Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS
(Returnable October 25, 2018)
(Re: Approval of the Cross-Border Protocol)

October 23, 2018

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I N D E X

2012 ONSC 3974
Ontario Superior Court of Justice [Commercial List]

Northstar Aerospace Inc., Re

2012 CarswellOnt 8605, 2012 ONSC 3974, 219 A.C.W.S. (3d) 24

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

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company, Applicants

Morawetz J.

Heard: June 14, 2012
Judgment: June 14, 2012
Docket: CV-12-9761-00CL

Counsel: A.J. Taylor, D. Murdoch, for Northstar
Craig Hill, for Monitor, Ernst & Young Inc.
Clifton Prophet, for Boeing Capital Loan Corporation
Steven Weisz, Chris Burr, for Fifth Third Bank as DIP Agent and Agent, for Existing Lenders
Paul Guy, for Former Directors and Officers of Northstar
Grant Moffat, for FTI Consulting Inc., Chief Restructuring Officer

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval
CCAA entities sought relief under Companies Creditors Arrangement Act ("CCAA") — CCAA entities were unable to meet financial and other covenants with secured creditors and did not have liquidity needed t meet ongoing payment obligations — Without protection of CCAA, shutdown was inevitable — CCAA entities were debtor companies to which CCAA applied — Circumstances existed making order granting protection under CCAA appropriate — Appointment of FTI as CRO was appropriate — It was appropriate to approve CRO agreement nunc pro tunc — It was appropriate to grant administration charge, critical suppliers' charge, and directors' charge — It was appropriate to authorize DIP facility and to grant DIP lenders' charge — It was appropriate to approve cross-border guarantee and cross-border protocol — Court approved proposed approval process of giving notice to creditors and shareholders of motion to seek approval of Boeing release.

***Morawetz J.*:**

1 Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. ("2007775") and 3024308 Nova Scotia Company (3024308"), together with Northstar Inc., Northstar Canada and 2007775, (the "CCAA Entities") seek relief under the *Companies' Creditors Arrangement Act* ("CCAA").

2 Certain of Northstar Canada's direct and indirect U.S. subsidiaries (the "Chapter 11 Entities") are expected to file voluntary petitions ("Chapter 11 Proceedings"), pursuant to Chapter 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the United States Bankruptcy Court for the Delaware (the "U.S. Court") concurrently with the CCAA applications. The CCAA Entities and the Chapter 11 Entities are sometimes collectively referred to as "Northstar".

3 Northstar manufactures components and assemblies for military and commercial aircraft. Northstar is facing severe liquidity issues as a result of, among other things: low to negative profit margins on significant customer contracts; decreases in defence spending and a resulting stretch out of deliveries of backlog orders and decline in new business orders placed; and the inability to secure additional funding.

4 The record establishes that the CCAA Entities are unable to meet various financial and other covenants with their secured lenders and do not have the liquidity needed to meet their ongoing payment obligations.

5 I accept that, without the protection of the CCAA, a shutdown of operations is inevitable, which would be extremely detrimental to the employees, customers, suppliers and creditors of Northstar.

6 I accept the submission of counsel that CCAA protection will allow the CCAA Entities to maintain operations, while giving them the necessary time to complete the remaining steps in a marketing process for the sale of their business and assets and provide a going concern outcome for the CCAA Entities' stakeholders.

7 The facts with respect to the application are fully set out in the affidavit of Mr. Craig A. Yuen, sworn June 11, 2012 in support of this filing. They are also summarized in the comprehensive factum filed by counsel and, therefore, are not repeated in this endorsement.

8 Northstar Inc., Northstar Canada and 2007775 are all corporations established under the laws of Ontario and 3024308 is a corporation established under the laws of Nova Scotia. The CCAA Entities are, therefore, "companies" within the definition of the CCAA.

9 I am satisfied that the record establishes that the CCAA Entities do not have the liquidity necessary to meet their obligations to creditors as they come due and have failed to pay certain obligations as they came due. The total claims against the CCAA Entities are in excess of $147 million. Therefore, the CCAA Entities are "debtor companies" to which the CCAA applies.

10 I am also satisfied that the CCAA Entities require the protection of the CCAA, including a stay of proceedings, to allow them to maintain operations while giving them the necessary time to complete the sales process and maximize recovery for the CCAA Entities' stakeholders. In my view, circumstances exist that make an order granting protection under the CCAA appropriate.

11 As set out in the affidavit of Mr. Yuen, the directors of Northstar Inc., Northstar Canada and 2007775 intend to resign effective on the granting of the Initial Order. Counsel to the Applicants advised that, in order to ensure ongoing corporate governance, the CCAA Entities entered into an engagement letter with FTI Consulting Canada Inc. ("FTI Consulting") dated June 6, 2012 (the "CRO Agreement") and therefore seek an order appointing FTI Consulting as the CRO and approving the terms of the CRO Agreement *nunc pro tunc*.

12 I am satisfied that the appointment of FTI Consulting as CRO is appropriate in the circumstances and it is also appropriate that they be afforded the protections outlined in the draft Initial Order. In the circumstances, I have been persuaded that it is appropriate to approve the CRO Agreement *nunc pro tunc*.

13 The CCAA Entities also seek an Administration Charge to secure the fees and disbursements of counsel to the CCAA Entities, the Monitor, the Monitor's counsel, the CRO, the CRO's counsel and independent counsel to Northstar Inc.'s board of directors (the "Administration Charge"). The legal basis for the appointment is set out at paragraphs 72-78 of the factum, which statements I accept.

14 I have been persuaded that it is appropriate to grant the Administration Charge for the reasons set out in the factum.

15 The CCAA Entities also seek a Critical Supplier Charge. The basis for creating such a charge is set out at paragraphs 79-85 of the factum.

16 With the assistance of the CRO, the CCAA Entities have identified a number of suppliers which they consider to be critical to the ongoing operations of their business. A complete listing of the suppliers for the CCAA Entities considered critical (the "Critical Suppliers") is attached as Schedule "A" to the proposed Initial Order.

17 I am satisfied that it is appropriate to grant the Critical Suppliers' Charge on the terms set out in the draft order. I am also mindful of the priority issue raised at paragraph 85 of the factum.

18 The CCAA Entities also seek a Directors' Charge in the amount of $1,750,000. The basis for the Directors' Charge is set out at paragraphs 86-92 of the factum.

19 I accept these submissions and have concluded that the granting of the Directors' Charge is appropriate in the circumstances.

20 The CCAA Entities also seek approval of a DIP Facility up to a principal amount of $3 million and a DIP Lenders' Charge. The terms of the Charge are summarized in the factum commencing at paragraph 94 and the basis for the granting of the Charge is set out at paragraphs 94-98.

21 I am satisfied that, for reasons set out in the factum, it is appropriate to authorize the DIP Facility and to grant the DIP Lenders' Charge.

22 The Chapter 11 Entities are also seeking approval of DIP Financing from the DIP Lenders and from an affiliate of Boeing. The provision of the U.S. $7,500,000 financing from Boeing to the Chapter 11 Entities (the "U.S. Boeing DIP Agreement") is a condition to the continued availability of the DIP Facility. The U.S. Boeing DIP Agreement requires a guarantee by the CCAA Entities of the obligations of the Chapter 11 Entities (the "Boeing Guarantee") and a priority charge as part of the DIP Lenders' Charge. This issue is fully set out in the factum at paragraphs 99-102. I have been persuaded, by the submissions, that it is appropriate to approve the Cross-Border Guarantee.

