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 Richtree Inc. et al.

[Indexed as: Richtree Inc. (Re)]

74 O.R. (3d) 174
[2005] O.J. No. 251
Court File No. 04-CL-5584

Ontario Superior Court of Justice,
Lax J.
January 26, 2005

Debtor and creditor -- Companies' Creditors Arrangement Act -- Jurisdiction -- Court not having jurisdiction to grant exemption from filing requirements of Securities Act -- Securities Act, R.S.O. 1990, c. S.5, s. 80 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Securites regulation -- Companies' Creditors Arrangement Act -- Jurisdiction -- Court not having jurisdiction to grant exemption from filing requirements of Securities Act -- Securities Act, R.S.O. 1990, c. S.5, s. 80 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Corporations under the protection of the Companies' Creditors Arrangement Act ("CCAA") are not immunized from complying with regulatory regimes, and [page175] the court does not have the jurisdiction to relieve a reporting issuer who has been granted protection under the CCAA from its filing obligations under the Securities Act.

Cases referred to

Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1; GMAC Commercial Credit Corp. of Canada v. T.C.T. Logistics Inc. (2004), 71 O.R. (3d) 54, [2004] O.J. No. 1353, 185 O.A.C. 138, 238 D.L.R. (4th) 677, 48 C.B.R. (4th) 256 (C.A.); Loewen Group Inc. (Re), [2001] O.J. No. 5640, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134 (S.C.J.); Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 676, 12 C.B.R. (4th) 94 (C.A.); Quintette Coal Ltd. v. Nippon Steel Corp., [1990] B.C.J. No. 2497, 2 C.B.R. (3d) 303 (C.A.); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div.); Skeena Cellulose Inc. (Re), [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331, 14 C.B.R. (3d) 88 (S.C.)

Statutes referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6 [as am.], 11 [as am.]

Securities Act, R.S.O. 1990, c. S.5, s. 80 [as am.]

MOTION requesting an extension from the requirement to file disclosure documents.

Edmond F.B. Lamek, for applicant, Richtree Inc.

Michael Weinczok, for Catalyst Fund General Partner Inc.

Kelley McKinnon, Alexandra S. Clark and J.H. Grout, for respondent, The Ontario Securities Commission.

[1] LAX J.: -- Richtree Inc. is a reporting issuer in Ontario and in several other Canadian jurisdictions. It brings this motion requesting an exemption by way of extension from the

requirement to file its audited financial statements and other continuous disclosure documents with the Ontario Securities Commission (the "OSC") and the equivalent regulatory authorities in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador and Nova Scotia. Following submissions, I dismissed the motion with reasons to follow. These are the reasons.

Background

[2] At the time of the motion, Richtree had filed an application with the Superior Court of Justice, Commercial List, and received creditor protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). This proceeding is ongoing.

[3] On November 24, 2004, it made an application under the Mutual Reliance Review System for Exemptive Relief Applications [page176] (the "MRRS System") for an exemption from the obligation to meet its filing requirements with the OSC. The MRRS System permits reporting issuers to request exemptions from multiple Canadian securities regulators with a single application. As Richtree had appointed the OSC as the principal regulator, its staff had primary carriage of the Application for Exemption. The exemptions sought were exemptions from the filing with the OSC the 2005 Q1 Interim Financial Statements and the 2005 Q1 Management's Discussion and Analysis by December 8, 2004; and, the 2004 Annual Financial Statements, the 2004 Management's Discussion and Analysis and the 2004 Annual Information Form by December 10, 2004.

[4] Shortly before the formal filing of the Application for Exemption, OSC staff informed Richtree that they would not recommend that the OSC grant the exemption. On December 1, 2004, OSC staff confirmed its recommendation and also informed Richtree that staff of the other regulators would also recommend that their securities commissions refuse the request for exemption. The OSC staff offered to convene a joint hearing before a panel of the OSC, with the other jurisdictions participating by conference, or a hearing before the OSC if the other jurisdictions agreed to abide by the decision of the OSC.

Richtree refused the hearing and brought this motion on December 7, 2004, which was the day before its first filings were due.

