAA) and court should strive, where language of both statutes supported it, to give both statutes harmonious interpretation — There was no principled basis on which analysis and treatment of third-party release in BIA proposal proceeding should differ from CCAA proceeding — Released parties contributed in tangle and realistic way to proposal — Without inclusion of releases it was unlikely that certain parties would have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

MOTION by applicants for court sanction of proposal under Bankruptcy and Insolvency Act which contained third-party release.

***Morawetz J.*:**

78 It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

79 The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

80 In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

> (a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> (b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;
>
> (c) the Plan (Proposal) cannot succeed without the releases;
>
> (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and
>
> (e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

81 These requirements have also been referenced in *Canwest Global Communications Corp., Re* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) and *Angiotech Pharmaceuticals Inc., Re* (2011), 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]).

82 No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

83 The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured intercompany loans in the amount of approximately $120 million.

84 Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases, counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

85 The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

TAB 16

Muscletech Research & Development Inc., Re

2007 CarswellOnt 1029 | Ontario Superior Court of Justice [Commercial List] | Ontario | February 22, 2007

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2007 CarswellOnt 1029, [2007] O.J. No. 695, 156 A.C.W.S. (3d) 22, 30 C.B.R. (5th) 59

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 1:11 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2007 CarswellOnt 1029
Ontario Superior Court of Justice [Commercial List]

Muscletech Research & Development Inc., Re

2007 CarswellOnt 1029, [2007] O.J. No. 695, 156 A.C.W.S. (3d) 22, 30 C.B.R. (5th) 59

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO (Applicants)

Ground J.

Heard: February 15, 2007
Judgment: February 22, 2007
Docket: 06-CL-6241

Counsel: Fred Myers, David Bish for Applicants, CCAA
Derrick Tay, Randy Sutton for Iovate Companies
Natasha MacParland, Jay Schwartz for RSM Richter Inc.
Steven Gollick for Zurich Insurance Company
A. Kauffman for GNC Oldco
Sheryl Seigel for General Nutrition Companies Inc. and other GNC Newcos
Pamela Huff, Beth Posno for Representative Plaintiffs
Jeff Carhart for Ad Hoc Tort Claimants Committee
David Molton, Steven Smith for Brown Rudnick
Brent McPherson for XL Insurance America Inc.
Alex Ilchenko for Walgreen Co.
Lisa La Horey for E&L Associates, Inc.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Insolvent company advertised, marketed and sold health supplements and weight loss and sports nutrition products and was attempting to restructure under Companies' Creditors Arrangement Act — Large number of product liability and other lawsuits related to company's products was commenced principally in United States by numerous claimants — Applicants were 15 corporations involved in production and trade-marking of company's products who were defendants in United States' litigation and who sought global resolution of claims — Applicants brought motion pursuant to s. 6 of Act for sanction of liquidation plan funded entirely by third parties and which included third party releases — Plan was unanimously approved by all classes of creditors and appointed monitor — At hearing on motion issue arose as to jurisdiction of court to authorize third party releases as one of plan terms — Motion granted — On consideration of all relevant factors plan was fair and reasonable and exercise of discretion pursuant to s. 6 of Act to sanction plan was warranted — Applicants strictly complied with all statutory requirements, adhered to all previous orders, were insolvent within meaning of s. 2 of Act and had total claims within meaning of s. 12 of Act in excess of $5,000,000 — Creditors' and monitor's approval of plan supported conclusion that plan was fair and reasonable — On balancing of prejudice to various parties, without plan creditors would receive nothing and third parties would continue to be mired in extensive and possibly conflicting litigation in United States — Third party releases were condition precedent to establishment of contributed funds and were reasonable — Opposition to sanction of plan by prospective representative