23 The Applicants also seek approval of a Cross-Border Protocol, which they submit will facilitate communication and cooperation between the U.S. Court and the Canadian court in respect of the issues arising in the Sales Process, the DIP Facility and any other issues which may arise at a later date. The basis for approving the Cross-Border Protocol is set out at paragraphs 103-108 of the factum.

24 Cross-border protocols have been approved and implemented by courts across Canada in CCAA proceedings where parallel U.S. proceedings have been commenced under Chapter 11. In particular, cross-border protocols have been adopted where "it is clear that there are issues of overlapping jurisdiction that would make a form of cross-border protocol appropriate". See *Calpine Canada Energy Ltd., Re*, 2006 ABQB 743 (Alta. Q.B.) and *Nortel Networks Corp., Re* (2009), 50 C.B.R. (5th) 77 (Ont. S.C.J. [Commercial List]).

25 I am satisfied that it is appropriate to approve the Cross-Border Protocol.

26 Finally, the CCAA Entities request approval of a Notice Process for approval of the Boeing Release. This issue is covered at paragraphs 109-112 of the factum. I am satisfied that it is appropriate in these circumstances for the court to approve the proposed process for giving notice to creditors and shareholders of the motion to seek approval of the Boeing Release.

27 In the result, the relief requested by the CCAA Entities is granted and the Initial Order has been signed in the form presented.

2006 ABQB 743
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2006 CarswellAlta 1313, 2006 ABQB 743, [2006] A.W.L.D. 3144, 153 A.C.W.S. (3d) 358, 26 C.B.R. (5th) 77

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

And In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Heard: October 4, 2006
Oral reasons: October 4, 2006
Written reasons: October 10, 2006
Docket: Calgary 0501-17864

Counsel: Jay Carfagnini, Joseph Pasquanello for CCAA Debtors
Larry B. Robinson, Q.C. for CCAA Debtors
Patrick T. McCarthy, Q.C., Josef Kruger for Monitor
Peter Griffin, Monique Jilesen, Usman Sheikh (present by telephone) for U.S. Debtors
David Seligman, Jeffrey Powell (present by telephone) for U.S. Debtors (U.S. Counsel)
Howard Gorman, Randal Van de Mosselaer for ULC1 Noteholders
John Finnigan, Robert Thornton, Rachelle Moncur for ULC2 Ad Hoc Committee of Bondholders
Sean Dunphy, Elizabeth Pillon for ULC2 Trustee
Phillip J. LaFlair for ULC2 Bond Holders

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Debtors obtained protection from their creditors under Companies' Creditors Arrangement Act ("CCAA") — Debtors obtained order permitting them to market debentures they owned with provision requiring them to identify and process claims purporting to differentiate rights, privileges, and entitlements associated with debentures ("bond differentiation claims") — U.S. debtors in CCAA proceeding brought application to vary order relating to bond differentiation claims process and to compel negotiation of cross-border protocol — Application dismissed; terms of order remained same except with respect to date for U.S. debtors to file bond differentiation claims, which was extended from October 6, 2006 to October 16, 2006 — Amendments proposed by U.S. debtors were not of refinement or clarification but of real change in effect and scope of order — Proposed amendments would narrow meaning of bond differentiation claim and exempt matters within jurisdiction of U.S. court including any defences U.S. debtors might have to claims filed in U.S. proceedings — Clarification of order was not required as suggested by U.S. debtors who were seeking maximum flexibility and unlimited options in U.S. proceedings relating to guarantees of certain debentures — Court had jurisdiction to make determinations relating to bond differentiation claims and order was for identifying claims so that their validity might be subject of later proceedings — Claims and possible defences in other jurisdiction did not lessen appropriateness of court to administer bond differentiation claims process and adjudicate claims under that process in respect of CCAA debtors including U.S. debtors — Cross-border protocol was premature and unpopular with nearly all other parties in CCAA process.

***B.E. Romaine J.*:**

Introduction

1 On October 4, 2006, I dismissed an application brought by the U.S. Debtors in this CCAA proceeding to vary previous orders made relating to a Bond Differentiation Claim process and to compel the negotiation of a cross-border protocol. These are my reasons.

Background

2 On December 20, 2005, the Applicants filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended, (the "CCAA"). In addition to the Applicants, the Initial Order of this Court provided for a stay of proceedings against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG"), and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The applicants and the additional parties are collectively referred to as the "CCAA Debtors".

3 Pursuant to the Initial Order, Ernst & Young Inc. was appointed Monitor of the CCAA Debtors during these CCAA proceedings.

4 I was advised at the time, and understand, that on the same day, Calpine Corporation and certain of its direct and indirect subsidiaries (the "U.S. Debtors") filed voluntary petitions for relief in the United States Bankruptcy Court in the Southern District of New York pursuant to Chapter 11 of the Bankruptcy Code of the United States of America.

5 From time to time in these proceedings, reference has been made to the U.S. proceedings. For example, the Claims Bar date in the Canadian proceedings was moved back a few days to August 1, 2006, the same date as the Claims Bar Date in the U.S. proceedings, in part in order to encourage cooperation between the U.S. Debtors and the CCAA Debtors with respect to the filing of claims against the estates of the other parties. The Canadian proceedings and the U.S. proceedings are, however, separate and distinct. Neither the CCAA Debtors nor the U.S. Debtors have sought to have their proceedings recognized in the other jurisdiction.

6 Calpine Canada Resources Company ("CCRC") owns approximately US $360 million principal amount of public debentures issued by Calpine Canada Energy Finance ULC (the "ULC1 Senior Notes"). Saltend LP owns approximately £ 78.6 million and £ 57.6 million principal amount of public debentures issued by Calpine Canada Energy Finance ULC 11 (the "ULC2 Senior Notes").These ULC1 Senior Notes and ULC2 Senior Notes are significant assets of the estates of the CCAA Debtors.

7 The ULC1 Senior Notes and ULC2 Senior Notes are alleged to have been guaranteed by Calpine Corporation. In the U.S. proceedings, the indenture trustees for both ULC1 and ULC2 bondholders have filed proofs of claim based on these guarantees.

8 The CCAA Debtors applied to this Court on July 21, 2006 for authority to market the Notes and to engage advisors with respect to the marketing process. The sale of the Notes would be subject to further approval of this Court. An order to this effect was granted on August 31, 2006. This order includes the following provision:

> . . .all claims filed in advance of the claims bar date of August 1, 2006 (the "Claims Bar Date"), or not subject to the Claims Bar Date, that in any way purport to differentiate the rights, privileges and entitlements associated with the CCRC ULC1 Senior Notes from any other ULC1 Senior Notes are reserved pending further order of this Court, such Order to be obtained on or before October 21, 2006, or such later date as this Court may order.(emphasis added)

9 The issue of what is now referred to as the Bond Differentiation Claims was raised at the hearing on August 31, 2006. The Ad Hoc Committee of Bondholders of Calpine Canada Energy Finance II ULC (the "ULC2 Committee") put forward the wording that was substantially adopted in the Order to address the issue of "whether the [Notes] are subject

to any legal or equitable claims or other "clouds" affecting their value such that they would be treated any differently than any other [Notes]." I determined that it was appropriate to attempt to resolve this type of claim in a timely fashion. The parties were directed to develop a process for the litigation of the Bond Differentiation Claims. The August 31, 2006 order has not been appealed.

