Tab 7

*Case Name:*

# Tiger Brand Knitting Co. (Re)

**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 Tiger Brand Knitting Company Limited, applicants**

[2005] O.J. No. 1259

[2005] O.T.C. 238

9 C.B.R. (5th) 315

138 A.C.W.S. (3d) 221

2005 CarswellOnt 1240

Court File No. 04-CL-5532

Ontario Superior Court of Justice

**C.L. Campbell J.**

Heard: April 1, 2005.
Judgment: April 5, 2005.

(43 paras.)

*Insolvency law -- Practice -- Proceedings in bankruptcy -- Jurisdiction of courts -- Orders.*

Application by Tiger Brand Knitting and the Monitor, RSM Richter, for a 15-day extension of time to present an offer to the court for the sale of the business and assets of Tiger Brand. Tiger Brand was under CCAA protection and in the midst of a court-ordered sale process. A potential purchaser came forward, but the major secured creditor, GMAC, and Tiger Brand's union, the USWA, believed that a superior offer was available. Accordingly, the deadline for the sale process was extended. At the date of the hearing, two potential purchasers executed non-binding agreements and the Monitor sought an extension to finalize a third bid. The union sought a condition that the Monitor be directed to negotiate with other potential parties before the acceptance of a bid, and a condition that the purchaser provide the opportunity of some or all of the jobs occupied by the union. The potential third bidder provided the possibility for preservation of some employment. The Monitor submitted that adding conditions to the grant of extension would undermine and violate the process.

HELD: Application allowed. There was no accepted offer before the court for approval and the actions of the Monitor in soliciting a third bid were appropriate. No conditions were warranted at this stage of the sale process. It was necessary to the administration of the CCAA to honour the terms of the current

process. To effectively re-open the offering process would amount to unfairness and favour the interests of the union over other stakeholders.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act.

Companies' Creditors Arrangement Act.

**Counsel:**

Scott A. Bomhof, for the Monitor RSM Richter Inc.

Orestes Pasparakis, for GMAC Commercial Finance Corporation-Canada.

Sean Dewart for the USWA.

Renée B. Brosseau, for Tiger Brand Knitting Company Limited.

Steven L. Graff, for Geetex Global Sourcing Inc.

Christopher Besant, for Joan Fisk.

Fred Myers, for the prospective purchaser.

Hugh Mackenzie, for Andrew Warnock and James Warnock.

Leonard Alksnis, for the majority of the members of the Board.

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REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- Tiger Brand Knitting Company Limited ("the Applicant") and RSM Richter Inc. ("the Monitor") seek an extension of the time within which to present an offer to the Court for the sale of the business and assets of the Applicant.

2 The extension of up to 15 days is not opposed. Counsel on behalf of the United Steel Workers of America ("USWA") urges the Court to add a condition to the granting of any extension, namely, that the Monitor be directed not to accept a bid offer that it has received and to negotiate with another party that may make an offer.

3 USWA seeks to add the condition with the prospect that a new offer, if it comes forward, would provide the opportunity of some or all of the 200 jobs now occupied by its members at the Applicant's facility in Cambridge.

4 Very simply, it is urged that the broad considerations available to the Court to provide remedy under The Companies' Creditors Arrangement Act ("CCAA") permit the Court to take into account and balance the interests of all stakeholders, not just those of a purchaser who would provide the greatest immediate monetary recovery to a secured creditor.

Background Facts

5 On August 30, 2004, the Applicant filed for, and obtained, protection from its creditors under the CCAA pursuant to the "Initial Order." The stay of proceedings was initially for a period of 30 days and since September 29, 2004, has been extended on a number of occasions, the last being March 15, 2005.

6 Tiger Brand, which is in the business of design and manufacture of casual clothing, has been subject to the impact of globalization, which has seen cheaper goods manufactured abroad displace domestic production. This, together with the rise of the Canadian dollar relative to the United States dollar, has resulted in a deterioration of financial performance.

7 The impact will particularly felt by the employees in head office and manufacturing facilities in Cambridge, Ontario, but as well by the Company's three retail outlets.

8 From the commencement of its involvement, the Monitor has recognized that a so-called multi-track process provided the only realistic opportunity to maximize stakeholder returns. As set out in the Monitor's First Report, these included (a) soliciting offers for the business and assets; (b) considering shareholders' restructuring plans; (c) the liquidation value of assets; and (d) assisting in identification of potential investors.

9 Subject to comments below, none of the interested parties has taken the position that the Monitor has not reasonably or appropriately carried out its duties in accordance with Court Orders.

10 By this Court's Order of September 13, 2004, a Sale Process was approved, as it was recognized that a sale of assets rather than a restructuring of the Company was the more likely result of the ongoing effort.

11 The marketing process was extended and by Order of November 3, 2004, amended as set out in that Order with the explanation and rationale for it contained in the Monitor's Fifth Report to the Court dated January 11, 2005:

- The Monitor originally identified a sale transaction with Geetex which, at the time, provided the highest value to the stakeholders and had the greatest probability of closing. Importantly, the Geetex offer was premised on an asset acquisition which would likely result in Geetex carrying on an importing operation; and, as such, an orderly wind-down and termination of the Company's manufacturing and possibly other operations in Cambridge, Ontario;
- Geetex agreed that its offer would be a "stalking horse" in the amended sale process. Parties interested in purchasing the Assets for an amount greater than the Geetex stalking horse bid had to submit offers by a November 12, 2004 deadline;

12 A deadline of November 12, 2004 was set for the receipt of offers pursuant to the Amended Sale Process, the short time period being considered necessary due to a belief by, among others, Geetex that, "if a transaction was not consummated in short order, the assets and the business of Tiger Brand generally would deteriorate significantly and rapidly in value."

