Court File No. CV-12-9539-00CL

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

FACTUM OF THE
RESPONDING PARTY, JOHN P. WALSH
(Stay Extension Motion returnable April 27, 2012)

Dated: April 26, 2012

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TO: **THE SERVICE LIST**

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I. SUBMISSIONS

1. John P. Walsh ("Walsh"), a former director of Timminco Limited ("Timminco") and a defendant in an uncertified class proceeding (the "Class Action") supports Timminco's motion for an extension of the stay, and opposes the efforts by St. Clair Pennyfeather ("Pennyfeather"), the putative plaintiff in the Class Action, to bring yet another lift stay motion in the guise of opposition to the extension of the stay.

2. Insofar as Pennyfeather seeks to relitigate the last motion for a lift stay, the decision for which is under reserve, Walsh repeats and relies on submissions previously made. Insofar as Pennyfeather seeks to not have the stay apply to the Class Action, that is tantamount to seeking (again) a lift stay motion, and that requires Pennyfeather to satisfy the tests set out in *Canwest Global Communications Corp. (Re)*. Nothing Pennyfeather has said in this factum changes the fact that that test cannot be made out.

Canwest Global Communications Corp. (Re) (2009), 61 C.B.R. (5th) 200 (S.C.J.)

3. In its factum, Pennyfeather claims that Timminco is seeking "to use the CCAA process for the collateral and improper purpose of eliminating all shareholders' claims in the Class Action" and adds the hyperbolic statement that the CCAA was being used as "a laundromat for questionable corporate conduct". In these submissions, Pennyfeather has demonstrated a fundamental misunderstanding of insolvency law.

4. Timminco is insolvent. Shareholders have no economic interest in an insolvent entity. There is a fundamental difference between shareholders and creditors in this respect. While shareholders have the unlimited right to participate in the upside potential of a solvent entity (unlike creditors in most cases), where the debtor has insufficient assets to satisfy its creditor claims, there is nothing further for shareholders. As stated by Pepall J.:

> This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being that they will rank ahead of shareholders in an insolvency. Put differently, amongst other things, equity investors bear the risk relating to the integrity and character of management.
>
> *Nelson Financial Group Ltd. (Re.)*, 2010 ONSC 6229 at para. 25
>
> *Stelco Inc. (Re)*, 2006 CanLII 1773 (Ont. S.C.J.) at paras. 15-17
>
> *Canadian Airlines (Re.)* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) at pp. 36-37

5. Shareholders are not allowed to transform their claim associated with their shares into creditor claims simply by suing the company for damages. It is for this reason why – consistent with prior caselaw – the CCAA specifically provides a definition for "equity claims", which

clearly applies to Mr. Pennyfeather's claim, and why the CCAA prohibits any plan of arrangement that yields shareholders a penny in circumstances where creditors are not paid in full.

CCAA, ss. 2, 6(8)

Nelson Financial, supra at para. 26

6. And it is for that reason that the section cited by Pennyfeather in its factum includes some important words, ignored entirely by Pennyfeather in his submissions:

> 5.1(2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more **creditors**; or
>
> (b) are based on allegations of misrepresentations **made by directors to creditors** or of wrongful or oppressive conduct by directors

CCAA, s. 5.1(2) [emphasis added]

7. Moreover, even extending this protection to shareholders, the reference to "misrepresentations made by directors" is not even applicable in this case, because at least as it relates to Walsh, there is not a hint of a suggestion in the plaintiff's Statement of Claim that Walsh uttered a single word alleged to be untrue. His liability, according to the plaintiffs, is not for misrepresentation, but rather, for the allegedly tortious act of sitting on the board of a company who made alleged misrepresentations.

Amended Statement of Claim filed May 17, 2011

8. In any event, any debate regarding the extent to which a release may or may not be sought in relation to directors is not an issue for this motion. The only question is whether Timminco has met the test for an extension of the stay, and Walsh submits that Timminco has done so. "Good faith" does not require Timminco to act in a manner that is contrary to the structural prioritization of claims against an insolvency entity. As it relates to Pennyfeather, it is not appropriate to use this stay extension motion to re-argue points relating to the lift stay motion, under reserve. Treating such submissions at their highest, the only question is whether Pennyfeather has met the test for lifting the stay as it relates to the class action writ large, and for the reasons in Walsh's prior factum and those set out above, it is respectfully submitted that Pennyfeather has not met that test.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DEREK J. BELL

Lawyers for John Walsh

SCHEDULE "A" – AUTHORITIES CITED

Canwest Global Communications Corp. (Re.) (2009), 61 C.B.R. (5th) 200 (S.C.J.)

Nelson Financial Group Ltd. (Re.), 2010 ONSC 6229

Stelco Inc. (Re), 2006 CanLII 1773 (Ont. S.C.J.)

Canadian Airlines (Re.) (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.)

SCHEDULE "B" – STATUTORY REFERENCES

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

Definitions

2. (1) In this Act,

[...]

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

[...]

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

[...]

Payment – equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.