Q.B.G. No. 1461 of 2009

C A N A D A)
PROVINCE OF SASKATCHEWAN)

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 (the "CCAA")

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF BIG SKY FARMS INC., DRYCAST SYSTEMS INC. and BIG SKY MANAGEMENT CONSULTING CORP.

BRIEF OF LAW ON BEHALF OF THE APPLICANTS, BIG SKY FARMS INC., DRYCAST SYSTEMS INC. AND BIG SKY MANAGEMENT CONSULTING CORP

(Sanction of Plan of Arrangement)

FACTS

1. This Brief of Law is filed in support of an application by Big Sky Farms Inc., Drycast Systems Inc. and Big Sky Management Consulting Corp. (collectively, "**Big Sky**" or the "**Applicants**") for an Order under section 6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") sanctioning the Amended and Restated Plan of Compromise and Arrangement of the Applicants dated February 5, 2010 (the "**Plan**") and other relief as more particularly set out in the Notice of Motion of Big Sky dated February 7, 2010.

2. The Applicants rely upon the facts described in the Sixth Supplementary Affidavit of Canute Tagseth sworn on February 7, 2010 (the "**Sixth Supplementary Tagseth Affidavit**"); the First Report of the Monitor; the Second Report of the Monitor, the Third Report of the Monitor; the Fourth Report of the Monitor; and the Fifth Report of the Monitor (the "**Monitor's Fifth Report**"); and the materials filed in support of this application. Words and phrases contained in this Supplementary Brief of Law which begin with capital letters

and which are not otherwise defined herein shall have the respective meanings ascribed thereto in the Plan.

ISSUES

3. The Applicants respectfully submit that this application by Big Sky raises the following issues for consideration by this Honourable Court, namely:

(1) What is the source of the jurisdiction of this Honourable Court to grant an order sanctioning the Plan under section 6 of the CCAA?

(2) What are the factors which the Court is to consider in determining whether or not to exercise its jurisdiction to sanction the Plan under section 6 of the CCAA?

(3) Applying these principles to the case, to what extent is it appropriate for this Honourable Court to grant the Order sought by Big Sky?

ARGUMENT

(1) Jurisdiction of the Court to Grant a Sanction Order

4. In *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289, Doherty J.A. set out the purpose and scheme of the CCAA in the context of the Court's jurisdiction to sanction a plan under section 6:

> Viewed in its totality, the Act gives the court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company, and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (No. 1) (1989), 102 A.R. 161 (Q.B.), at p. 165.

5. The Court's sanctioning of the plan is the final step in the CCAA process, upon which the plan becomes binding on the company and its creditors. The exercise of this statutory obligation imposed upon the court is a matter of discretion (*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 at para. 16).

(2) **Factors to Be Considered By the Court in Exercising Its Jurisdiction**

6. The general principles to be applied in the exercise of the Court's discretion were set forth and adopted on appeal in *Re Northland Properties Ltd.* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) at 201: 1) there must be strict compliance with all statutory requirements and adherence to previous orders of the court; 2) all materials filed and procedures carried out must be examined to determine if anything has been done—or purported to have been done—which is not authorized by the C.C.A.A.; and 3) The plan must be inherently fair, reasonable and equitable. (See also *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para. 60 [*Canadian Airlines*].)

7. In determining whether a plan is "fair and reasonable", Courts have emphasized that perfection is not required (*Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C.S.C.); *Wandlyn Inns Ltd. (Re)* (1992), 15 C.B.R. (3d) 316 (N.BQ.B)). Nor, however, is the court's analysis to be considered a "rubber stamp" process. The following factors are taken into account (*Canadian Airlines* at para. 96):

(1) The composition of the unsecured vote;

(2) What creditors would receive on liquidation or bankruptcy as compared to the Plan;

(3) Any available alternatives to the Plan;

(4) Oppression rights of certain creditors;

(5) Unfairness to Shareholders; and

(6) The public interest.

8. The claims must have been properly classified, and there must not be any secret arrangements that advantage one or more creditors over the rest. The approval of the requisite majority is integral. (*Canadian Airlines* at para. 101; *Stelco Inc. (Re)* (2006), 17 C.B.R. (5th) 78 at para. 12.)

9. The Monitor's reports are also helpful to the court's analysis (*Stelco Inc. (Re)* at para. 41).

10. Options or alternatives that have been explored and rejected as unworkable will also be significant factors for the court's consideration (*Stelco Inc. (Re)* at para. 12).

(3) It Is Appropriate For the Court to Grant the Relief Requested

(a) There Has Been Strict Compliance with All Statutory Requirements and Adherence to Previous Orders of This Honourable Court; and

(b) Nothing Has Been Done Which Is Not Authorized By the CCAA

Technical Requirements of Section 6 of the CCAA

11. Section 6 of the CCAA provides that:

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.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accord- ance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

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.