10 The parties were unable to agree on a litigation process. The ULC2 Committee applied on September 11, 2006 for an order establishing a process and timetable for the resolution of the Bond Differentiation Claims. A number of draft orders were submitted for discussion at the hearing. The resulting Order included the following provisions:

> (a) all claims referred to in Paragraph 6 of the August 31 Order, namely all claims properly filed in advance of the Claims Bar Date, or not subject to the Claims Bar Date, that in any way purport to differentiate the rights, privileges and entitlements associated with the CCRC ULC1 Senior Notes from any other ULC1 Senior Notes, are defined as "Bond Differentiation Claims";
>
> (b) the ULC1 Trustee Claim may include a Bond Differentiation Claim;
>
> (c) in order for any other Proof of Claim filed with the Monitor in accordance with the Claims Process Order to be considered a potential Bond Differentiation Claim, the creditor in respect of such Proof of Claim must identify the Claim as a potential Bond Differentiation Claim on or before October 6, 2006;
>
> (d) if any creditor believes it has a claim that was not subject to the Claims Process Order and that constitutes a potential Bond Differentiation Claim, the creditor must identify the claim as such on or before October 6, 2006; and
>
> (e) all parties with purported Bond Differentiation Claim(s) who wish to appeal the deemed disallowance of such claim(s), must do so by pleading their purported Bond Differentiation Claim(s) on or before October 6, 2006.

Once the Bond Differentiation Claims have been identified, a process would be undertaken that would culminate in a hearing on November 14, 2006 on the issue of Bond Differentiation Claims.

11 The U.S. Debtors appeared by counsel and made submissions at the September 11, 2006 hearing. Counsel for the U.S. Debtors advised me that the U.S. Debtors had filed substantial claims in the claims process mandated by the Court. The U.S. Debtors are thus parties in the claims bar process before this Court and subject to its jurisdiction for the purpose of the resolution of their claims against the CCAA Debtors.

12 The issue of the necessity or advisability of a cross-border protocol involving this Court and the U.S. Court was discussed at the September 11, 2006 hearing, as was the issue of whether or not the Order sought would be contrary to a memorandum of understanding and protocol entered into by the U.S. Debtors and the Canadian Debtors on the issue of inter-company indebtedness. In my brief oral reasons granting the Order, I commented as follows:

> As I indicated on August 31st, 2006, it is appropriate and necessary that any claims that have now been described as bond differentiation claims, that might cloud title to the CCRC ULC1 senior notes and jeopardize the timely realization of that asset of the CCAA debtors, should be resolved in a timely manner, preferably sometime in the order of October 31st, 2006. . . .
>
> The other issue that I will deal with prior to getting into the meat of the process and timelines is Mr. Griffin's submissions on behalf of the Calpine US entities for a more measured approach to the process, by which he means more time to accommodate a further protocol.
>
> I am unable to see how anything in the existing memorandum of understanding and protocol, in wording or in spirit, prevents this Court from dealing with the marketing of this significant asset of the Canadian CCAA Debtors'

estate, nor can I see how the determination of the rather narrow issue of whether there are any in rem claims against the Bonds that may preclude the timely marketing of this asset poses any disrespect to the US Bankruptcy Court.

If the US entities intend to pose any claim that may affect the marketing of the bonds, they will have to abide by the process that will be established by my ruling here today.

13 The U.S. Debtors subsequently brought an application heard on its merits on October 4, 2006 for an order extending the dealine by which the U.S. Debtors must identify any potential Bond Differentiation Claims and providing supplemental language to the September 11, 2006 Order to change the definition of Bond Differentiation Claims. The U.S. Debtors also applied for an order directing that, once all the Bond Differentiation Claims have been filed, the CCAA Debtors, the Monitor, the U.S. Debtors and all parties who file Bond Differentiation Claims seek the joint assistance of this Court and the U.S. Court with respect to any cross-border issues arising out of such claims, whether or not a cross-border protocol has been approved. The order sought would also have authorized and directed the CCAA Debtors and the Monitor to negotiate a cross-border protocol with interested stakeholders with respect to any cross-border issues that may arise from any and all claims filed with the Court, including but not limited to any defences the U.S. Debtors may have to any proofs of claim filed in the U.S. Court proceedings.

Analysis

14 While the Notice of Motion filed by the U.S. Debtors purports to provide clarification to the definition of Bond Differential Claims, what the changes proposed by the U.S. Debtors would do is to narrow the meaning of such definition and to exempt from its application "any matters within the jurisdiction of the U.S. Court, including, without limitation, any defences the U.S. Debtors may have to any proof of claim filed in the U.S. Court proceedings." The Notice of Motion asserts that "the Bond Differentiation Claims Order should not have the effect of requiring the U.S. Debtors to adjudicate their defences to the Indenture Trustee Claims in the CCAA Claims process."

15 This give rise to three issues:

(a) Is this application a collateral attack on this Court's Orders of August 31 and September 11, 2006?

(b) Do these Orders require clarification?

(c) Is this an appropriate time for the negotiation of a cross-border protocol?

(a) Is this application a collateral attack on this Court's Orders of August 31 and September 11, 2006?

16 A number of parties assert that it is, and that the application is a thinly-disguised attempt to vary or appeal the Orders. I must agree with them. I have already noted the effect of the amendments proposed by the U.S. Debtors, which is not one of refinement or clarification but of real change in effect and scope. Most if not all of the issues raised by the U.S. Debtors in this application were raised on September 11, 2006, or, at the least, could have been raised at that time. The motion comes nowhere close to meeting the limited circumstances that would justify a reconsideration of the issue, even taking into account the traditional flexibility of CCAA proceedings and the generally wider latitude afforded by this Court to applications of this kind.

17 Having said this, given the decision I have reached on the question of whether clarification of the Orders is necessary and whether a cross-border protocol is necessary at this point in the proceedings, I do not rest my decision on this more formalistic basis. These are not easy issues, and I understand that the process mandated by my Orders requires affected parties to make what may be difficult strategic choices. If there is a bona fide concern that the process is flawed, I am prepared to reconsider submissions made on that issue.

(b) Do the Orders of August 31 and September 11, 20006 require clarification?

18 Having reviewed the briefs and listened to the submissions of interested parties, I must conclude that the issue is not one of lack of clarity but of the unhappiness of the U.S. Debtors with the possible effect of the Orders on their ability to retain maximum flexibility and unlimited options in the U.S. proceedings when the time comes in those proceedings to deal with claims that relate to the guarantees.

19 The U.S. Debtors submit that the narrow purpose of the Orders was merely to flesh out possible "in rem" claims against the Notes, relying heavily on a portion of my oral comments dealing with whether the proposed order breached the protocol reached between the U.S. Debtors and the CCAA Debtors on inter-corporate claims. This ignores the balance of my comments and the submissions made at the hearing that were focussed on the words that eventually became the definition of Bond Differentiation Claims in the Orders.

20 The U.S. Debtors attempt to recast the discussion by drawing a distinction between "claims" and "defences". They submit that, if they are required to advance defences or objections to the guarantees that *might* fall within the definition of Bond Differentiation Claims under the orders, that would force them to litigate in Canada matters that are properly within the jurisdiction of the U.S. court. They make this broad assertion without specifically identifying what form these defences or objections might take.

