TAB 11

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

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

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

---

[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

---

[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

---

[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6] and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

---

[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

---

[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4^{th}) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

[12] Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 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 and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the 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.
>
> (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 upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

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

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

---

[13] This exception also applies to the other charges granted.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

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

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

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

---

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

---

[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

TAB 12

C

2009 CarswellQue 9963, 58 C.B.R. (5th) 49, EYB 2009-164655

Mecachrome Canada Inc., Re

In the Matter of the Plan of Compromise or Arrangement of

Mecachrome Canada Inc. and Mecachrome Montréal-Nord Inc. and Mecachrome Technologies Inc. and Mirabel-Mecachrome Inc. (Petitioners) and Ernst & Young Inc. and Samson Bélair Deloitte & Touche Inc. (Co-Monitors)

Quebec Superior Court

Clément Gascon, J.C.S.

Heard: July 14, 16, 2009
Judgment: July 16, 2009
Docket: C.S. Montréal 500-11-035041-082

Counsel: Me Sylvain Rigaud for Petitioners

Me Jean Fontaine for Co-Monitors

Me Sylvain Vauclair for "Fonds de Solidarité des travailleurs du Québec (F.T.Q.), FCRP Aerofund et FCRP Aerofund II, représentés par Société de gestion ACE Management), prêteurs temporaires"

Me Fred Myers, Me Brendan O'Neill, Me Jonathan Warin for "Comité ad hoc des détenteurs de billets"

Me Gordon Levine for Bank of New York Mellon (formerly "Bank of New York") and BNY Trust Company of Canada

Me Francis Meagher, Me Guillaume Hébert for General Electric Canada Equipment Finance G.P.

Me Kurt A. Johnson for Makino, Inc. et SST-Canada, ULC

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

Debtor MII was worldwide manufacturer of high precision components for car and aeronautical industry and, especially, was sole supplier for several commercial customers — In December 2008, MII and its subsidiaries applied to Court for initial order under Companies' Creditors Arrangement Act for purpose of negotiating plan of arrangement with their creditors — Plan funding agreement was entered into between MII and DIP lenders, which lead to conclusion of proposed plan — Under proposed plan, DIP lenders would acquire all shares of MII and, in consideration, DIP lenders would undertake to pay MII approximately 55,000,000 euros — As result, unsecured creditors would recover about 12 per cent of their claims — Group of unsecured creditors contested plan because they were not involved in its negotiation and did not support it — MII and its subsidiaries brought motion asking Court to issue order approving plan funding agreement — Motion dismissed — Act is aimed at enabling debtor company, with support of its creditors, to weather its financial difficulties and continue to operate through conclusion of plan of arrangement on best possible conditions for creditors — Here, probabilities of achieving this fundamental goal appeared to be better served by refusing to approve plan funding agreement presented rather than by tying hands of debtors with respect to consideration of potentially available alternate solutions that could benefit affected creditors — Court considered that debtors and monitor failed to proceed in manner where transparency, integrity, credibility and fairness were beyond reproach — Given absence of open, transparent and flexible process, Court found that unsecured creditors' arguments should prevail — Therefore, while process may be going to dead end without plan, this was not reason for Court to give its blessings to plan resulting from such flawed process.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation du tribunal — Discrétion du tribunal

