



Court of Appeal File No. CA49489

Supreme Court File No. S-235288

COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Justice Fitzpatrick, of the Supreme Court of British Columbia, pronounced October 31, 2023

BETWEEN:

M&M BUSINESS GROUP, L.P., MUFEED HADDAD and MIKE BUDKA

APPELLANTS

AND:

NEXTPPOINT FINANCIAL, INC., AND THOSE PARTIES LISTED ON SCHEDULE "A"

RESPONDENTS
(PETITIONERS)

AND:

FTI CONSULTING CANADA INC., FIRST CENTURY BANK, N.A., BASEPOINT, DRAKE ENTERPRISES LTD., FRONTIER CAPITAL GROUP LTD., CHILMARK ADMINISTRATIVE LLC, TMI TRUST COMPANY, CMB TAX SERVICE, LLC, and HIS MAJESTY THE KING IN RIGHT OF CANADA

RESPONDENTS

MEMORANDUM OF ARGUMENT OF THE RESPONDENT DRAKE ENTERPRISES LTD.

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OVERVIEW

1. With respect to the Appellants' application for leave to appeal, the Respondent Drake Enterprises Ltd. (the "**Respondent**") adopts the position and the submissions of the Respondents NextPoint Financial Inc. and related parties (the "**NextPoint Group**").
2. Set out herein are the Respondent's supplementary submissions with respect to the undue hindrance and prejudice that would arise if the Appellants' application was granted.

PART 1: FACTS

3. The Respondent is a secured creditor of the NextPoint Group.
4. The NextPoint Group provides financial and tax services for small business and consumers along three primary business lines, one of which is a tax debt solution service carried out by a subset of entities in the NextPoint Group known collectively as the "Community Tax" entities (the "**Community Tax Entities**").
5. In the course of the transaction approved by Justice Fitzpatrick in the order under appeal, the Respondent would become a minority shareholder of the corporate owner of the Community Tax Entities and is expected to participate in the management decisions of same on an ongoing basis. The current closing date for the transaction is by the end of 2023.
6. The Community Tax Entities are not parties to the Appellants' area development agreements. The Appellants have no agreements with nor interests in the Community Tax Entities.

PART 2: ISSUES

7. The Respondent opposes the Appellants' application for leave to appeal on the basis that it would unduly hinder the progress of the action and thereby cause significant prejudice to the Respondent.

PART 3: ANALYSIS

A. Leave to appeal

Legal framework

8. The criteria for leave to appeal include the following:
 - a. whether the point on appeal is of significance to the practice;
 - b. whether the point raised is of significance to the action itself;
 - c. whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - d. whether the appeal will unduly hinder the progress of the action.¹

¹ *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364 ["*Southern Star*"], at para. 22

9. The extent to which the proposed appeal will unduly hinder the progress of the action has historically been characterized as the most important of the four criteria.² This is highlighted in CCAA proceedings as such proceedings are very often time sensitive for a variety of reasons including scarcity of resources.
10. Even where the four criteria have been met, leave may still be denied where granting it would not be in the interests of justice.³
11. A high degree of deference is owed to the discretionary decisions of judges supervising proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") as they are "steeped in the intricacies of the CCAA proceedings they oversee".⁴ Accordingly, leave to appeal in CCAA proceedings is only granted sparingly.⁵

Undue hindrance and prejudice

12. The appeal will unduly hinder the progress of the action and cause significant prejudice to the Respondent.
13. The business conducted – and revenue generated – by the Community Tax Entities is cyclical and based in significant part on the tax filing deadlines applicable in the U.S. as well as the I.R.S.'s enforcement and collections with respect to same. As Mr. Stiles summarizes, the U.S. "tax season" runs from approximately January 1 to April 15, with February being the busiest month for businesses providing tax-related services and advice.⁶
14. Further, with respect to the enforcement and collections aspects of the business, the Respondent is expecting to see a unique surge in demand for the services provided by the Community Tax Entities in January of 2024. As Mr. Stiles explains, the I.R.S. is expected to address a longstanding backlog of notices of correction and notices of assessment in January of 2024,⁷ which will likely give rise to an exceptional increase in demand for debt solution services at that time. If the Community Tax Entities are not in a position to provide those services, prospective clients will engage its competitors instead.
15. The Respondent took this expectation into account when it agreed to the transaction respecting the Community Tax Entities and its view of the transaction's value is based, in whole or in considerable part, on the ability to realize revenue from this increase in demand. The realization of this value is dependent on the transaction closing before the end of this year and any deviation from this schedule would potentially result in a significant loss of revenue.
16. If leave to appeal is granted, the closing of the transaction will inevitably be delayed beyond January of 2024 and likely beyond February of 2024. This will have the effect of preventing the Community Tax Entities from realizing revenue from increased demand for its services and from the busiest part of the 2024 tax season, with resultant monetary losses suffered by

² *Southern Star* at para. 35; *Hockin v. Bank of B.C.*, (1989) 37 BCLR (2d) 139 at para. 20

³ *Southern Star* at para. 23

⁴ *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 54

⁵ *Southern Star* at para. 25

⁶ Affidavit #1 of J. Stiles, made November 27, 2023

⁷ *Ibid.*

the Respondent. In effect, the order sought would prevent the Community Tax Entities from pursuing the most profitable aspects of its business.

17. These losses would significantly alter the value proposition underlying the transaction approved by Justice Fitzgerald. The Respondent has foregone the exercise of its enforcement remedies in favor of entering into the transactions respecting the Community Tax Entities for a period of approximately six months. The effect of the Appellants' application for leave would be to worsen the terms of this agreement, causing the Respondent considerable prejudice.
18. The Appellants have no interest or agreements with the Community Tax Entities. As their application will nevertheless interfere with the Respondent's acquisition and operation of same, it gives rise to an undue hindrance.
19. On these bases, the Respondent submits that leave to appeal ought not be granted.

B. Stay of Justice Fitzpatrick's order

20. In the alternative, if leave to appeal is granted, the Respondent submits that a stay of the order pending appeal should not be granted.
21. On the grounds enumerated in paragraphs 12-19 above, the Respondent submits that the inconvenience it would face were a stay granted would be greater than the inconvenience the Appellants would face if a stay was not granted.

PART 4: ORDERS SOUGHT

22. The Respondent seeks a declaration that leave to appeal is refused.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Martin C. Sennott