21 If a defence to the guarantees may qualify as a Bond Differentiation Claim, it is conceivable that jurisdictional issues may arise. Without knowing the specifics of such defences, it is impossible for this Court to determine at this point of the proceedings whether the issue is within the jurisdiction of this Court, the jurisdiction of the U.S. Court, or whether the issue so overlaps jurisdictions that it would be appropriate to have it dealt with in some sort of cross-border proceeding.

22 The distinction between "claims" and "defences" is unhelpful in the abstract. If Bond Differentiation Claims are limited to affirmative claims only and exclude "defences" that may cloud title to the particular Notes that are proposed to be marketed or to treat them in principle differently from Notes held by parties unrelated to the CCAA Debtors, the potential problem that my Orders were intended to identify and deal with in a slightly accelerated process so that an effective sale of the Notes can occur will not be resolved. I say slightly accelerated, since this issue has been before me since July 21, 2006, with notice to all parties including the U.S. Debtors, and will culminate in a hearing on November 14, 2006. This is not particularly accelerated in terms of normal CCAA time lines.

23 Counsel for the U.S. Debtors says that they are concerned that if the existing definition of Bond Differentiation Claims stands, "any legal theory that might be advanced that would have any implication on whether or not these bonds rank in some *pari passu* basis with other bonds, even if only to be raised by [U.S. Debtors] as a defence in the United States on a guarantee claim, may have to be put forward."

24 It is true that my Orders may require the U.S. Debtors to make some choices that they would prefer to delay or defer. If they have defences to the guarantees that may fall within the definition of Bond Differentiation Claims, they will have to identify them. Once they do, it may be clear that these Bond Differentiation Claims raise issues of jurisdiction. If so, those issues will have to be resolved. I do not intend to pre-judge those question until the issues have been clearly identified before me.

25 Where the proper jurisdiction lies on defences to the guarantees that may fall within the definition of Bond Differentiation Claims is unclear at this time. What is clear, however, is that if there is a possibility that unspecified defences to the guarantees that might taint title to or the character of these particular Notes may later surface in the U.S. proceedings, that consideration will most certainly affect the value of the Notes and render their sale prey to substantial discounting of value.

26 The jurisdiction to make the orders I have made with respect to Bond Differentiation Claims arises from the following facts:

a) the Notes in issue are held by CCRC, a Canadian petitioner before this Court;

b) the Notes in issue were issued by ULC1 - another Canadian petitioner before this Court; and

c) the claims filed by all parties, the U.S. Debtors, ULC 1 or otherwise, relating to such Notes were filed in the Canadian proceedings.

27 This Court must necessarily make determinations regarding the status and enforceability of all outstanding Notes as these principal claims are the main claims outstanding in the estates of the CCAA Debtors and the main asset in their estates.

28 The fact that any such still undefined claim may also constitute a defence by a third party in respect of its obligations in other proceedings in another jurisdiction does not lessen the appropriateness of this Court administering a claims process and adjudicating claims under that process in respect of CCAA Debtors and in respect of their principal assets.

29 When the shadow-boxing is over and Bond Differentiation Claims have been identified, the possibility that some of the claims may be more appropriately dealt with by a cross-border proceeding or solely by the U.S. Court as falling clearly within its jurisdiction can be dealt with in real and not speculative terms. As some parties have implied, it may be enormously complicated and call for a full protocol. It may, in the end not be so complicated. It is important to note that the impugned process is just that, a process to identify Bond Differentiation Claims so that their validity may be the subject of later proceedings.

30 While the CCAA Debtors submit that further clarification regarding the Bond Differentiation Claims process is not required, in an attempt to resolve the issue, they have proposed a clarification of the definition and of the process. That clarification document includes the following statement:

> For greater certainty, any and all claims that purport to differentiate principal obligations (as opposed to guarantee obligations) owing in respect of CCRC ULC1 Senior Notes from principal obligations (as opposed to guarantee obligations) owing in respect of any other ULC1 Senior Notes are [Bond Differentiation Claims] that must be filed and resolved in Canada in accordance with the BDC Order and the BDC Process established thereby.
>
> In other words, any claims that, if successful, would have the effect of requiring ULC1 (a CCAA debtor) to treat the obligations owing by it to CCRC (also a CCAA debtor), under or in respect of the CCRC ULC1 Senior Notes differently from how ULC1 treats or is to treat the obligations owing by it in respect of any other ULC1 Senior Notes are [Bond Differentiation Claims] which are properly before the CCAA Court.

31 Apparently independently, the ULCII Indenture Trustee in its brief provided its interpretation of the definition of Bond Differentiation Claims as follows:

> Should the U.S. Debtors require any clarification or confirmation in respect of the September 11 Order, it is to confirm the Court's expectations and requirements that all *assertions* (be they claims, defences or counterclaims or otherwise), that the principal claim associated with the CCRC ULC I Bonds is different from the principal claim associated with all other ULCI Bonds, represents a Bond Differentiation Claim which shall be determined in accordance with the September 11 Order.

32 While I do not find it necessary to amend my previous Orders, I do not find anything in the above interpretations of the definition of Bond Differentiation Claims and what was intended by the institution of the process of identifying such claims to be inconsistent with these Orders. I make this comment to reduce the possibility of misinterpretation of the August 31 and September 11, 2006 Orders in an effort to focus the process.

33 I must also comment on the issue of the automatic stay under the U.S. Bankruptcy Code. As U.S. counsel to the U.S. Debtors has repeatedly advised the parties and this Court, it is his opinion that a requirement to litigate any defences to the guarantees in Canada would be a violation of the automatic stay imposed under U.S. bankruptcy law when a party files for bankruptcy. Unfortunately, his lack of specificity with respect to the nature of these defences fails

to provide context to his opinion, and I note that the U.S. Debtors have not sought companion or ancillary orders in Canada with respect to the proceedings they instituted, and the stay they obtained, in the United States.

34 Canadian counsel to the U.S. Debtors attempted to clarify the opinion expressed on the U.S. stay. I gather him to be suggesting that, if this Court does anything that may limit the options available to the U.S. Debtors in defending on the question of the guarantees in the U.S. proceedings, that would be a violation of the stay. I would have to hear further evidence on this broad interpretation of the automatic stay before I would be prepared to accept this opinion. Surely, the U.S. stay does not insulate the U.S. Debtors who have filed claims in Canada from having those claims dealt with in the Canadian proceedings.

35 Having said this, this Court will of course extend to the U.S. court respect and the full benefits of comity. If and when real questions of jurisdiction surface in these proceedings, they will be dealt with directly and thoroughly.

c) Is this an appropriate time for the negotiation of a cross-border protocol?

36 As I have indicated in my previous comments, the time may come when it is clear that there are issues of overlapping jurisdiction that would make a form of cross-border protocol appropriate. The issue is whether that time has arrived. Currently, I have nothing before me but speculation and conjecture as to the nature of the Bond Differentiation Claims that may be identified for resolution by the parties, and parties who are not anxious to lay their cards on the table. In that regard, nothing substantial has been added to the debate since I decided on September 11, 2006 that a cross-border protocol was premature. It still is.

37 I certainly have no objection to the principles that underlie the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, which are currently the subject of review by the Corporate and Commercial Advisory Committee of this Court with a view to formal adoption. As counsel for the Monitor has pointed out, the first court-to-court communication between Canada and the United States on a CCAA/US insolvency matter involved the Court of this province, as did one of the first formal protocols to be endorsed. It would not be surprising if this case necessitated some form of protocol at some point in time, or at least some form of communication between the Courts.