Débitrice MII était un fabricant mondial de composants de haute précision destinés à l'industrie de l'automobile et de l'aéronautique et, en particulier, était l'unique fournisseur de plusieurs clients commerciaux — En décembre 2008, MII et ses filiales ont demandé au tribunal d'émettre une ordonnance initiale en vertu de la Loi sur les arrangements avec les créanciers des compagnies dont l'objectif était de négocier un plan d'arrangement avec leurs créanciers — Entente sur le plan de financement a été conclue entre MII et des prêteurs de type débiteur en possession (« prêteurs DEP »), ce qui a mené à la conclusion du plan proposé — En vertu du plan proposé, les prêteurs DEP feraient l'acquisition de toutes les actions de MII et, en contrepartie, les prêteurs DEP s'engageraient à payer à MII environ 55 000 000 d'euros — Comme résultat, les créanciers chirographaires récupéreraient environ 12 pour cent de leurs réclamations — Groupe de créanciers chirographaires a contesté le plan parce qu'il n'avait pas été impliqué dans sa négociation et ne l'appuyait pas — MII et ses filiales ont déposé une requête demandant au tribunal d'émettre une ordonnance approuvant l'entente sur le plan de financement — Requête rejetée — Loi a pour objectif de permettre à la compagnie débitrice, avec l'appui de ses créanciers, de passer à travers des difficultés et de continuer ses opérations au moyen d'un plan d'arrangement conclu dans les meilleures conditions pour les créanciers — En l'espèce, il semblait préférable, pour que cet objectif fondamental soit atteint, de refuser d'approuver l'entente sur le plan de financement présenté plutôt que de lier les mains des débitrices en regard des solutions alternatives qu'il était possible de trouver au bénéfice des créanciers visés — Tribunal considérait que les débitrices et le contrôleur n'avaient pas procédé d'une manière qui soit sans reproche en ce qui concerne la transparence, l'intégrité, la crédibilité et l'équité — Considérant l'absence d'un processus ouvert, transparent et flexible, le tribunal a conclu que les arguments des créanciers chirographaires devraient l'emporter — Par conséquent, bien que le processus risquait de se retrouver au point mort sans le plan, ce n'était pas une raison pour que le tribunal donne sa bénédiction à un plan résultant d'un processus aussi défaillant.

Cases considered by *Clément Gascon, J.C.S.*:

Boutique Euphoria (Arrangement) (July 19, 2007), Doc. Montreal 500-11-030746-073 (Que. S.C.) — followed

Calpine Canada Energy Ltd., Re (2007), 2007 ABQB 49, 2007 CarswellAlta 156, 28 C.B.R. (5th) 185 (Alta. Q.B.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Stelco Inc., Re (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]) — referred to

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

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — followed

Tiger Brand Knitting Co., Re (2005), 19 C.B.R. (5th) 53, 2005 CarswellOnt 8387 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 4 — referred to

s. 5 — referred to

s. 11 — referred to

Motion by debtors asking Court to issue order approving plan funding agreement.

***Clément Gascon, J.C.S.*:**

The Motion at Issue

1 The Court renders judgment on a Motion to Approve a Plan Funding Agreement. The reasons are delivered in the English language as the Motion, the Exhibits, the Monitor's Report and the Contestation involved are all drafted in that language.

2 While the Court was ready to render judgment on July 15th, at the request of the parties' Counsel, the delivery of these reasons was postponed for 24 hours in view of their ongoing discussions.

3 By their Motion dated July 7, 2009, Mecachrome International Inc. (MII), Mecachrome Canada Inc., Mecachrome Montréal-Nord Inc., Mecachrome Technologies Inc. and Mirabel Mecachrome Inc. (collectively, the Canadian Debtors), ask the Court to issue an order approving a Plan Funding Agreement (the PFA) entered into between MII and FCPR Aerofund, FCPR Aerofund II, the Fonds de solidarité des travailleurs du Québec FTQ (together, the DIP Lenders) and Mecadev SAS, a newly formed entity to remain under the control of the DIP Lenders.

4 The original PFA at issue, dated July 4, 2009[FN1] , was amended during the second phase of oral arguments, namely on July 14, 2009, and replaced by another one, this time dated July 13, 2009[FN2] .

5 The Motion is filed pursuant to a restructuring process initiated on December 12, 2008, whereby the Canadian Debtors applied to the Court for the issuance of an initial order under Sections 4, 5 and 11 of the *CCAA*[FN3] .

6 The goal was to enable the restructuring of their affairs by preparing, negotiating and implementing a plan of arrangement with their creditors. The Canadian Debtors were then - and are still - operating at a deficit and facing serious liquidity problems.

7 On that same day, the subsidiaries of MII incorporated in France, that is, Mecachrome France SAS and Mecachrome SAS (the French Debtors), also applied for the commencement of a parallel safeguard procedure in France.

