



COURT OF APPEAL FILE NO. CA49489  
M&M business Group, L.P. v. NextPoint Financial, Inc.  
Memorandum of Argument of the Monitor (FTI Consulting Canada Inc.)

**COURT OF APPEAL**

ON APPEAL FROM the order of the Honourable Madam Justice Fitzpatrick of the Supreme Court of British Columbia pronounced on 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

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**MEMORANDUM OF ARGUMENT FTI CONSULTING CANADA INC., IN ITS  
CAPACITY AS THE COURT-APPOINTED MONITOR OF NEXTPPOINT FINANCIAL  
INC. AND THOSE OTHER PARTIES LISTED ON SCHEDULE "A", ON AN  
APPLICATION FOR LEAVE TO APPEAL AND STAY OF PROCEEDINGS**

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## Part 1: Facts

1. In the Proceedings,<sup>1</sup> FTI Consulting Canada Inc. is the monitor of NextPoint Financial Inc. and those other parties listed on Schedule “A” (in such capacity, the “**Monitor**”), appointed pursuant to an order of the Court made July 25, 2023 (the “**Initial Order**”), as amended and restated from time to time. Most recently, the Court made its second amendment and restatement of the Initial Order on October 13, 2023.
2. The Monitor takes no position on the Appellants’ applications, other than to note that if leave were granted, it could interfere with the transaction if the appeal is not heard and decided prior to the December 11, 2023 recognition hearing. The Monitor provides this argument to respond to factual and legal assertions in the Appellants’ materials to assist this Court in its consideration of the test for leave, including the relative merits of the proposed appeal and the importance of the proposed appeal to the practice.

### Appellants’ Assertions

3. In their written argument, the Appellants make assertions regarding the Monitor, specifically that the Monitor did not consider the Appellants’ economic interest in the RVO arising from the ADAs being excluded contracts.<sup>2</sup> The Appellants also assert that the proposed appeal will address “to what extent must an applicant and the Monitor... give notice to parties whose interests are uniquely affected by the relief sought.”<sup>3</sup>
4. The former is factually incorrect. The latter misapprehends the role of the Monitor.

### The Monitor’s Role

5. The Monitor did not apply for the RVO and it has never been an applicant in the Proceedings.

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<sup>1</sup> Capitalized terms used in this argument and not otherwise defined have the meaning set out in the Appellants’ argument dated November 21, 2023. The proceedings the Supreme Court of British Columbia (the “**Court**”) related to this matter are referred to as the “**Proceedings**”.

<sup>2</sup> Appellants’ Motion Book, Part 4, Appellants’ Argument at paras. 6, 28, 48

<sup>3</sup> Appellants’ Motion Book, Part 4, Appellants’ Argument at para. 55.

6. The Monitor's powers and duties are set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") or as the Court may direct.
7. In the Proceedings, these include directions and powers<sup>4</sup> to, among other things, report to the Court at such times and intervals as the Monitor may deem appropriate.<sup>5</sup> The sequence, and contents, of the reports is in the Monitor's discretion, based on the information it believes is pertinent to the Court and stakeholders at that time.
8. The Monitor has filed a pre-filing report and five reports in connection with the Petitioners' applications and a supplemental report dated November 27, 2023 providing additional information in response to certain factual and legal assertions of the Appellants.
9. The Court's directions to the Monitor regarding service and notice are set out in paragraphs 55 and 57 of the Initial Order.<sup>6</sup> Specifically, those paragraphs require the Monitor to:
  - a. publish a notice containing information prescribed by the CCAA in one Canadian national newspaper;
  - b. make the Initial Order available on its website;
  - c. send, or cause to be sent, a notice to every known creditor who has a claim of more than \$1,000 against NextPoint Financial Inc. and the other Petitioners;
  - d. prepare a list of those creditors and make it available on the Monitor's website;  
and

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<sup>4</sup> NextPoint Financial Inc.'s Motion Book ("**Respondents' Motion Book**"), Part 3, C, Affidavit #2 of Wen-Shih Yang, Exhibit E, Initial Order at para 34.

<sup>5</sup> Respondents' Motion Book, Part 3, C, Affidavit #2 of Wen-Shih Yang, Exhibit E, Initial Order at para. 34(b).