plaintiffs in five class actions was without merit — Representative plaintiffs had opportunity to submit individual proofs of claim but chose not to do so.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Insolvent company advertised, marketed and sold health supplements and weight loss and sports nutrition products and was attempting to restructure under Companies' Creditors Arrangement Act — Large number of product liability and other lawsuits related to company's products was commenced principally in United States by numerous claimants — Applicants were 15 corporations involved in production and trade-marking of company's products who were defendants in United States' litigation and who sought global resolution of claims — Applicants brought motion pursuant to s. 6 of Act for sanction of liquidation plan funded entirely by third parties and which included third party releases — Plan was unanimously approved by all classes of creditors and appointed monitor — At hearing on motion issue arose as to jurisdiction of court to authorize third party releases as one of plan terms — Motion granted — Position of plan opponents that court lacked jurisdiction to grant third party releases was without merit — Whole plan of compromise was funded by third parties and would not proceed without resolution of all claims against third parties — Act did not prohibit inclusion in plan of settlement of claims against third parties — Jurisdiction of courts to grant third party releases was recognized in both Canada and United States.

MOTION by insolvent company for sanction of liquidation plan.

***Ground J.*:**

1 The motion before this court is brought by the Applicants pursuant to s. 6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for the sanction of a plan (the "Plan") put forward by the Applicants for distributions to each creditor in the General Claimants Class ("GCC") and each creditor in the Personal Injury Claimants Class ("PICC"), such distributions to be funded from the contributed funds paid to the Monitor by the subject parties ("SP") as defined in the Plan.

2 The Plan is not a restructuring plan but is a unique liquidation plan funded entirely by parties other than the Applicants.

3 The purpose and goal of the Applicants in seeking relief under the CCAA is to achieve a global resolution of a large number of product liability and other lawsuits commenced principally in the United States of America by numerous claimants and which relate to products formerly advertised, marketed and sold by MuscleTech Research and Development Inc. ("MDI") and to resolve such actions as against the Applicants and Third Parties.

4 In addition to the Applicants, many of these actions named as a party defendant one or more of: (a) the directors and officers, and affiliates of the Applicants (i.e. one or more of the Iovate Companies); and/or (b) arm's length third parties such as manufacturers, researchers and retailers of MDI's products (collectively, the "Third Parties"). Many, if not all, of the Third Parties have claims for contribution or indemnity against the Applicants and/or other Third Parties relating to these actions.

The Claims Process

5 On March 3, 2006, this court granted an unopposed order (the "Call For Claims Order") that established a process for the calling of: (a) all Claims (as defined in the Call For Claims Order) in respect of the Applicants and its officers and directors; and (b) all Product Liability Claims (as defined in the Call For Claims Order) in respect of the Applicants and Third Parties.

6 The Call For Claims Order required people who wished to advance claims to file proofs of claim with the Monitor by no later than 5:00 p.m. (EST) on May 8, 2006 (the "Claims Bar Date"), failing which any and all such claims would be forever barred. The Call For Claims Order was approved by unopposed Order of the United States District Court for the Southern District of New York (the "U.S. Court") dated March 22, 2006. The Call For Claims Order set out in a comprehensive manner the types of claims being called for and established an elaborate method of giving broad notice to anyone who might have such claims.

7 Pursuant to an order dated June 8, 2006 (the "Claims Resolution Order"), this court approved a process for the resolution of the Claims and Product Liability Claims. The claims resolution process set out in the Claims Resolution Order provided for, *inter alia*: (a) a process for the review of proofs of claim filed with the Monitor; (b) a process for the acceptance, revision or

seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no member of the putative class other than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of Rakoff, J. in *Re Ephedra Products Liability Litigation* (2005) U.S. Dist. LEXIS 16060 at page 6 are particularly apt.

> Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be $ 30, entitling each claimant to a distribution of about $ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering $ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

[35] In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez et al. v. Metabolife International Inc.* (2003) U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

23 The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.

The representative Plaintiffs also appear to challenge the jurisdiction of this court to authorize the Third Party Releases as one of the terms of the Plan to be sanctioned. I remain of the view expressed in paragraphs 7-9 of my endorsement dated October 13, 2006 in this proceeding on a motion brought by certain personal injury claimants, as follows:

> With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> > the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.
>
> Moreover, it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs of Claim settling [sic] out in detail their claims against numerous Third Parties.
>
> It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) Paperny J. stated at p. 92:
>
> > While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