The PFA

8 The PFA referred to in the Motion sets out the terms and conditions on which the DIP Lenders propose to fund a plan of compromise or arrangement (the Proposed Plan), to be implemented pursuant to the *CCAA* in respect of the Canadian Debtors and their creditors.

9 In short, the PFA as amended provides for:

a) the execution and implementation of the restructuring transactions agreed upon in the Proposed Plan attached as Schedule A to the PFA;

b) the DIP Lenders to act as sponsors for the funding;

c) MII agreeing to undertake, upon request by the DIP Lenders, a corporate reorganization of the business, operations and assets of the company and its subsidiaries, but only after the vote of the creditors on the Proposed Plan and the sanction order of the Court;

d) the possibility for MII to consider, negotiate and ultimately accept a proposal which is a Superior Proposal, from a financial point of view, to the one provided in the PFA. In such a case, the DIP Lenders have the right to offer to amend the terms of the PFA to match the Superior Proposal within a five-day period. If they elect not to match such Superior Proposal, MII has the right to terminate the PFA, but will be required to pay a break fee;

e) other events giving rise to the right to receive a break fee, including breach of specified covenants and failure of the Board of Directors of MII to recommend approval of the Proposed Plan;

f) MII's obligation to pay to the DIP Lenders all fees and expenses incurred in connection with the DIP loan agreement and the transaction contemplated by the PFA and all transactions related thereto if the Proposed Plan is not approved by the creditors;

g) a number of conditions precedent to closing, including obtaining the required creditors' support and Canadian Court approval, all required appropriate regulatory approvals, consents from certain third parties under the company's contracts, renegotiation of certain agreements, and absence of material adverse change.

10 Under the PFA and the Proposed Plan, the DIP Lenders will acquire all the shares of MII. In consideration, they undertake to pay to MII, through Mecadev, approximately Euros 55,000,000, of which some Euros 30,000,000 will serve for distribution purposes to the unsecured creditors of the Canadian Debtors. The other Euros 25,000,000 will essentially be used to repay the DIP loan advances, the Bank Syndicate's secured loan, the claims of a specific creditor and the fees and disbursements of the transaction.

11 For the DIP Lenders, the PFA is equivalent to an acquisition proposal of the business of MII, as the Monitor points out at paragraph 30 of his Fifth Report.

12 For the unsecured creditors of the Canadian Debtors, the Proposed Plan arising there from would entail a recovery of about 12% of their claims.

The Contestation

13 The record shows that MII issued Euros 200,000,000 of senior subordinated notes (the Notes) in May 2006, guaranteed by the Canadian Debtors and the French Debtors.

14 An Ad Hoc Committee of Holders of the Notes is actively involved in the restructuring process. It represents by far the largest group of unsecured creditors in the *CCAA* proceedings. The members of the Ad Hoc Committee hold

approximately 70% of the Notes. The Noteholders are the unsecured creditors who will most significantly have to bear the losses arising from this *CCAA* restructuring.

15 The Ad Hoc Committee contests the Motion at issue. In a nutshell, they consider that the DIP Lenders:

a) have unilaterally put forward a pre-emptive PFA under which they propose to take ownership of 100% of MII;

b) have sought to do so in the absence of a Court-approved marketing process being conducted to confirm the fairness of the consideration they are offering;

c) rather than inviting negotiations and a fair process, seek to prevent MII from truly negotiating further any other reasonable arrangement;

d) seek a break fee and expense reimbursement despite the absence of a fair process and knowing that their Proposed Plan, as currently drafted, does not have the support of key stakeholders, that is, the Noteholders they represent.

16 While, so they say, open to achieve a consensual restructuring solution for the Canadian Debtors, the Ad Hoc Committee argues that the DIP Lenders have chosen to unilaterally put forward a PFA and Proposed Plan which do not have their support as key stakeholders and which are premised upon an untested offer.

17 Their clear and unambiguous intention, reiterated during oral argument, is to veto the Proposed Plan arising from the PFA.