<sup>6</sup> Respondents' Motion Book, Part 3, C, Affidavit #2 of Wen-Shih Yang, Exhibit E, Initial Order at paras. 55 and 57.

- e. maintain a service list (the “**Service List**”) and post that list on the Monitor’s website. The Service List contains the parties that wish to be served with any application and other materials in the Proceedings and request to be added.<sup>7</sup>

10. The Monitor has fulfilled each of these requirements. All pleadings and other materials filed in the Proceedings are available on the Monitor’s website.

11. The Fifth Report specifically notes that the Petitioners had not served all contract counterparties with the application materials. Although the Fifth Report specifically references limited service due to the associated costs, the Monitor notes that the application was also urgent, apparent from the Petitioners’ limited resources (as shown in the cash flow statements and reliance on interim financing) and the dates materials were delivered. Specifically:

- a. The Petitioners delivered the Notice of Application and supporting materials with a draft of the transaction agreement, to the Service List on October 24, 2023;
- b. The Monitor delivered the Fifth Report to the Service List on October 27, 2023;
- c. The Petitioners delivered the unsworn Affidavit #5 of Peter Kravitz, attaching the executed transaction agreement and all schedules, to the Service List on October 30, 2023 and the sworn version on October 31, 2023;
- d. On October 31, 2023, the Court made the RVO; and
- e. On November 6, 2023, the Petitioners sought recognition of the RVO from the US Bankruptcy Court. This hearing has been continued to December 11, 2023 to accommodate the Appellants’ opposition in those proceedings. The Monitor understands that the Appellants have recently requested an adjournment of

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<sup>7</sup> Respondents’ Motion Book, Part 3, C, Affidavit #2 of Wen-Shih Yang, Exhibit E, Initial Order at para. 57.

this recognition hearing on the basis that the proposed appeal ought to be decided first.<sup>8</sup>

### **Appellants' Agreements with the Petitioners**

12. With the consent of the Monitor, the Petitioners disclaimed various contracts, including the ADAs. Prior to giving its consent, the Monitor considered the proposed disclaimers, including the impact on counterparties and the impact of the disclaimer on the Petitioners' restructuring.<sup>9</sup> The Monitor's assessment and consideration of all disclaimers was in accordance with its duties and obligations pursuant to the CCAA, orders of the Court and its role as officer of the Court.

13. Contrary to the Appellants' assertions, the Monitor considered, among other things, the impact of the RVO on stakeholders, including the Appellants. In particular, the Appellants' argument quotes from the Monitor's Fourth Report which specifically identified that:

- a. in the Monitor's view, no stakeholder was prejudiced by the RVO structure as compared to an asset transaction, being the most likely viable alternative structure;<sup>10</sup> and,
- b. the Petitioners had not served all contract counterparties with the materials, along with the cost considerations that impacted the Petitioners service efforts.<sup>11</sup>

14. Although the Monitor's Fourth Report does not specifically identify the Appellants or particularize the Monitor's analysis, the Monitor considered stakeholder interests,

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<sup>8</sup> Respondents' Motion Book, Part 3, A, Supplemental Report to the Fifth Report of the Monitor, para. 10.

<sup>9</sup> Respondents' Motion Book, Part 3, A, Supplemental Report to the Fifth Report of the Monitor, paras. 12 and 13.

<sup>10</sup> Appellants' Motion Book, Part 4, Appellants' Argument at para 23 and Part 3, E, Fourth Report of the Monitor at para. 27(c) to (e).

<sup>11</sup> Appellants' Motion Book, Part 4, Appellants' Argument at para. 24 and Part 3, E, Fourth Report of the Monitor at para. 28.

including the Appellants, in making these comments. Although the transaction does not benefit the Appellants, it is no worse treatment than under an alternative structure.

15. In the Monitor's experience, it would be unusual for a monitor's report to discuss in detail each interest it has considered. This is primarily for practical purposes and efficiency. There are often numerous disclaimed agreements with different counterparties and considerations. In this case, the Petitioners disclaimed 62 agreements, including the four ADAs with the Appellants. It would have been uneconomic and impractical to enumerate and report on each disclaimed agreement.
16. Further, the Initial Order expressly authorises the Monitor to provide information to creditors following reasonable requests<sup>12</sup> and the Monitor responds to reasonable requests for information as and when they are received. The CCAA also provides that parties that receive disclaimer notices can ask the Petitioners for the reasons for the disclaimer.
17. As of the date of this argument, the Monitor had not received any requests for information or clarification from the Appellants. Accordingly, the Monitor has not had an opportunity to address the Appellants' concerns and questions directly.