24 The representative Plaintiffs have referred to certain decisions in the United States that appear to question the jurisdiction of the courts to grant Third Party Releases. I note, however, that Judge Rakoff, who is the U.S. District Court Judge is seized of the *MuscleTech* proceeding, and Judge Drain stated in a hearing in *Re TL Administration Corporation* on July 21, 2005:

> It appears to us to be clear that this release was, indeed, essential to the settlement which underlies this plan as set forth at length on the record, including by counsel for the official claimants committee as well as by the other parties involved, and, as importantly, by our review of the settlement agreement itself, which from the start, before this particular plan in fact was filed, included a release that was not limited to class 4 claims but would extend to claims in class 5 that would include the type of claim asserted by the consumer class claims.
>
> Therefore, in contrast to the Blechman release, this release is essential to confirmation of this plan and the distributions that will be made to creditors in both classes, class 4 and class 5.
>
> Secondly, the parties who are being released here have asserted indemnification claims against the estate, and because of the active nature of the litigation against them, it appears that those claims would have a good chance, if not resolved through this plan, of actually being allowed and reducing the claims of creditors.

At least there is a clear element of circularity between the third-party claims and the indemnification rights of the settling third parties, which is another very important factor recognized in the Second Circuit cases, including Manville, Drexel, Finely, Kumble and the like.

The settling third parties it is undisputed are contributing by far the most assets to the settlement, and those assets are substantial in respect of this reorganization by this Chapter 11 case. They're the main assets being contributed.

Again, both classes have voted overwhelmingly for confirmation of the plan, particularly in terms of the numbers of those voting. Each of those factors, although they may be weighed differently in different cases, appear in all the cases where there have been injunctions protecting third parties.

The one factor that is sometimes cited in other cases, i.e., that the settlement will pay substantially all of the claims against the estate, we do not view to be dispositive. Obviously, substantially all of the claims against the estate are not being paid here. On the other hand, even, again, in the Second Circuit cases, that is not a dispositive factor. There have been numerous cases where plans have been confirmed over opposition with respect to third-party releases and third-party injunctions where the percentage recovery of creditors was in the range provided for under this plan.

The key point is that the settlement was arrived at after arduous arm's length negotiations and that it is a substantial amount and that the key parties in interest and the court are satisfied that the settlement is fair and it is unlikely that substantially more would be obtained in negotiation.

25 The reasoning of Judge Rakoff and Judge Drain is, in my view, equally applicable to the case at bar where the facts are substantially similar.

26 It would accordingly appear that the jurisdiction of the courts to grant Third Party Releases has been recognized both in Canada and in the United States.

27 An order will issue sanctioning the Plan in the form of the order submitted to this court and appended as Schedule B to this endorsement.

Motion granted.

Schedule"A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Trademark Ltd.

MT Canadian Supplement Trademark Ltd.

MT Foreign Supplement Trademark Ltd.

HC Trademark Holdings Ltd.

TAB 17

In the Matter of a Plan of Arrangement of UrtheCast Corp.

2021 BCSC 1819, 2021 CarswellBC 2886 | British Columbia Supreme Court | British Columbia | January 7, 2021

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2021 BCSC 1819, 2021 CarswellBC 2886, 336 A.C.W.S. (3d) 20, 92 C.B.R. (6th) 294

Find Details

Jurisdiction:	British Columbia

Delivery Details

Date:	November 11, 2023 at 1:12 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2021 BCSC 1819
British Columbia Supreme Court

In the Matter of a Plan of Arrangement of UrtheCast Corp.

2021 CarswellBC 2886, 2021 BCSC 1819, 336 A.C.W.S. (3d) 20, 92 C.B.R. (6th) 294

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 Compromise and Arrangement of UrtheCast Corp., UrtheCast International Corp., UrtheCast USA Inc., 1185729 BC Ltd. and Those Other Petitioners Set Out on the Attached Schedule "A"

Sharma J.