The Requisite Vote in Favour of the Plan

12. Votes were cast in favour of the Plan by the majority in number, representing two thirds in value, of the creditors present and voting either in person or by proxy at the meeting of creditors in accordance with subsection 6(1) of the CCAA. [Monitor's Fifth Report at para. 41(a).i)]

Restriction—Certain Crown Claims

13. The Plan provides for payment in full to the Crown or a province within six months of sanctioning of the Plan of all amounts that were outstanding at the date of the making of the Initial Order in accordance with subsection 6(3) of the CCAA. [Monitor's Fifth Report at para. 41(b)]

Restriction—Default of Remittance to Crown

14. In accordance with subsection 6(4) of the CCAA, Big Sky is not in default of any remittance in favour of the Crown in respect of the period commencing after the making of the Initial Order by this Honourable Court up to and inclusive of the date of the hearing of this motion. [Monitor's Fifth Report at para. 41(c)]

Restriction—Employees, etc.

15. Article 4.7 of the Plan provides for payment immediately upon Plan Implementation of employee and former employee claims in accordance with In accordance with subsection 6(5) of the CCAA. Moreover, all amounts in respect of wages and/or other amounts that would be deemed payable pursuant to the above outlined provision have been paid in the normal course. [Monitor's Fifth Report at para. 41(d)]

Restriction—Pension Plan

16. Article 4.8 of the Plan provides for payment immediately upon Plan Implementation of pension amounts deducted from employees' remuneration in accordance with subsection 6(6) of the CCAA. Moreover, all amounts in respect of pension plans that would be deemed payable pursuant to the above outlined provisions have been paid in the normal course. [Monitor's Fifth Report at para. 41(e)]

Payment—Equity Claims

17. Article 4.9 of the Plan specifically prohibits payments on account of equity claims in accordance with subsection 6(8) of the CCAA. [Monitor's Fifth Report at para. 41(f)]

Compliance with the Creditors' Meeting Order and Other Orders of this Honourable Court

18. The Claims Process which this Honourable Court approved for the purpose of calling for the claims of creditors of the Applicants was conducted in accordance with the Claims Process Order dated December 9, 2009.

19. In accordance with the Order of this Honourable Court dated January 5, 2010 authorizing the filing of the Plan and the conducting of the Creditors' Meeting (the

"**Creditors' Meeting Order**"), the Applicants, assisted by the Monitor, sent by ordinary pre-paid mail to each Affected Creditor with a Proven Voting Claim the Plan and Meeting Documents, which documents were also posted on the Monitor's website in accordance with the Creditors' Meeting Order. [Monitor's Fifth Report at para. 26]

20. On or before January 11, 2010, January 18, 2010, and January 25, 2010, the Applicants, with the assistance of the Monitor, sent (by ordinary pre-paid mail) the Plan & Meeting Documents to each Affected Creditor entitled to vote on the Plan who had been identified by the Applicants as holding a Proven Voting Claim by such respective dates and to whom the Plan & Meeting Documents had not previously been mailed. [Monitor's Fifth Report at para. 28]

21. On January 15, 2010, as required by the Creditors' Meeting Order, the Monitor published the Notice of Meeting of Creditors in each of the Saskatoon StarPhoenix, Regina Leader-Post, Winnipeg Free Press and Des Moines Register newspapers. [Monitor's Fifth Report at para. 29]

22. On February 8, 2010, the Applicants convened and conducted the Creditors' Meeting to consider and vote on the Plan in the Laurentian Room of the Holiday Inn Express Hotel, 315 Idylwyld Drive North, Saskatoon, Saskatchewan, which meeting was convened and conducted in accordance with the Creditors' Meeting Order. [Monitor's Fifth Report at para. 30]

23. Based on the foregoing, and as evidenced by the First through Fifth Monitor's Reports, the Applicants have complied with and strictly adhered to all Orders of this Honourable Court in these proceedings to date,

(c) The Plan is Fair, Reasonable and Equitable

24. Based on the application to this case of the analysis of the factors outlined above in *Canadian Airlines* it is respectfully submitted that the Applicants have established that the Plan is fair, reasonable and equitable.

(i) The composition of the unsecured vote

25. The unsecured vote was overwhelmingly in favour of the Plan.

26. At the February 8th meeting of creditors, a single class of creditors—namely the Affected Creditors—voted on the Plan. Secured creditors and other Excluded Claims were not affected by the Plan. 98.6% of the creditors voting, representing 98.4% in value of the claims, voted in favour of the plan.