38 What a protocol should not be is a method to delay or obfuscate proceedings, or to provide an alternate method of appeal or the re-hearing of a ruling of the court of one jurisdiction in the court of another. It is these types of cross-border manipulations that protocols and court-to-court communications are designed to prevent.

39 The form of protocol suggested by the U.S. Debtors has proved to be unpopular with nearly all other parties in this CCAA process. This supports the proposition that a protocol cannot be drafted in a vacuum, and must address the particular circumstances of the case at hand. This case is different from cases where there is to be a global restructuring of all of the applicants, wherever they are situate. As pointed out by counsel for the CCAA Debtors, while there are some common issues among the CCAA Debtors and the U.S. Debtors, they are adverse in interest in others given their respective status as creditors (even major creditors in the case of the CCAA Debtors in the U.S. claims process) in each others' estates. If and when a protocol is necessary, it is unlikely to be one pulled off the shelf from a less-complicated cross-border situation. The negotiation of a cross-border protocol should be a matter of discussion, negotiation and cooperation among interested parties before a form of protocol is presented to the Courts for review and approval. The CCAA Debrors have advised me that they are prepared to commence good faith discussions with the U.S. Debtors, and I assume other stakeholders, to determine the need for a court-to-court protocol and the terms that may be appropriate.

40 This should be a continuing discussion as the Bond Differentiation Claims process unfolds and other issues arise. There is currently no need for this Court to step in and direct the negotiation.

41 For the reasons given, I dismissed the application brought by the U.S. Debtors, except as follows.

42 On September 29, 2006, the CCAA Debtors and the Monitor reached an agreement with the U.S. Debtors to reschedule the hearing before the U.S. Bankruptcy Court to October 12, 2006. I understand that the CCAA Debtors

have agreed that they would be amenable to the U.S. Debtors obtaining an Order of this Court extending, for the U.S. Debtors only, the date by which the U.S. Debtors are required to file any Bond Differentiation Claims from October 6, 2006 to a time which has now been identified as October 16, 2006. All other terms of and dates set forth in the September 11, 2006 Order remain the same.

Applications for Extension by the Ad Hoc ULC1 Committee and the ULC1 Indenture Trustee

43 As I indicated on October 4, 2006, I have granted to the Ad Hoc ULC1 Committee and the ULC1 Indenture Trustee an extension of time of two business days after the release of my reasons for decision to identify their Bond Differentiation Claims. This gives them an opportunity to review these reasons before they make decisions on the identification of their claims.

44 Counsel for the Ad Hoc ULC1 Committee during the hearing raised the question of whether a failure to raise an argument with respect to the Notes would preclude him from raising it for future purposes. He asked for assurances that "all that would be resolved in the Bond Differentiation Claim would be square within what is included in the Bond Differentiation Claim and the subsequent dispute Note."

45 I confirm that the Orders are meant to address only claims that may fall within the definition of Bond Differentiation Claims, and not to preclude claims involving the Notes that do not fall within that definition from being raised in later proceedings. A decision on whether or not a particular claim may fall within the definition of Bond Differentiation Claim is for a party affected by these proceedings to decide, and I recognize that such determination may not be easy to make or without implications for later strategies. The parties have, however, been involved in this process for 10 months on both side of the border.

46 It is timely under the CCAA process to facilitate the sale of the Notes by minimizing market uncertainty about the legal rights of the Applicants as holders of the Bonds.

Order accordingly.

2009 CarswellOnt 9132
Ontario Superior Court of Justice [Commercial List]

Barzel Industries Canada Inc., Re

2009 CarswellOnt 9132

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

In The Matter of a Plan of Compromise or Arrangement of Barzel Industries Canada Inc.

Morawetz J.

Judgment: September 15, 2009
Docket: Toronto 09-8363-00CL

Counsel: R.B. Schwill, for Applicant
S. Golick, M. Wasserman, for D & T Inc.
P. Macdonald, for J.P. Morgan
L. Pillon, for Chriscott USA Inc.

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

***Morawetz J.*:**

1 The matter proceeded on an unopposed basis.

2 The record establishes that the Applicant qualifies for protection under the CCAA.

3 The Applicant is incorporated under the CBCR. It carries on business in Ontario and Quebec. The Applicant's registered office and chief place of business is in Ontario and the total claims against the Applicant exceeds $5 million. The Applicant has acknowledged that it is insolvent.

4 The record also establishes that the Applicant is seeking protection under the CCAA to provide it with the necessary forum, time and a stable operational environment so as to effect and implement a going concern sale of its business.

5 The Applicant is a wholly owned, indirect subsidiary of Barzel Industries Inc., a Delaware Corporation. This entity and certain of its U.S. subsidiaries the "U.S. Debtors" filed under Chapter 11 of the U.S. Code this morning.

6 The record sets out the relationship of the Applicant to its affiliated company. The US Debtors, together with the Applicant and 632422 N.B. Ltd are collectively referred to as the "Barzel Group."

7 The operations of the Barzel Group are described in the affidavit of Ms. Narwold. It is clear that the operators are integrated and that, in my view, it is desirable that these proceedings be coordinated with the Chapter 11 proceedings.

8 It is also apparent from the affidavit of Ms. Narwold that the secured creditors appear to have indebtedness well in excess of the value of the assets of the Barzel Crop. [illegible text] NAS [illegible text] would buy Barzel Finco Inc in November, 2007 in the amount US $315. Of this amount $125 was loaned to the Applicants. Security has been provided as the applicants for this inter intercompany advance.

9 It is also apparent that the expected value of the assets of the Barzel Corp is less than the amount of this intercompany advance.

10 Two-thirds of the Notes are held by JP Morgan Chase Bank (JPM) ad one-third are held by CIBC World Markets Corp ("CIBC" and together with JPM, the "Holders").

11 The Holders are also the ABL Leaders. The ABL [illegible text] is currently outstanding in the amount of approximately US $17.5 million of which US $14 million was owing by the Applicant for direct borrowings.

12 The involvement of the Holders has been noted as the Holders are also the proposed DIP leaders under a US $30 DIP [illegible text]. The DIP [illegible text] is required, according to Ms Narwold's affidavit, on an immediate basis for the Applicant to continue as a going concern.

13 The Applicant and Barzel Finco will has access to the DIP [illegible text].

14 The Applicant is obligated for the entire amount of the DIP [illegible text], but in view of the indebtedness owed to the Holders and the apparent value of the assets which leave the Holders with a substantial shortfall, it is the Holders who have the economic exposure and it does not appear that any other creditor of the Applicant will be adversely affected by this arrangement.

15 The affidavit also sets out the efforts that have been made to effect a sale of the assets culminating in a "stalking horse bid". It is expected that the parties will be returning to Court in order in the near future to finalize the sale process.

16 The affidavit also sets out the basis for a D & O Chapter, which, in my view, is appropriate.

17 The affidavit also contains the required financial statements and cash flow protection. Deloitte & Torch Inc is the proposed [illegible text] and their preclaims report has been filed.

18 The Applicant also requests that this Court consider a form of cross-border protocol. In my view a protocol is desirable, in view of the integrated nature of the operations and the fact that the parties and the Courts will need to coordinate activities in the upcoming sale process. In my view it is appropriate to approve the protocol — on the understanding that the implementation of the protocol cannot take effect until such time as it has also been approved by the US Bankruptcy Court.