Heard: January 6-7, 2021
Judgment: January 7, 2021
Docket: Vancouver S208894

Counsel: D.E. Gruber, J. Mighton, B. Reedijk, for Petitioners, UrtheCast Corp.
C. Brousson, J. Bradshaw, for Monitor, Ernst & Young
M. Nowina, for Land O'Lakes and WinField
I. Aversa, for 1262743 BC Ltd.
S. Collins, R. Richardson, for Antarctica Capital and UrtheDaily

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Parties were involved in proceedings under Companies' Creditors Arrangement Act — Debtor brought petition for extension of stay to conclude transactions necessary to effect two asset sales, one of which was not controversial between parties and other involving weather imagery technology — Debtor also sought assignment of contract regarding weather imagery technology — Petition granted — Monitor approved of proposed assignment — Reasonable to assume that sophisticated financial entity debtor-in-possession (DIP) facilitator would not be involved if it did not have confidence that it could raise required money, and considerable amount had already been spent and advanced under DIP facility — Although DIP facilitator had no experience in satellite imagery, it had retained experts to assist it — Assignment was necessary for asset sale to go forward because it was vital to successful restructuring — Not shown that non-monetary default under agreement had occurred regarding launch of satellites — There was strong enough case presented that potential of existing default did not outweigh benefits of restructuring — Release of third-party claims against former directors and officers granted.

PETITION by debtor company for assignment of contract in insolvency proceedings.

***Sharma J.* (orally):**

I. INTRODUCTION

1 This is the written version of an oral judgment that was delivered on January 7, 2021. When I delivered the judgment, I advised the parties any written version of it would be edited to include more background, none of which is disputed. Other than those additions, edits have been made to add citations, references to the evidence or to clarify wording, improve style or correct grammatical errors. Nothing substantial has been altered.

2 This matter is an ongoing proceeding pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C–36 [CCAA].

> [27] Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.
>
> . . .
>
> [29] Bankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another.
>
> [30] It seems to me that a fundamental condition precedent to requiring a contract counterpart to be locked into an involuntary assignment post-insolvency is that the court sanctioning the assignment is able to conclude that the assignee will, in the words of s. 11.3(3)(b) of the CCAA, "be able to perform the obligations". This does not imply iron-clad guarantees. It does not give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor.

46 Despite the concerns in that case (which included factors not present here), the court approved the assignment.

47 Land O'Lakes says *Dundee* is helpful. It submits that the factors which allowed the court in that case to overcome its grave concerns do not exist on the facts before me. Specifically, Land O'Lakes says the court was satisfied that the evidence demonstrated that the cash flow was solid. Land O'Lakes says the evidence before me does not do the same.

48 Land O'Lakes also submits that in *Dundee*, the court had the assurance that an independent party (Deloitte) had reviewed the business plan going forward and expressed some confidence in it. With regard to the forecasts in that plan, the court commented that they had been prepared to "reviewable standards of reasonableness" (at para. 34). The court also stated that the forecasts established a "*reasonable basis* to conclude that the cash flow from the acquired assets will sustain operations and the acquisition debt" (at para. 34, emphasis in original).

49 In this case, I find it significant that the Monitor has approved of the assignment and is in favour of it. At para. 69(c) of the 6th Report, the Monitor mentions what it calls the "robust transactional history" of the principals of Antarctica Capital. This is a reference to the affidavit of Chandra Patel, which I also rely on, where he describes Antarctica's considerable experience in finding investors and financing, as well as in setting up companies that not only finance but also purport to run the businesses they are involved with. This favours allowing the assignment.

50 I agree that it is reasonable for this Court to assume that a sophisticated financial entity such as Antarctica Capital would not be proceeding if it did not have confidence that it could raise the money, having said it will in its forecasts. It has already spent over $2 million on due diligence in professional fees, and it has already advanced about $2.8 million in the DIP facility. It is committed to paying all the cure costs, which are not insignificant. I agree this gives me some comfort about the viability and the likely success of the venture that is being proposed.

