

No. S-120712
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44

AND

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

AND

IN THE MATTER OF CATALYST PAPER CORPORATION
AND OTHER PETITIONERS

PETITIONERS

RESPONSE TO NOTICE OF APPLICATION

Filed by:

Western Forest Products Inc.
International Forest Products Limited
Seaspan Marine Corporation

THIS IS A RESPONSE to the Notice of Application filed by the Petitioners on February 1, 2012.

Part 1: ORDERS CONSENTED TO

These Respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: Nil.

Part 2: ORDERS OPPOSED

These Respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application:

2.(a) through (f).

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

These Respondents take no position on the granting of orders set out in the following paragraphs of Part 1 of the Notice of Application:

1 and 3.

Part 4: FACTUAL BASIS

1. These Respondents are all counterparties to continuing supply agreements with one or more of the Petitioners, and accordingly are subject to the requirements contained in paragraph 22 and 23 of the Interim Order pronounced in this proceeding on January 31, 2012 (the "Interim Order"). The products and services that these Respondents provide to the Petitioners involve significant structural investments, and their cash flow requirements are managed on the basis of long-term, historical practices.
2. As a result of the Interim Order, these Respondents have been precluded from relying upon their remedies under their agreements with the Petitioners, and are collectively exposed to approximately \$2,500,000 in pre-Order accounts receivable.
3. Since the pronouncement of the Interim Order, and in accordance with paragraphs 22 and 23 of the Initial Order, these Respondents have continued to supply goods and services in accordance with their obligations under the supply agreements, and have advised the Petitioners of their intent to continue meeting those obligations. This is not a situation in which any of the Respondents have indicated an unwillingness or inability to continue to supply the Petitioners. To the contrary, the Respondents are obligated to continue to supply in accordance with the terms of the Initial Order, and have confirmed their willingness to do so.
4. Section 11.01 of the CCAA ensures that a supplier is entitled to require immediate payment for goods and services provided after the Initial Order is made. Additionally,

much of the cost involved in the supply of products and services to the Petitioners by these Respondents is "up front", with the Petitioners receiving the benefit upon delivery to their premises. The Petitioners have, since the date of the Interim Order, provided payment in advance for ongoing supply of goods and services to each of these Respondents.

5. In each case, the Petitioners have acknowledged that advance payment is an appropriate arrangement to protect against further loss exposure for these Respondents.
6. While each of these Respondents may be "critical in fact" to the continued operation of the Petitioners, there is no requirement for a further order that these Respondents be compelled to continue in their supply of goods and services to the Petitioners; this is already required under paragraphs 22 and 23 of the Interim Order.
7. Any order declaring these Respondents to be critical suppliers would deprive them of the right to be paid immediately for their goods and services, and would instead require them to provide further credit to the Petitioners on the basis of subordinated security.
8. The value of that subordinated security, and therefore the risk being forced upon these Respondents if they are declared critical suppliers, is simply not known.
9. The additional risk to these Respondents if they are compelled to provide payment terms is in the range of \$6,080,000 to \$9,390,000, based upon their pre-Order credit terms.

Part 5: LEGAL BASIS/ARGUMENT

10. The Critical Supplier provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"), are set out in section 11.4:

Critical supplier

11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

11. These provisions were added in 2009. Previously, critical supplier arrangements were made pursuant to the Court's inherent jurisdiction, and the discretion afforded under s. 11.
12. The amendment was made to address a limited, specific circumstance: where it is necessary for the Court to compel a person to supply a debtor company. This is apparent from the Industry Canada Briefing Book on the 2009 amendments to the CCAA:

Rationale

Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

Subsection (1) provides that a court may designate a supplier to the debtor company to be a critical supplier. The designation should not be lightly granted but

should only be made where the supplier is of such a nature that the debtor company would not be able to continue to operate without a continuing business relationship.

Subsection (2) provides that a court may require a critical supplier to continue to supply goods and services to the debtor company. The court will have the authority to determine the appropriate terms and conditions of the business relationship, however, the court should look to the existing terms or, if necessary, the prevailing market terms.