18 The Canadian Debtors reply that under the special circumstances of this case:

a) time is of the essence and they need to proceed forthwith to a vote by the unsecured creditors on the Proposed Plan;

b) to that end, the PFA remains the best and, indeed, the only available funding arrangement received so far for the presentation of any kind of plan of arrangement to the unsecured creditors;

c) the matter should be put to a vote of the unsecured creditors, in the interest of all stakeholders involved;

d) the Monitor supports the PFA, even more so in its amended format.

19 Of course, the Monitor and the DIP Lenders support the argument of the Canadian Debtors.

Analysis and Discussion

20 For a restructuring process that has started barely six months ago, it is quite unfortunate to see that key stakeholders, such as the DIP Lenders and the Ad Hoc Committee of Noteholders, have chosen to crystallize their respective position and not to pursue more constructive dialogue together.

21 They both appear to have lost sight of the fact that neither one will be able to achieve any reasonable and acceptable solution to this restructuring without the cooperation of the other.

22 In his wisdom, the Monitor had warned both of these parties along these lines at paragraph 41 of his Fourth Report of June 26, 2009, apparently to no avail, or at the very least, with not much success. Neither the DIP Lenders nor the Ad Hoc Committee appear to have paid attention to his remarks.

23 On the one hand, the DIP Lenders' approach of presenting the initial PFA and the Proposed Plan as a "take it or leave it" proposal, not open to discussion or negotiation, certainly appears questionable. Even more so when one now realizes that, faced with the articulated contestation of the Ad Hoc Committee and their line of questions to the Monitor, the DIP Lenders have finally decided to amend their PFA during the second phase of oral arguments, so as to tone down what was said to be irrevocable.

24 No doubt such change of heart would have been far more beneficial to the whole process if done earlier rather than at the very last minute. Very precious days, if not weeks, have been lost as a result. This does not enhance the credibility of the process adopted towards the conclusion of the PFA.

25 On the other hand, the Ad Hoc Committee's Contestation seems to forget the high risks involved with their position. They consider that the PFA, even as amended, remains unacceptable. Yet, their Contestation may end up in an absence of any reasonable arrangement and thus, in a liquidation of the Canadian Debtors and an even smaller recovery for the Noteholders compared to the one contemplated in the PFA and the Proposed Plan.

26 The Ad Hoc Committee does raise legitimate objections, but they do not appear to bring much to the table in terms of concrete or reasonable solution at this stage.

27 Be that as it may, the parties and their learned Counsel and financial advisors have elected to rely on this Court's judgment to sort out what, in all due respect, they should have solved together through reasonable concessions and compromises.

28 In so doing, through their respective Motion and Contestation, they ask the Court to decide which of the two (2) conflicting positions should prevail. There is no in-between. Either the Motion is well founded or the Contestation is. The Court cannot change the terms of the PFA at the centre of this debate. This negotiation belongs to the parties, not to the Court.

29 To rule upon this issue, the Court must exercise the powers given in this respect by the relevant provisions of the *CCAA*. This includes notably the exercise of its judicial discretion and inherent jurisdiction, the whole in fur-

therance of the objectives of the Act.

30 As this Court already stated before, the fundamental goal of the *CCAA* is found in its very title, that is an Act to facilitate compromises and arrangements between companies and their creditors. It is aimed at enabling a debtor company, with the support of its creditors, to weather its financial difficulties and continue to operate in the interest of all interveners and society in general.

31 The manner in which the *CCAA* favours this objective is through the conclusion of a plan of arrangement approved by minimum levels of majority of creditors, in number and in value. Of course, this objective must be reached at the best cost and on the best possible conditions for the creditors who inevitably suffer the consequences.

32 In the Court's assessment of the situation as it stands today, the probabilities of achieving this fundamental goal of the *CCAA* appears to be better served by refusing to approve the PFA presented rather than by tying the hands of the Canadian Debtors in the manner entailed by such PFA.