### **Part 2: Issues**

18. The issues to be determined on this application are whether this Court should:
- a. grant leave to appeal the RVO; and
  - b. order a stay of the RVO, or aspects of it.

### **Part 3: Analysis**

19. The criteria for leave, including the factors mitigating in favour of deference to a supervising judge in CCAA proceedings, are well-established and not controversial.

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<sup>12</sup> Respondents' Motion Book, Part 3, C, Affidavit #2 of Wen-Shih Yang, Exhibit E, Initial Order at para. 37,



20. The Monitor understands that the Petitioners oppose this Court granting leave and the stay of proceedings.

21. The Monitor does not take a position but provides the following comments on the implications of the proposed appeal for the assistance of this Court.

*Potential impact on the Proceedings*

22. The transaction approved by the RVO is the best, and only, transaction available to the Petitioners and maintains going concern value for most of the Petitioners' business, benefiting a range of stakeholders.

23. Considering the Petitioners' precarious financial position, if leave is granted and the appeal is decided on a later date, this may jeopardize the transaction and, unless they receive additional interim financing, the Petitioners will not be able to maintain operations or going-concern value. It is not clear such financing will be available in the face of an extant appeal and transaction uncertainty.

*Merits of the proposed appeal and importance to the practice*

24. The Fifth Report addressed each factor relevant to the determination of whether a reverse vesting order is appropriate<sup>13</sup> and identified that not all parties had been served.<sup>14</sup>

25. The Petitioners (as the applicant) and Monitor each addressed notice and service and the Court considered these issues in making its decision. Notice and service are fact-specific questions and in CCAA proceedings, recognizing that notice may not always be feasible, these issues are left to the CCAA judge's judicial discretion.<sup>15</sup>

26. To the extent the proposed appeal seeks clarification regarding notice and service obligations, this is settled law. The Monitor submits that imposing an obligation on monitors to serve parties with another party's application materials would be an

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<sup>13</sup> *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para. 38.

<sup>14</sup> Appellants' Motion Book, Part 3, E, Fourth Report of the Monitor at para. 28.

<sup>15</sup> *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 218.

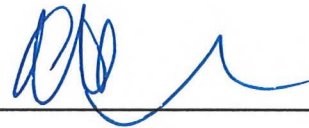
impractical and uneconomic departure from the requirements of the CCAA and the *Supreme Court Civil Rules*.

**Part 4: Order Sought**

27. The Monitor takes no position on the relief sought but provides the above comments regarding impact on the proceedings and CCAA practice to assist this Court.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 27<sup>th</sup> day of November 2023.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a solid black horizontal line.

Lisa Hiebert and Kibben Jackson

## Schedule "A"

1. NextPoint Financial, Inc.
2. NPI Holdco LLC

### **Liberty Tax Entities**

1. LT Holdco, LLC
2. LT Intermediate Holdco, LLC
3. SiempreTax+ LLC
4. JTH Tax LLC
5. Liberty Tax Holding Corporation
6. Liberty Tax Service, Inc.
7. JTH Financial, LLC
8. JTH Properties 1632, LLC
9. Liberty Credit Repair, LLC
10. Wefile LLC
11. JTH Tax Office Properties, LLC
12. LTS Software LLC
13. JTH Court Plaza, LLC
14. 360 Accounting Solutions, LLC
15. LTS Properties, LLC

### **Community Tax Entities**

1. CTAX Acquisition LLC
2. Community Tax Puerto Rico LLC
3. Community Tax LLC

### **Loan Me Entities**

1. NPLM Holdco LLC
2. MMS Servicing LLC
3. LoanMe, LLC
4. LoanMe Funding, LLC
5. LM Retention Holdings, LLC
6. LoanMe Stores LLC
7. LM BP Holdings, LLC
8. InsightsLogic LLC
9. LM 2020 CM I SPE, LLC