19 In my view it is appropriate to grant CCAA protection. An order shall issue to give effect to the foregoing.

2009 CarswellOnt 146
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re.

2009 CarswellOnt 146, [2009] O.J. No. 154, 174 A.C.W.S. (3d) 332, 50 C.B.R. (5th) 77

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

Morawetz J.

Heard: January 14, 2009
Oral reasons: January 14, 2009
Docket: 09-CL-7950

Counsel: Derrick Tay, Mario Forte, Jennifer Stam for Nortel Networks Corporation, et al
Edmond Lamek, Aubrey Kauffman for Export Development Canada
Michael Barrack, Rachelle Moncur for Flextronics Corporation
Edward A. Sellers for Directors of Nortel Networks Corporation, Nortel Networks Limited
Jay Carfagnini for Monitor, Ernst & Young Inc.

***Morawetz J.*:**

1 Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks International Corporation ("NNIC"), Nortel Networks Global Corporation ("NNGC"), Nortel Networks International Corporation ("NNIC") and Nortel Networks Technology Corporation ("NNTC") bring this application under the *Companies' Creditors Arrangement Act* ("*CCAA*").

2 NNC is a Canadian corporation and is the direct or indirect parent of 143 subsidiaries including the other applicants. NNC, NNL, NNIC, NNGC and NNTC are referred to as the "Applicants".

3 In addition, NNC is party to eight joint ventures operating worldwide. References to "Nortel" or the "Nortel Companies" are references to the global enterprise as a whole. References to a "Nortel Company" are references to a single entity within the Nortel Companies.

4 NNC's and NNL's principal executive offices are in Toronto, Ontario. NNTC's principal executive offices are in Ottawa, Ontario. NNL also has offices in Montreal and Ottawa with sales and support offices throughout Western and Central Canada, Quebec and Atlantic Canada. NNIC and NNGC have their registered offices in Toronto, Ontario, but apparently have no operations.

5 The Applicants seek protection under the *CCAA* to facilitate the re-organization of the Nortel Companies for the benefit of all creditors. In addition, certain of NNC's direct and indirect U.S. subsidiaries have filed voluntary petitions (the "Chapter 11 proceedings") pursuant to Chapter 11 of the United States Bankruptcy Code (the "Code"), and the directors of certain of NNL's active subsidiaries in Europe, Middle East and Africa (collectively referred to as the "ENEA Entities") and ("ENEA"), are expected to apply to the English court for administration orders for each of the ENEA

Entities and (the "Administration Proceedings") pursuant to the *Insolvency Act* 1986 ("IA86"). The Applicants are also seeking this court's authorization to apply for recognition of the *CCAA* proceedings as "foreign main proceedings" under Chapter 15 of the Code. Counsel has also indicated that Nortel Networks Inc. ("NNI") and the other scheduled Chapter 11 applicants are making an application to this court pursuant to s.18.6 of the *CCAA* to recognize the Chapter 11 proceedings as "foreign proceedings" in Canada and to give effect to the stay thereunder.

6 The name Nortel is known throughout the world for leadership in the networking and communication industries, delivering cutting-edge hardware and software solutions and related services.

7 In his affidavit filed in support of this application, Mr. John Doolittle, Treasurer of NNC and NNL stated that at their peak in 2000, the Nortel companies generated approximately $30 billion of annual revenue, employed nearly 93,000 employees and had a market capitalization of over U.S. $250 billion. He also stated that with the burst of the high-tech bubble in early 2001 and the resulting significant downturn in both the telecommunications industry and the economic environment, the Nortel companies began to face an increasingly difficult competitive environment.

8 A number of steps have been taken to restructure the affairs of Nortel since 2001, but as Mr. Doolittle explains in his affidavit these measures have not provided adequate relief from the significant pressures Nortel is experiencing. The Applicants are of the view that the action which presents the greatest potential for the survival and recovery of Nortel is a comprehensive business and financial restructuring which can only be accomplished through a *CCAA* process coordinated with the Chapter 11 proceedings and the Administration Proceedings.

9 The Canadian corporate structure, the U.S. corporate structure and the European corporate structure are detailed in the affidavit of Mr. Doolittle as is the Applicants' capital structure.

10 As at January 9, 2009, Nortel's debt structure consisted of the following unsecured obligations:

Nortel Networks Corporation

- $575 million, 1.75 percent convertible notes due 2012
- $575 million, 2.125 percent convertible notes due 2014

Nortel Networks Limited and Nortel Networks Inc.

- $1 billion Libor + 4.25 percent senior notes due 2011
- $550 million, 10.125 percent senior notes due 2013
- $1.125 billion, 10.75 percent senior notes due 2016
- $200 million, 6.875 percent senior notes due 2023 (no NNI guarantee)

Nortel Networks Capital Corporation

- $150 million, 7.875 percent senior notes due 2026
- Notes do not carry NNI guarantee but are fully and unconditionally guaranteed by NNL

11 Mr. Doolittle also stated that the operation of the Nortel business is a highly complex integrated structure designed to accommodate the global nature of their business and, although many of Nortel's primary contractual external relationships with vendors are through NNL, products are ordered, delivered and paid for pursuant to internal sub-agreements with vendors and Nortel regional entities.

12 As a result of the complex structure, Mr. Doolittle states that there are frequent inter-company receivables arising among the operating subsidiaries and, occasionally, when such receivables are not settled on a short timeframe, such receivables may be converted into an inter-company loan. These loans are typically repaid in the normal course.

13 Further, as a result of the inter-connectivity of the Nortel Companies, Nortel employs a complex arrangement to deal with cash management and inter-company payments and the allocation of revenues, and costs among the Nortel Companies. By way of summary, Mr. Doolittle noted that the Applicants have a total of 39 Canadian $ and U.S. $ bank accounts, which are maintained on an entity-by-entity basis.

14 Again, according to Mr. Doolittle, the Nortel business is highly integrated with several key Nortel Companies acting as purchasing hubs for Nortel Companies around the world which results in high levels of inter-company receivables and payables, which necessitate the complex transfer pricing and inter-company settling methods employed by Nortel.

15 Mr. Doolittle goes on to explain that the inter-company sales and receivables system is highly complex and essential for the ongoing fulfillment of customer orders.

16 Accordingly, the Applicants propose to continue their buying and selling arrangements consistent with the transfer pricing model post filing. In anticipating of these insolvency proceedings, the Chapter 11 proceedings in the U.S. and the Administration in England, Mr. Doolittle stated that the Applicants have entered into discussions with NNI in the U.S. and NNUK (the head of ENEA) along with Ernst & Young LLP (UK) as proposed administrator (the "Administrator") and have reached a 30-day agreement with respect to the terms on which these arrangements would continue were proceedings to be commenced in all three jurisdictions.

17 In addition, the Applicants have critical relationships with two entities.

18 First, the Applicants rely heavily on Flextronics Telecom Systems Ltd. to supply approximately 75 percent of Nortel's products. In anticipation of this filing, and in recognition of the importance of Flextronics' continuing compliance during the proceedings, Nortel and Flextronics negotiated the terms of an agreement that will ensure ongoing supply upon filing. A copy of the agreement is contained at Exhibit B to the affidavit of Mr. Doolittle. The agreement is subject to Canadian court approval. The Monitor recommends that this court approve this amending agreement.