33 In a situation like this one, where the Court is asked to approve and give its blessing to a PFA leading to a Proposed Plan pursuant to which the DIP Lenders will end up acquiring MII, a *CCAA* restructuring requires the Canadian Debtors and the Monitor to satisfy the Court that they have proceeded in a manner where the transparency, integrity, credibility and fairness of the process is beyond reproach.

34 Notwithstanding the clear efforts of the Canadian Debtors and the Monitor, the Court considers that this not the case here. Too many factors militate against granting the Motion as sought and approving the PFA as it stands, even in its amended format.

35 In the Court's opinion, the cumulative effect of a) the absence of any legitimate and open process in order to obtain funding proposals beyond those of the DIP Lenders or the Ad Hoc Committee after May 15, 2009, b) the narrow definition of what constitutes a Superior Proposal under the PFA and the lack of flexibility, if any, given to the Board of Directors of MII in qualifying a proposal as a Superior Proposal or in considering or recommending such, and, c) the chilling effect of the rather high break fee contemplated in the PFA, forces the conclusion that the arguments of the Ad Hoc Committee's Contestation must prevail.

36 To rule otherwise would pay scant respect to the need for a sufficient, transparent and open process before a Court sanctions the potential acquisition of the whole business in the context of a *CCAA* restructuring.

37 As well, to allow the process contemplated by the PFA to move forward with no additional amendments will somehow usurp the key exercise of the right to vote belonging to the creditors under the *CCAA*. The Court is of the view that, as it stands now, the PFA unnecessarily ties up the hands of the Canadian Debtors with respect to the consideration of potentially available alternate solutions that, in the end, could benefit the affected creditors.

38 This is wrong and should not be condoned lightly. Some explanations are called for.

39 First, the Court agrees that the evidence does not establish that a proper maximizing value process has been undertaken so as to justify approving the PFA as it stands now.

40 In fact, short of the DIP Lenders and the Ad Hoc Committee, neither the Canadian Debtors, nor the Monitor or anyone else have apparently interested any other entity in funding an arrangement.

41 The lack of any steps taken towards that end appears to be linked to the short time frame allegedly available and the exclusivity clause of the DIP financing agreement that was extended to May 15, 2009. In the context of what is equivalent to an acquisition proposal of the business, this is hardly acceptable.

42 The evidence indicates that as recently as last December 2008, prior to agreeing to a DIP financing arrangement under very difficult circumstances, the Canadian Debtors still canvassed no less 23 potential parties before making a final choice.

43 While the interest shown then remained very sketchy, as only two (2) proposals were received, the following key changes however took place since that time:

a) a well-organized data room pertaining to the business and its financial information has been set up, after what appears to have been a lot of work by many;

b) there is a new CEO and a new CFO now in charge of the business;

c) significant downsizing of the business has taken place since the beginning of the *CCAA* process;

d) a new business plan has been prepared by MII in May 2009.

44 In view of this, it is hard to understand why no steps were taken in order to interest any other parties in funding a potential arrangement. The impression given by the evidence offered is that the focus was limited solely to the DIP Lenders and the Ad Hoc Committee, and nothing else. The Monitor's Fifth Report seems to confirm that, apparently, it would have been unworkable to proceed otherwise.

45 As stated, albeit in a different but still similar context, by the Ontario Court of Appeal in *Soundair*[FN4], by the Ontario Superior Court of Justice in *Tiger Brand Knitting*[FN5], by the Alberta Court of Queen's Bench in *Calpine Canada Energy Ltd., Re*[FN6], and by this Court in [FN7], in a process such as this one, there has to be some demonstration by the Canadian Debtors that reasonable attempts have been made to properly canvass the market before approving a PFA that is, in essence, presented to the affected creditors as the best available deal under the circumstances.

46 To that end, the PFA, which is aimed at acquiring all the shares of MII with a right to match any competing offer and a break fee should a Superior Proposal be accepted, closely resembles a stalking horse bid process with no real canvassing of the market at any point in time, be it prior to its finalization or after its approval.