13 Apparently, both the major secured creditor GMAC and the Union were of the view that superior offers were available, the process was extended and in early January 2005, a "stay fee" was negotiated between the Monitor and Geetex, whereby Geetex kept its offer open to February 15, 2005.

14 Geetex takes the position that there has not been until most recently an offer superior to its and that

either the new offer from a new purchaser of assets should be accepted and closed, or Geetex's offer accepted and completed, or it be paid the break fee plus costs.

15 As of the time of its Sixth Report, the Monitor had executed non-binding non-exclusive memoranda of understanding with two prospective purchasers and looked forward to one or both of the parties presenting a final form of asset purchase agreement for consideration.

16 Since that time, the Monitor has been negotiating an agreement with one prospective purchaser, which is expected to be finalized and executed shortly. Hence the request for an extension to April 15, 2005.

17 The affidavit material filed on behalf of USWA identifies a potential bidder, which, if successful, would provide the opportunity for preservation of some employment in Cambridge.

18 In effect, USWA complains that the Monitor will not now consider and negotiate an offer from this bidder, which effectively eliminates the possibility of saving employment in Cambridge.

19 The Monitor reports in its Seventh Report that efforts to identify going-concern purchasers that would preserve employment at Cambridge have been unsuccessful.

20 The position of the Monitor, supported by the major secured creditor, Geetex and the prospective purchaser, is that to add a condition to the grant of extension would undermine and violate the process that has been followed to date.

Analysis & Law

21 Two principles involving the Court's jurisdiction and discretion are urged, one by USWA and another by those who oppose an extension of the time to complete a plan on terms.

22 USWA submits that the broad discretion given to the Court to take into account the interests of all stakeholders not just secured creditors, directs that in these circumstances, every reasonable consideration be given to the saving of jobs and of the Company to operate as an entity.

23 Mr. Dewart submits that the broad and flexible discretion given to the Court under the CCAA favours any reasonable effort to preserve the business under a restructuring as opposed to a liquidation, which is more properly achieved under the BIA.

24 The balancing effort, it is suggested, should allow those stakeholders who wish to achieve continuance of the enterprise every reasonable opportunity to do so and in this case, the only way to do so is to require the Monitor to not accept an offer to purchase assets until it at least considers a bid from an entity that might allow continuance of at least some of the business.

25 The Court of Appeal for Ontario rendered a decision on March 31, 2005 dealing with the issue of removal of directors in the context of a CCAA proceeding.

26 In Re Stelco Inc and others, [2005] O.J. No. 1171, the reasons of Blair J. for the Court considered the extent to which the Court's "inherent jurisdiction" and "discretion" under the CCAA might be involved to provide the remedy sought.

27 After adopting the observation from I.H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems at p. 2, that there is a vital distinction between jurisdiction and discretion that must be observed, he went on to say at paragraph 38:

> [38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose." Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. [Footnote omitted]

**28** At paragraph 39, in commenting on the discretion of a judge under s. 11 of the CCAA to, among other things, stay, restrain further proceedings or prohibit actions against the Company acting in good faith and with due diligence, Blair J.A. went on to say:

> In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself.

**29** Paragraph 44 reads:

> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, 17 C.B.R. (3d) 24, supra, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. ...

**30** This leads to the principle relied on by those who oppose the extension on conditions that would favour a new offer.

**31** The principle is that process that has been put in place for receiving offers in respect of either the business as a going concern or of its assets, should be honoured. The process is integral to the administration of statutes such as the BIA and the CCAA.

**32** Royal Bank v. Soundair Corp (1991), 7 C.B.R. (3d) 1 is a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern.

**33** At paragraph 42, Galligan J.A. for the majority (himself and McKinlay J.A.) said:

> While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected.

**34** At paragraph 16, the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87 at p. 92 was adopted and the duties of the Court summarized as follows:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
> 2. It should consider the interests of all parties.
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
> 4. It should consider whether there has been unfairness in the working out of the process.

**35** To my mind, those same duties of the Court are implicit in a marketing and sale process pursuant to Court Order under the CCAA.

**36** There is nothing in the material before me or in the submissions of Mr. Dewart that suggest that any of those duties have to date been breached by the Monitor in the negotiation or offer process.

**37** At this point in time, I am of the view that to allow the offering process to in effect be re-opened by enjoining the Monitor from completing a proposed transaction would amount to an unfairness in the working out of the process to the prospective purchaser, to Geetex and to GMAC the secured creditor. As well, it would interfere with the efficacy and integrity of the process and prefer the interests of one party (the USWA, albeit an important one) over others. As noted at paragraph 46 of Soundair

> [46] It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

**38** This is not to suggest that the interests urged by the USWA would be without remedy in appropriate circumstances.

**39** The dissent of Goodman J.A. in Soundair was really on the factual side, as he concluded that in his view, the conditional offer accepted by the Receiver in that case was "...an improvident one..." [at paragraph 118.]

**40** In this case, there is no accepted offer before the Court for approval. When there is, should there be another offer that would meet the test of rendering the accepted offer improvident, the Court can and perhaps should intervene.

**41** Until that occurs, I do not conclude on the facts before me, that the Monitor has acted improvidently in failing to negotiate with a party who did not bring forward an offer capable of acceptance within the process set out in the previous Order of the Court. The actions of the Monitor appear entirely appropriate.

**42** For the above reasons, the motion to extend the time within which to present an offer for sale of the business and assets of the Applicant is extended to April 15, 2005 or such earlier date as may be appropriate without the condition as sought by the USWA.

**43** If it is necessary to deal with any issue of costs, they may be spoken to at a 9:30 appointment.

C.L. CAMPBELL J.

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