19 Second, Export Development Canada ("EDC") provides a support facility to Nortel. Nortel is of the view that this facility is a key component of the ability of Nortel to continue its business. EDC has agreed to provide a 30-day waiver of default and has agreed to provide up to U.S. $30 million of additional support during the 30-day waiver period, to allow EDC and Nortel to work together to see if a longer-term arrangement can be reached. The EDC waiver is subject to the condition that any support granted by EDC post-filing will be secured by a charge on the assets of Nortel (the "EDC Charge"). Nortel is agreeable to the granting of the charge and the Monitor has recommended that the EDC Charge be granted.

20 Copies of NNC's audited Consolidated Financial Statements for 2007 as well its Unconsolidated Financial Statements for the first three fiscal quarters of 2008 are filed in the Record.

21 As of September 30, 2008, the Applicants had total current assets of U.S. $21.153 billion and total current liabilities of U.S. $22.355 billion.

22 The Applicants do not have any senior secured obligations. Other than leased equipment, capital leases, sale lease arrangements related to the real estate properties and certain letters of credit which are cash collateralized, the remainder of their obligations are apparently unsecured obligations.

23 Nortel also has significant pension and post-retirement plan liabilities. Mr. Doolittle states that an upcoming valuation will reflect a significant decline in the value of the assets held in Nortel pension plans due to the recent adverse

conditions in the financial markets globally. As a result, Nortel anticipates that its pension plan funding requirements in 2009 will increase in a very substantial and material manner.

24 Mr. Doolittle also states that the Applicants have third-party trade debt of approximately U.S. $160 million. He also indicated that the Applicants are defendants in various legal proceedings for which the Applicants are unable to ascertain the ultimate aggregate amount of liability. Further, the Applicants have other debt of approximately $414 million relating to various contractual commitments.

25 The Applicants have acknowledged that they are insolvent. In addition to the information referenced above, the Chapter 11 applicants are seeking protection pursuant to Chapter 11 of the Code, which is a default under the high-yield notes. Mr. Doolittle has acknowledged that NNL and NNC do not have sufficient funds to pay any accelerated amounts on the high-yield notes and defaults under the high-yield notes lead to a default under support facility provided by EDC as well as other convertible notes.

26 Further, Mr. Doolittle acknowledges that the Applicants are cognizant of the significant pension deficits in England (the contributions to which have been guaranteed by NNL) and Canada, which, if accelerated they would not be able to fulfill.

27 Ernst & Young Inc. ("E&Y") was retained by the Applicants on September 26, 2008 to advise as to the financial status of the Applicants.

28 E&Y has consented to act as the Monitor (the "Monitor") of the Applicants in the *CCAA* proceedings.

29 E&Y has filed a report in its capacity as proposed Monitor (the "Report"). The Report provides additional detail as to the current financial status of Nortel and as well it contains the recommendations of the Monitor in respect of the proposed form of *CCAA* order.

30 The Record filed in support of the application also contains the required cash-flow forecast, which in this case is a 13-week cash-flow forecast that estimates the Applicants' financing requirements.

31 The proposed form of order provides for a number of charges and financial thresholds which are described in both the affidavit of Mr. Doolittle and in the Report.

32 These charges include an Administrative Charge, a Directors' and Officers' Charge, and Inter-Company Charge, and a Carling Facility Charge to support cash loans from NNI to NNL.

33 With respect to the Carling Facility Charge, Mr. Doolittle states that, at the present time, most of Nortel's cash in North America is with NNI. NNL requires access to $200 million of that cash to ensure that NNL has access to adequate funding for this process. It is therefore contemplated that as part of its first-day hearings, NNI will seek U.S. Bankruptcy Court approval to advance up to U.S. $200 million on a revolving basis to NNL (the "NNI Loan") which will be secured by the Carling Facility Charge.

34 The Applicants have also disclosed that the directors in the past have elected to receive remuneration by way of allocation of share units. The proposed Monitor has been advised by the Applicants that, in the future, all directors will be remunerated by way of cash payments (at current cash-equivalent levels, less $25,000), subject to court approval.

35 In its report, the Monitor has recommended that the Applicants be granted the benefit of protection under the *CCAA* and, as well, the Monitor is supportive of the charges and financial thresholds proposed in the draft order. The priority of the various charges is specified in the order.

36 Having reviewed the record and having heard submissions, I am satisfied that the Applicants qualify as debtor corporations within the meaning of the *CCAA*.

37 The Applicants clearly have obligations in excess of the qualifying limit and have acknowledged that they are insolvent.

38 The jurisdiction of this court to receive the *CCAA* application has been established.

39 The Applicants seek an initial order under s.11 of the *CCAA*. The required Statement of Projected Cash Flow and the other financial documents required under s.11(2) have been filed. The application was not opposed by any party appearing.

40 Counsel to Flextronics, EDC and the Board of Directors all expressed their support for the granting of the requested relief. The Monitor expressed its approval to the requested form of order.

41 I am satisfied that it is appropriate that the Applicants be granted protection under the *CCAA* and an order shall issue to that effect, which order also approves the amending agreement with Flextronics and the granting of the EDC Charge. The draft order is based on the Model Order and the modifications as proposed are acceptable.

42 Although none of the Applicants have filed for Chapter 11 protection in the United States, and none of the Chapter 11 entities have filed as debtor companies under the *CCAA*, it is recognized that Nortel's operations are connected in many ways such that, in my view, it is desirable to implement a cross-border insolvency protocol. The initial order seeks approval of such a protocol which establishes the basis for communication and cooperation between the Canadian and U.S. courts, while confirming their independence. The form of protocol is acceptable to this court and is, accordingly, approved. However, this cross-border insolvency protocol cannot be implemented without the approval of the U.S. court.

43 The Applicants have also requested that the Monitor be directed to commence proceedings under Chapter 15 of the Code to have the *CCAA* proceedings recognized as "foreign main proceedings". The effect of the Chapter 15 proceedings would be to give effect to this initial order in the United States. The Applicants anticipate that the Monitor will be appointed as the Applicants' foreign representative in respect of such Chapter 15 proceedings.

44 The Monitor is of the view that the Applicants should be authorized to seek such recognition. I am in agreement with these submissions and the Monitor is accordingly authorized to seek such recognition under Chapter 15 of the Code.

45 In considering whether these *CCAA* proceedings should be recognized as "foreign main proceedings", Mr. Doolittle at paragraph 189 of his affidavit provides comprehensive reasons for the basis for his conclusion that the Applicants' centre of main interest ("COMI") is in Toronto, Ontario.

46 An order shall issue to give effect to the foregoing.

47 I would like to express my appreciation to all parties involved in this process. It is clear that significant effort was expended by all concerned in the preparation of the materials. The detail contained in the affidavit of Mr. Doolittle as well as the proposed Monitor's report was of great assistance to the court.

Application granted.

2009 CarswellOnt 3657
Ontario Superior Court of Justice [Commercial List]

Eddie Bauer of Canada Inc., Re

2009 CarswellOnt 3657, [2009] O.J. No. 2647, 179 A.C.W.S. (3d) 47, 55 C.B.R. (5th) 33

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC. (Applicants)

Morawetz J.

Heard: June 17, 2009
Judgment: June 24, 2009
Docket: 09-8240-CL

Counsel: L.J. Latham, F.L. Myers, C.G. Armstrong for Applicants
A. Kauffman for Rainier Holdings LLP
A. Cobb for Bank of America
M.P. Gottlieb for RSM Richter Inc.