Analysis

[5] Richtree concedes that the OSC has statutory jurisdiction to grant an exemption to a reporting issuer: Securities Act, R.S.O. 1990, c. S.5, s. 80. However, it submits that the court has inherent jurisdiction to grant this relief consistent with its discretionary powers under s. 11 of the CCAA to accomplish the goal of facilitating the restructuring of a debtor company. It points to examples of stays in the nature of "tolling provisions". These are frequently granted in Initial CCAA Orders and constrain creditors or third parties from exercising rights so as to provide the necessary stability for the debtor company to restructure its affairs. It submits that the court has a variety of discretionary powers arising from its inherent jurisdiction to make orders to do justice between the parties and also to do what practicality demands. For this proposition, it relies on dicta of Farley J. in Re Royal Oak Mines Inc., [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div.) where he said at p. 296 C.B.R.:

> In light of the very general framework of the CCAA, judges must rely upon inherent jurisdiction to deal with CCAA proceedings. However, inherent jurisdiction is not limitless if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play. [page177] The same limitations are applicable to a Court's use of a discretion granted by statute. I appreciate that there may have been some blurring of distinction among discretion, inherent jurisdiction and general jurisdiction (including the common law facility). This combination is implicitly recognized in Baxter Student Housing Ltd. v. College Housing Cooperative Ltd. (1975), 57 D.L.R. (3d) 1 (S.C.C.) in Dickson J's analysis of inherent jurisdiction at pp. 4-5. ...

[6] In Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1,

Dickson J. emphasized that inherent jurisdiction does not empower a judge to negate an unambiguous expression of the legislature. Neither may it be exercised to conflict with a statute or rule. It is a special and extraordinary power to be exercised only sparingly and in a clear case and usually to maintain the authority and integrity of the court process.

[7] The concept of "inherent jurisdiction" within CCAA proceedings is discussed in the recent decision of the British Columbia Court of Appeal in Re Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at pp. 211-12 C.B.R.. The court concludes that when one analyzes cases such as Re Royal Oak Mines, as well as others referred to by Farley J., such as Re Westar Mining Ltd., [1992] B.C.J. No. 1360, [1992] 6 W.W.R. 331 (S.C.), the court's use of the term "inherent jurisdiction" is a misnomer. In these cases, the courts are exercising a statutory discretion given by the CCAA rather than their inherent jurisdiction. This is an important distinction, which Farley J. recognizes in Re Royal Oak Mines in the passage quoted and in his reference to the decision of the Supreme Court of Canada in Baxter.

[8] I agree with the analysis in Skeena Cellulose that when a court grants a stay of proceedings under s. 11 or approves a plan of arrangement under s. 6, the court is not exercising a power that arises from its nature as a Superior Court, but rather is exercising the discretion granted to it under the broad statutory regime of the CCAA. The relief that Richtree requests whether under the CCAA or the Securities Act is discretionary. The question that arises then is whether the statutory discretion granted to a court under the CCAA can be exercised in the face of s. 80 of the Securities Act, which provides that it is the Commission that may grant or refuse the exemptions sought.

[9] The answer is no. There is no provision of the CCAA that either addresses or contemplates an application to the court for exemption from the filing requirements of the Securities Act. The doctrine of paramountcy has been acknowledged to apply where the exercise of a court's discretion under the CCAA conflicts with the mandatory provisions of provincial

legislation, see for example, [page178] Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 676, 12 C.B.R. (4th) 94 (C.A.), at p. 115 C.B.R.; Re Loewen Group Inc., [2001] O.J. No. 5640, 32 C.B.R. (4th) 54 (S.C.J.), at p. 58 C.B.R. However, it is worth noting that in neither case was it necessary to invoke the paramountcy doctrine. Here, as in the cases referred to, there is no inconsistency between federal and provincial law. The doctrine of paramountcy does not apply.

[10] Further, where a provincial statute is given exclusive jurisdiction to determine a matter, the court's discretionary power under the CCAA cannot be used to override it. Hence, a broad receivership power under federal bankruptcy legislation confers no authority on a bankruptcy court to determine whether a receiver that carries on the business of a debtor is a successor employer. This is within the exclusive jurisdiction of the Ontario Labour Relations Board: GMAC Commercial Credit Corp. of Canada v. T.C.T. Logistics Inc. (2004), 71 O.R. (3d) 54, [2004] O.J. No. 1353, 238 D.L.R. (4th) 677 (C.A.). On this point, the court was unanimous.