51 Land O'Lakes identifies another reason why I should not be satisfied on the evidence before me that the capital needed to continue will be raised. It points out that Antarctica Capital has no experience in the particular sector (satellite imagery). However, Antarctica Capital submits that as any prudent business would do, it has retained experts to assist it. Land O'Lakes has had some communications with those experts.

TAB 18

Ted Leroy Trucking [Century Services] Ltd., Re

2010 SCC 60, 2010 CSC 60, 2010 CarswellBC 3419 | Supreme Court of Canada | British Columbia | December 16, 2010

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	2010 SCC 60, 2010 CSC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Find Details

Jurisdiction:	SCC

Delivery Details

Date:	November 11, 2023 at 1:14 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, 2010 CSC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to

assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le

régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the

CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.
Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised

get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

TAB 19

Veris Gold Corp., Re

2015 BCSC 1204, 2015 CarswellBC 1949 | British Columbia Supreme Court | British Columbia | July 10, 2015

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2015 BCSC 1204, 2015 CarswellBC 1949, [2015] B.C.W.L.D. 4800, 256 A.C.W.S. (3d) 765, 26 C.B.R. (6th) 310

Find Details

Jurisdiction:	British Columbia

Delivery Details

Date:	November 11, 2023 at 1:18 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

2015 BCSC 1204
British Columbia Supreme Court

Veris Gold Corp., Re

2015 CarswellBC 1949, 2015 BCSC 1204, [2015] B.C.W.L.D. 4800, 256 A.C.W.S. (3d) 765, 26 C.B.R. (6th) 310

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, As Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

In the Matter of Veris Gold Corp., Queenstake Resources Ltd., Ketza River Holdings, and Veris Gold USA, Inc., Petitioners

Fitzpatrick J.

Heard: May 28, 2015
Judgment: July 10, 2015
Docket: Vancouver S144431

Counsel: J. Sandrelli, T. Jeffries for Monitor, Ernst & Young Inc.
D. Vu, for Deutsche Bank A.G.
C. Ramsay, S. Irving, K. Mak for Moelis & Company
K. Jackson, D. Toigo for Whitebox Advisors LLC, WBox 2014-1 Ltd.
R. Morse, N. Vaartunou (A/S) for Attorney General of Nevada
C. Ramsay, K. Mak for Nevada Cement
C. Brousson, J. Bradshaw (A/S) for NV Energy
J. Porter for Government of Yukon
K. Siddall for AIG
S. Ross for Linde LLC

Subject: Insolvency; International

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Assets of petitioner companies were gold mine in USA and mining properties in Canada — Initial order was granted in June 2014 due to steps taken by major secured creditor, DB to collect debt of approximately US$90 billion — Matters were stabilized, and in October 2014 court approved interim financing from WB in amount of US$12 million — Detailed sale and solicitation process was approved, but no qualified bids were received — Eventually petitioner entered into asset sale agreement with WBVG, which was wholly owned by WB — Monitor brought application to complete asset sale agreement — Application granted — Factors set out in s. 36(3) of Companies' Creditors Arrangement Act supported granting order — Process leading to transaction were fair and reasonable — Sale was best outcome for operational stakeholders — WBVG was to be assigned contracts as this would facilitate continuation of operations — Due to exigent and extraordinary circumstances, assignments were approved subject to US court being satisfied with notification to and service on counterparties to assigned contracts who did not received direct notice of application to approve sale.

APPLICATION by monitor for order approving and completing asset sale agreement.

***Fitzpatrick J.*:**

44 No one misunderstands that if the transaction is not approved WBox will withdraw funding and Veris Gold will almost certainly have to commence an orderly wind down of its operations and liquidation of its assets to satisfy the debt owed to WBox. It is more than likely that WBox will suffer a shortfall in a liquidation scenario. A liquidation scenario will also likely result in the Nevada environmental regulators taking over care and maintenance of the mine site on an expedited basis, at significant expense and with the possibility of environmental damage resulting from a surrender of the mine site without the lead time needed by the regulators.

45 In all the circumstances, a consideration of all the factors in s. 36 of the *CCAA* supports the conclusions that the proposed transaction is fair and reasonable and that the Agreement should be approved.