47 The inclusion of an exclusivity clause of limited duration in the DIP financing agreement may have given a head start to the DIP Lenders in any acquisition proposal scenario. However, in the Court's opinion, it did not, and could not, have the impact of relieving the Canadian Debtors and the Monitor of their duty and obligations towards all the other stakeholders.

48 A *CCAA* process does insulate a debtor company from the attacks of its creditors. However, at the same time, the Act places the process under the Court's supervision. This has meaning and consequences. The benefits that the Act gives to a debtor company do not exist without corresponding obligations, particularly in terms of fairness, transparency and openness towards all stakeholders.

49 The mere fact that, here, these obligations must be met and the results achieved, and rightly so, within a very tight time frame does not entail that these duties could or should be ignored.

50 From that standpoint, even though the DIP Lenders have finally decided, at the last hour, to withdraw their exclusivity clause requirements, it remains that the narrow definition of what constitutes a Superior Proposal seriously limits the possibility of even seeing other bidders involved once the PFA is approved. In other words, because of the content of the PFA as it stands now, once it is approved as sought, it appears unlikely that any kind of transparent and open process will follow.

51 The situation would no doubt have been worse with the exclusivity clause initially included in the PFA. The clause has now been removed. Yet, under the PFA, the conditions precedent to a Superior Proposal being qualified as such and the lack of flexibility of the Board of Directors of MII towards any proposal other than the PFA render quite unlikely the remote possibility of the Canadian Debtors seeing any other proposal once the PFA at issue is approved.

52 From that perspective, if the PFA is truly the best available funding arrangement under the circumstances, it is difficult to understand why the definition of Superior Proposal had to be so narrowly construed and why the MII Board of Directors' powers of recommendation so precisely limited, mostly when one sees that the DIP Lenders have the opportunity to match any Superior Proposal within five days.

53 At present, the terms of the PFA discourage rather than invite the coming forward of other potential bidders.

54 Contrary to what the Canadian Debtors argued, the issue is not whether the MII Board of Directors will likely consider or not a Superior Proposal received, even though their flexibility is very limited in that regard. The issue is rather whether or not the PFA as drafted does indeed favour any Superior Proposal coming forward because of its narrow and convoluted definition.

55 Second, while no doubt serious, the alleged urgency and need to proceed quickly to a vote of the unsecured creditors on the Proposed Plan on the basis of the PFA appears to be somewhat qualified. While no less than a few days ago, the PFA was being presented to the Court as a "take it or leave it" proposal, no terms of which could be modified, time has rather shown that even that initial PFA was not yet a fully matured and final proposal.

56 Faced with strong opposition by the Ad Hoc Committee of the Noteholders, the DIP Lenders first renounced to the rather unrealistic tight time frame they were insisting upon in their initial PFA. Then, they finally withdrew the gist of the exclusivity requirements that the Monitor himself had considered inappropriate for some time, to the knowledge of the DIP Lenders.

57 Furthermore, faced with the criticism regarding its level, they slightly reduced the amount of their break fee. Finally, they clarified the ambiguities concerning the pre-acquisition proposal clauses and the application of the break fee and fee and expenses clauses.

58 Considering the position voiced initially by the DIP Lenders, it appears obvious that none of this would have taken place without the benefit of the Contestation of the Ad Hoc Committee. That Contestation was triggered by the Canadian Debtors' Motion and the corresponding need to satisfy the Court as to the reasonability of the PFA conditions, including the integrity and transparency of the process leading to it.

59 In this respect, the additional delays caused so far by the Contestation have enhanced rather than hurt the process by allowing at the very least some problematic clauses of the PFA to be withdrawn or qualified.

60 Third, turning to the break fee, the Court agrees with the Ad Hoc Committee's submission that the amount proposed appears disproportionate to the amount that the DIP Lenders are putting on the table for the Canadian Debtors' plan of arrangement.

61 Under the PFA, the DIP Lenders undertake to pay through Mecadev Euros 55,000,000 to MII. The proposed break fee, as reduced, is Euros 2,500,000, which is about 4.5% of the Euros 55,000,000 offered.