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
US debtors filed voluntary petitions for relief under Chapter 11 of Bankruptcy Code — Applicant Canadian corporation and applicant Ontario corporation were wholly owned subsidiaries of US debtor — Applicants had liabilities in excess of $5 million and had declared themselves to be insolvent — Applicants applied for Initial order under s. 11 of Companies' Creditors Arrangement Act ("CCAA") — Initial order was granted — Applicants could not carry on business independently from US debtors — Principle indebtedness of each applicant was inter-company loan that arose between each applicant and US debtors — Applicants qualified as debtor corporations within meaning of CCAA — Applicants had obligations in excess of qualifying limit and had acknowledged that they were insolvent — Application had not been opposed by any party appearing — It was appropriate that applicants be granted protection under CCAA — Applicants were fully integrated into operations of US debtors — Applicants had not filed under Chapter 11 — Cross-Border Insolvency Protocol was approved.

***Morawetz J.*:**

1 On June 17, 2009, I granted an Initial Order under the *Companies' Creditors Arrangement Act* ("CCAA") which provided CCAA protection to Eddie Bauer of Canada, Inc. ("EB Canada") and Eddie Bauer Customer Services Inc. ("EBCS" and, with EB Canada, the "Applicants"), with brief reasons to follow. These are the reasons.

2 The application was not opposed.

3 Having reviewed the Affidavit of Marvin Toland, the Chief Financial Officer of Eddie Bauer Holdings Inc. ("EB Holdings") and a Vice President of EB Canada and EBCS (the "Toland Affidavit") as well as the Report of RSM Richter Inc. ("RSM"), the proposed Monitor of the Applicants (the "RSM Report"), I am satisfied that the Applicants qualify as proper applicants under the CCAA.

4 EB Holdings and Eddie Bauer Inc. ("EB Inc.") (collectively, the "US Debtors") have filed voluntary petitions (the "Chapter 11 Proceedings") for relief under Chapter 11 in the United States Bankruptcy Court for the District of Delaware.

5 The U.S. Debtors and the Applicants are collectively referred to as the "Eddie Bauer Group".

6 EB Canada is a Canadian corporation and EBCS is an Ontario corporation.

7 EB Canada is a wholly-owned subsidiary of EB Inc. which, in turn, is a wholly-owned subsidiary of EB Holdings.

8 EB Canada is located in Vaughan, Ontario and is the main operating company in Canada, focussing on operating the business of Eddie Bauer's 36 retail stores and its one warehouse store in Canada.

9 EBCS is located in Saint John, New Brunswick. EBCS is also a wholly-owned subsidiary of EB Inc., and is therefore an affiliate of EB Canada. EBCS operates a call centre.

10 The Applicants have liabilities in excess of $5 million and have declared themselves to be insolvent.

11 I am satisfied that, based on a reading of the Toland Affidavit and the RSM Report, that the Applicants cannot carry one business independently from the US Debtors.

12 The Toland Affidavit establishes that the Applicants are fully integrated into the US and except for some Canadian-specific functions, all of the "head office" functions are based out of Eddie Bauer's head office in Bellvue, Washington.

13 The principal indebtedness of each Applicant is the inter-company loan that arises between each Applicant and the US Debtors.

14 The Toland Affidavit also establishes that the Applicants depend on financing from EB Inc. to carry on business.

15 The Toland Affidavit also establishes that the primary purpose of the CCAA Proceedings and the Chapter 11 Proceedings (collectively, the "Restructuring Proceedings") is to allow the Eddie Bauer Group the opportunity to maximize the value of its business and assts in a unified, court-supervised sales process.

16 The US Debtors have, subject to necessary Chapter 11 approvals, obtained DIP Financing.

17 RSM understands that the Applicants do not have any secured creditors (with the possible exception of equipment lessors, if any), nor are the Applicants a borrower or guarantor under the US Debtors' Senior Secured Revolving Credit Facility.

18 The Applicants are funded by the US Debtors on an unsecured basis and the obligation is tracked in the inter-company account.

19 The proposed DIP Facility contemplates the US Debtors to advance up to US $7.5 million to the Applicants and US Debtors be granted a charge over the assets of the Applicants limited to the actual amount of inter-company advances.

20 The DIP Facility is predicated on the US Debtors carrying out a Sale Process, which will include the marketing of the businesses and assets of the US Debtors and the Applicants. The Sales Process will be subject to approval by this Court and the US Court. I am satisfied that the proposed DIP Facility is appropriate in the circumstances as is the creation of the Inter-company Charge as described in the Toland Affidavit and the RSM Report.

21 The proposed form of order is based on the Model Order. It provides for other charges as described in the Toland Affidavit and the RSM Report. These charges are the Administrative Charge and the Directors' Charge. I am satisfied that these charges are reasonable in the circumstances.

22 The proposed order also provides that the Applicants shall be entitled but not required to pay amounts owing for goods and services actually supplied to the Applicants prior to the date of the Order. The RSM Report comments on this point. The Eddie Bauer Group is of the view that operations could be disrupted and its vendor relationships adversely impacted if it does not have the ability to pay pre-filing obligations to certain vendors and it further believes that the value of its business will be maximized if it can pay its pre-filing creditors. RSM has reviewed this issue and is supportive of this provision as the Eddie Bauer Group believes it is a necessary provision and the DIP Lenders are supportive of the Restructuring Proceedings. The relief requested in these proceedings is consistent with the relief sought in the Chapter 11 Proceedings. This provision is unusual but, in the circumstances of this case, appears to be reasonable.

23 As previously noted, I am satisfied that the Applicants qualify as debtor corporations within the meaning of the CCAA. They have obligations in excess of the qualifying limit and have acknowledged they are insolvent. The jurisdiction of the court to receive the CCAA application has been established.

24 The Applicants seek an Initial Order under Section 11 of the CCAA. The Statement of Projected Cash Flow and other financial documents required under Section 11(2) have been filed. RSM Richter has consented to act as Monitor. The application was not opposed by any party appearing.

25 I am satisfied that it is appropriate that the Applicants be granted protection under the CCAA and an order shall issue to that effect.

26 The Applicants are fully integrated into the operations of the US Debtors. The Applicants have not filed under Chapter 11. The Applicants do, however, recognized that it is important to coordinate the activities of the Eddie Bauer Group in the two proceedings and, to this end, the Applicants have proposed the adoption of a Cross-Border Insolvency Protocol (the "Protocol") which incorporates by reference the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (the "Guidelines").

27 Mr. Toland stated that he believes the Protocol is needed to ensure that: (i) both the CCAA and Chapter 11 Proceedings are coordinated to avoid inconsistent, conflicting or duplicative rulings by the Courts; (ii) all parties of interest are provided with sufficient notice of key issues in both proceedings; (iii) the substantive rights of all parties in interest are protected; and (iv) the jurisdictional integrity of the Court is preserved.

28 I accept the views of Mr. Toland. It seems to me that all parties would be best served if the Protocol is implemented. Accordingly, I approve the Protocol, in substantially the form included in the Application Record. It is recognized, however, that the implementation of the Protocol cannot take effect until such time as the Protocol has also been approved by the US Bankruptcy Court.

29 An order shall issue to give effect to the foregoing.

30 I appreciate the efforts of the parties involved in this process. The detail contained in the Toland Affidavit and the RSM Report was of great assistance to the Court.

Application granted.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.

Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding Commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS

(Returnable October 25, 2018)
(Re: Approval of the Cross-Border Protocol)

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