(b) Assignment of Contracts

46 The asset sale agreement provides that WBVG will be assigned the "Assigned Contracts", which are defined as meaning "all Designated Seller Contracts" and also described as "Required Assigned Contracts". All of these contracts are listed in a schedule attached to the purchaser disclosure schedule delivered by WBVG to Veris Gold.

47 The Monitor seeks approval of the assignment of the Designated Seller Contracts, save to the extent that consents from counterparties have not already been obtained.

48 The relevant statutory authority to approve such assignments is found in s. 11.3 of the *CCAA*:

> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.
>
> . . .
>
> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed assignment;
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.
>
> (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.
>
> (5) The applicant is to send a copy of the order to every party to the agreement.

49 The Monitor's report and recommendations are in support of approval of these assignments. These approvals are part of the Monitor's overall recommendations in favour of the Agreement. WBVG has indicated its willingness to continue the operations of Veris Gold in Nevada on a going concern basis. The participation of WBox and Mr. Sprott lend credibility to its ability to do so, while performing any obligations under these contracts.

50 In that context, it is appropriate that WBVG obtain the benefit of contracts that will facilitate its ability to continue these operations. Indeed, some of the contracts are critical or necessary for future operations.

51 In addition, the Agreement contemplates the payment of "cure costs" which are defined in the Agreement in relation to statutory obligations arising under both s. 11.3(4) of the *CCAA* and s. 365(b)(1) of the *Bankruptcy Code* where the assignment of contracts is approved. Cure costs are defined in the Agreement as follows:

TAB 20

Nortel Networks Corp., Re

2017 ONSC 673, 2017 CarswellOnt 1122 | Ontario Superior Court of Justice [Commercial List] | Ontario | January 27, 2017

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	2017 ONSC 673, 2017 CarswellOnt 1122, 275 A.C.W.S. (3d) 696, 44 C.B.R. (6th) 289

Find Details

Jurisdiction:	Ontario

Delivery Details

Date:	November 11, 2023 at 1:48 p.m.
Delivered By:	Natalie Gillespie
Client ID:	A33002.1
Status Icons:	

Outline

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

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.

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 Latin America and Asia. NNC, the Nortel Group's ultimate parent holding company, was publicly listed and traded on both the Toronto Stock Exchange and the New York Stock Exchange.

4 On January 14, 2009 NNC, NNL, the wholly owned subsidiary of NNC which was its operating subsidiary and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary of NNL, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code and Nortel Networks UK Limited ("NNUK"), the principal UK subsidiary of NNL, and certain of their subsidiaries (the "EMEA Debtors") save the French subsidiary Nortel Networks S.A. ("NNSA") were granted administration orders under the UK Insolvency Act, 1986. On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

5 The Monitor was appointed in the Initial Order of January 14, 2009 which directed that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice." It is normal in CCAA proceedings for the Monitor to pass its accounts periodically. This was no normal CCAA proceeding and the Monitor chose not to pass its accounts periodically but rather wait until the end of the proceedings. One advantage in having all of the accounts passed at this stage is that up to date information as to the level of success achieved by the Monitor, one of the key factors to be considered, is now available as a result of the settlement recently achieved in the allocation dispute.

6 Normally a Monitor performs a neutral role as a court officer in a CCAA proceeding. However in this case there were two orders giving the Monitor extraordinary powers. On August 10, 2009, Nortel announced the departure of its then CEO, Mike Zafirovski, and on the same day five members of NNC's and NNL's boards of directors resigned. As a result of this change in circumstances, on August 14, 2009, this Court granted an Order that expanded the Monitor's role and powers to include, *inter alia*, the ability:

> (a) to conduct, supervise and direct the sales processes for the Canadian Debtors' property or business and any procedure regarding the allocation and/or distribution of proceeds of any sales;
>
> (b) to cause the Canadian Debtors to exercise the various restructuring powers authorized under paragraph 11 of the Initial Order and to cause the Canadian Debtors to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Canadian Debtors in dealing with their property, operations, restructuring, wind-down, liquidation or other activities; and

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.

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.