(ii) What creditors would receive on liquidation or bankruptcy as compared to the Plan

27. Under the Plan, each Affected Creditor with a Proven Distribution Claim of less than $4,000 will receive cash in an amount equal to 99% (up to a maximum of $3,960) of the full amount of its Proven Distribution Claim in full and final satisfaction of its Claim. Each Affected Creditor with a Proven Distribution Claim of more than $4,000 who has filed a Distribution Option Election with the Monitor and has elected to receive: a) the Fixed Distribution, will receive a cash payment in an amount equal to $3,960 in full and final satisfaction of its Affected Claim; or b) the Percentage Distribution, will receive a cash payment in an amount equal to 10% of the Proven Distribution Claim in full and final satisfaction of its Affected Claim.

28. Without the Plan, the debt owed to the Senior Secured Lenders of approximately $71.1 million, and the Sub-Debt Lenders of approximately $9.7 million, would have to be paid in full prior to any debt recovery by unsecured creditors.

29. The Monitor prepared an illustrative estimated realization value for the assets and undertakings of Big Sky as of December 4, 2009 (the "**Liquidation Analysis**").

30. As indicated in the Liquidation Analysis, the estimated net realizable value of the Assets after paying asset realization costs and priority charges would result in a deficiency on the indebtedness owed to the Senior Secured Lenders of approximately $26 to $45 million.

31. Accordingly, the Liquidation Analysis indicated that if the Plan were not approved and the Assets liquidated, the Unsecured Creditors would receive <u>no recovery</u> of their Affected Claims.

32. As such, the estimated distribution to the Affected Creditors under the Plan was significantly greater than the recovery under a liquidation of the Assets.

(iii) Alternatives available to the Plan

33. No viable alternatives to the Plan were identified during the assiduous process of preparing the Plan.

(iv) Oppression rights of certain creditors

34. No issues of oppressive conduct have arisen in this case.

(v) Unfairness to Shareholders

35. Potential unfairness to shareholders is a factor to be considered. However, in *Canadian Airlines*, the Court adopted the following perspective on this issue (at para. 170):

> Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing.

36. At bottom, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. In *Stelco Inc. (Re)* at paras. 18-19, the court analyzed alleged unfairness to the shareholders this way:

> If the existing equity has no true value at present, then what is to be gained by putting off to tomorrow (the ever present and continuous problem in these proceedings … which never comes) what should be done today[?] The [shareholders] speculate, with no concrete basis [or] foundation … that something good may happen. I am of the view that that approach was accurately described in court by one counsel as a desperation Hail Mary pass and the willingness of someone, without any of his own chips, in the poker game willing to bet the farm of someone else who does have an economic interest in Stelco.
>
> …
>
> Alternatively there is a saying: "If wishes were horses, then beggars would ride."

37. In this case, existing shareholders are not stripped of their shares. Rather, pursuant to Schedule "B" of the Plan, they retain a 5% ownership interest in the restructured business.

(vi) The public interest

38. Big Sky is an essential part of the economic fabric of the rural Saskatchewan and Manitoba communities in which it operates.

39. Big Sky Farms Inc. is the largest hog producer in the Province of Saskatchewan and one of the three largest hog producers in Canada. The Company operates in approximately 24 communities in rural Saskatchewan and Manitoba and employs approximately 430 employees.

40. Big Sky purchases over $30,000,000.00 worth of wheat, barley and peas annually from local area grain farmers located in or near the rural Saskatchewan and Manitoba communities in which it operates;

41. The economic impact upon those communities (where few other drivers of economic activity are typically located) of the failure of Big Sky can reasonably be expected to be devastating.

42. The Plan, including the Restructuring Transaction, promotes Big Sky as a viable going concern enterprise and will preserve the employment of greater than 400 employees in rural Saskatchewan and Manitoba.

43. Based on the foregoing, the Applicants respectfully submit that the public interest is well-served by sanctioning of the Plan.

(vii) Other factors for consideration

44. The major stakeholders, including the Senior Lenders and Sub-Debt Lenders continue to support Big Sky in its restructuring efforts.

45. The Applicants have been pursuing the advancement of their restructuring efforts in good faith and with due diligence.

CONCLUSION AND RELIEF REQUESTED

46. For all of the foregoing reasons, Big Sky respectfully requests that this Honourable Court grant an Order sanctioning the Plan on the basis that:

a. Notice of the Creditors' Meeting was duly given and properly constituted;

b. The Plan was overwhelmingly approved by the Affected Creditors;

c. The Plan has the support of the Senior Lenders and the Sub-Debt Lenders;

d. The Applicants have acted in good faith and with due diligence, have complied with all statutory requirements of the CCAA and all previous Orders of this Honourable Court, and have not done or purported to do anything which is not authorized by the CCAA;

e. The Plan is fair, reasonable and equitable and achieves a return to the Affected Creditors that is superior to that achievable in alternative insolvency proceedings (a receivership or bankruptcy); and

f. The Plan, including the Restructuring Transaction, promotes Big Sky as a viable going concern enterprise and will preserve the employment of greater than 400 employees in rural Saskatchewan and Manitoba.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of February, 2010.

MacPHERSON LESLIE & TYERMAN LLP

Per:____________________________
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