[11] Richtree relies on Orders made in CCAA proceedings in Slater Steel and Air Canada where the court granted extensions of time for calling an annual general meeting of shareholders. This is commonly done in CCAA proceedings. It is quite a different thing to relieve a reporting issuer from providing timely and accurate financial information to members of the public where, as here, the company's shares continue to trade. At the time of its application for exemption from filing requirements, Slater's shares had been delisted from the Toronto Stock Exchange and were no longer trading. Further, the OSC, as lead regulator, had granted Slater a filing exemption, which is recited in the Order of May 5, 2004.

[12] Richtree submits that the court should defer to the opinion of the directors of the company who are attempting to achieve the best results they can for the company and all of its stakeholders. I agree that the task of the directors is to focus their attention on assisting Richtree with its restructuring. However, the proper forum for debating the effect of the filing requirements on Richtree is not on this

motion, but at the OSC. The legislature has decided that it is the proper forum for balancing the interests of the company and its stakeholders on the one hand and the interests of members of the public on the other. I conclude that the court has no jurisdiction under the CCAA to grant the exemptions sought.

[13] Having said this, I wish to make some comments about the reasons that the Richtree directors have come to court. The company does not plan to comply with its filing requirements and the [page179] directors have two concerns. The only evidence before the court is a solicitor's affidavit, which deposes in para. 2:

> ... I understand that Richtree's directors are concerned that they could be required under applicable securities laws to notify the boards of any other public companies on which they serve or may in the future serve, of such filing requirement defaults. Moreover, I understand that Richtree's directors are concerned that they might be viewed as having acquiesced in a deliberate breach by Richtree of securities law and corporate legislation and thereafter suffer damage to their respective reputations.

[14] As to the first concern, the Richtree directors are already required to disclose that they have been directors of a company that has made a plan of arrangement under the CCAA. Specifically, the rules of the Toronto Stock Exchange require directors to disclose this on a Personal Information Form for all companies seeking to list, or that currently list their shares for trading on the TSX.

[15] The sole consequence of Richtree's failure to meet the filing requirements is that the company will be placed on the OSC's Default List. There is no requirement under Ontario securities law to disclose that an individual has been a director of a company that has been placed on the Default List. Although the OSC does place companies that are under CCAA protection on the Default List, there is no evidence that this has caused any harm to Richtree or indeed to other companies currently on the list, or to their directors.

[16] As to the second concern, I was informed that the Richtree directors, or at least some of them, are on several boards, and that this raises concerns for them about their reputations as directors of these boards or other boards they may be invited to join. I find this to be a disquieting submission. As directors of Richtree and as directors of any other boards on which they may now or in the future serve, they have fiduciary duties that require them to act honestly and in good faith with a view to the best interests of the corporation. These duties are paramount. Reputational concerns of a personal nature play no role in assessing the alleged harm that may flow to a director from being a member of a board whose company is a defaulting issuer.

[17] The purpose of s. 11 of the CCAA is to provide the court with a discretionary power to restrain conduct against a debtor company so as to permit it to continue in business during the arrangement period: see Quintette Coal Ltd. v. Nippon Steel Corp., [1990] B.C.J. No. 2497, 2 C.B.R. (3d) 303 (C.A.), at p. 312 C.B.R. As observed there, the power is discretionary and therefore is to be exercised judicially.

[18] Companies under CCAA protection are not immunized from complying with regulatory regimes. During a CCAA proceeding, [page180] directors are not immunized from carrying out their responsibilities or relieved of their obligations to serve the company and its stakeholders diligently. The order that is sought has nothing to do with Richtree's restructuring process. It is intended to grant the directors personal protection to their reputations. This is neither contemplated by s. 11, nor are the directors entitled to this protection. Even if the court had the jurisdiction to grant the relief sought, I would not do so as this is an improper and injudicious exercise of the court's discretion under the CCAA.

[19] For these reasons, the motion was dismissed. The OSC does not seek costs.

Order accordingly.