Subsection (3) stipulates that the court must provide the critical supplier with a security charge for the value of the goods or services supplied as a critical supplier. The provision is to ensure that the critical supplier is paid for its goods or services.

Subsection (4) provides the court with the ability to determine the priority of the security charge. It is expected that the court will recognize the uniqueness of this situation and grant the critical supplier a high priority.

13. Section 11.4(1) sets out the court's ability to make an order declaring a person to be a critical supplier. Once so declared, the court *may* then order such supplier to continue to supply during the restructuring. This is, in effect, a mandatory injunction against the supplier.

14. This extraordinary judicial power to compel a person to continue to supply an insolvent customer should be considered in its proper context. As is clear from the Industry Canada paper, the objective of the amendments was to address instances of necessity, where there is no other way to compel a critical supplier to remain involved in the operations of an insolvent company. It has its genesis in the doctrine of necessity, and can be traced back to cases such as *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 1990 CarswellBC 425; 80 C.B.R. (N.S.) 98 (B.C.S.C.) [See generally Philippe Belanger's article: "Critical Suppliers: What Does Section 11.4 Mean?", *Banking and Finance Law Review*, Volume 26, Number 1 (September 2010), page 1.]

15. There has been only limited judicial consideration of s. 11.4, and no decisions considering an application to impose the declaration upon a party already supplying goods or services. The judicial commentary to date has noted that the drafting is "...not very clear."

Canwest Global Communications Corp., Re (October 6, 2009), Doc. CV-09-8396-OOCL (Ont. S.C.J. [Commercial List]), at paragraph 50.

16. While the section itself may be unclear, the situations it was intended to govern are not. There is no need to resort to this authority except in respect of those suppliers who are not contractually bound to continue to supply to the debtor during the restructuring. Where there is a long term supply agreement, the supplier is already precluded from terminating the agreement (by s. 34 of the CCAA).

17. Moreover, in this case the Interim Order specifically requires that these Respondents continue to supply goods and services to the Petitioners.

18. Significantly, this is not a case where suppliers are seeking protection for post-Order accounts. These Respondents have relied upon paragraph 11.01 of the CCAA, which provides:

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

19. The Petitioners have complied with these requirements, by providing advance payment to these Respondents for any goods and services provided since the date of the Interim Order.

20. In the circumstances, there is simply no need to invoke the court's discretion under s. 11.4.

21. The critical supplier provisions are clearly intended to be used for the protection of unwilling suppliers who must be compelled to supply by the court. The Petitioners are, in effect, corrupting the use of s. 11.4, seeking to use it as a "sword" against certain of its suppliers who are already providing what they are required to. The sole purpose behind this application is to deprive these Respondents of their rights under s. 11.01, offering instead low-ranking security, the true liquidation value of which has not been established.

Part 6: MATERIAL TO BE RELIED UPON

- Interim Order.
- Affidavit of Steven D. Dvorak #1.

These Respondents estimate that the application will take 2 hours.

These Respondents have filed in this proceeding a document that contains their addresses for service.

x These Respondents have not filed in this proceeding a document that contains an address for service. Their ADDRESS FOR SERVICE is: 3000 – 1055 West Georgia Street, Vancouver, BC, V6E 3R3 (Telephone: 604-687-6575).

Bull, Housser & Tupper LLP

per:



Signature of

lawyer for the Respondents Western Forest Products Inc., International Forest Products Limited, and Seaspan Marine Corporation

E. Jane Milton, QC

This Response to Notice of Application is filed by Bull, Housser & Tupper LLP of 3000 – 1055 West Georgia Street, Vancouver, B.C. V6E 3R3 (Telephone: 604-687-6575)

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BULL, HOUSER & TUPPER LLP
Barristers & Solicitors
3000 - 1055 West Georgia Street
Vancouver, B.C. V6E 3R3
Attention: Steven D. Dvorak
Direct Telephone:
Direct Facsimile:

SDD/cef

Matter# 08-2506