62 Based on the evidence presented to the Court, this appears excessive. In the chart of break fees attached to the Motion[FN8] , the average break fee, in a merger and acquisition scenario, is about 2.9%. Also, no precedent involving similar break fees in the context of a restructuring process has been offered to the Court.

63 Finally, according to the evidence, the amount of the break fee is at least twice the amount of real expenses incurred so far by the DIP Lenders under the PFA process. Accordingly, it does include some sort of a risk premium or effort premium of some magnitude.

64 The burden of showing that the break fee is reasonable rests upon the Canadian Debtors. The evidence in support thereof is sketchy at best. This is not an issue that one should consider lightly in the context of a *CCAA* restructuring supervised by a Court, whereby the unsecured creditors, who are already suffering the consequences of the restructuring as here, end up in reality paying the cost of such break fee.

65 Fourth, the Court considers that the other arguments that the Canadian Debtors insisted upon are not convincing under the circumstances.

66 On the one hand, while the approval and support of the Monitor remains an important factor, it is not decisive in and of itself.

67 Here, the Monitor is faced with nothing else and reasonably fears that the process may be going to a dead end without the PFA. Admittedly, this is not an easy situation. Yet, in the Court's view, it is no reason to close one's eyes towards a process that appears to be submitted as a "*fait accompli*" under the PFA.

68 On the other hand, the argument voiced often by the Canadian Debtors and the Monitor, to the effect of letting the matter go to a vote on the Proposed Plan by the unsecured creditors, does not answer the problem truly at issue here.

69 The Court is asked to approve and give its blessing to the PFA. Once the PFA is approved, there is no going back. The creditors will not be in a position to change its terms, if alone, with respect notably to the narrow definition of a Superior Proposal, the lack of flexibility given to the Board of Directors of MII in terms of recommendations, and the applicability of the break fee. Letting the matter go to a vote on the Proposed Plan will not deal with these issues at any point in time.

70 In this regard, the *Stelco* decision[FN9] relied upon by the Canadian Debtors and the DIP Lenders is of no assistance. In that case, the decision to send the matter to a vote notwithstanding the opposition voiced was reached in a different context.

71 The process involved had been going on for twenty some months. Prior plans had been presented and had failed. No one had any formal or decisive veto like here. The Court was of the view that the plan was not doomed to fail and that the break fee was reasonable. The process was neither at issue.

72 In this case, this is not so.

73 The position voiced by the Ad Hoc Committee suffers no ambiguity. It should not be discarded lightly. No one has suggested that they have any other ulterior motive than to try to obtain the best possible value for their claims within the best available process and through the best efforts.

74 It is not with happiness that the Court concludes that it cannot approve the PFA as it stands today. No one knows if time or a more open process will lead to a better result. However, this uncertainty is insufficient to approve the process leading to the PFA and the PFA as it stands.

75 To paraphrase the Ad Hoc Committee's submission, approval of the PFA on the terms proposed would limit the flexibility and optionality of the process at a time when, given that the DIP Lenders' PFA has not been tested and is not supported by key stakeholders, the process does require flexibility, optionality and credibility.

76 All in all, the Court's assessment of the situation is that there is likely still margin to do better. The behaviour of the DIP Lenders and the amended PFA are silent testimony in support of that assertion.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

77 **DISMISSES** the Motion;

78 **COSTS TO FOLLOW.**

Motion dismissed.

FN1 Exhibit R-1.

FN2 Exhibit R-1A.

FN3 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

FN4 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at ¶16.

FN5 *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.).

FN6 2007 ABQB 49 (Alta. Q.B.)

FN7 *Boutique Euphoria (Arrangement)* (July 19, 2007), Doc. Montreal 500-11-030746-073 (Que. S.C.)

FN8 Exhibit R-2.

FN9 *Stelco Inc., Re* [2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List])], 2005 CanLII 36272; (2005), 15 C.B.R. (5th) 288 (Ont. C.A.), 2005 CanLII 40140.

END OF DOCUMENT