New Nouveau Brunswick

JUSTICE

FACSIMILE COVER PAGE / PAGE COUVERTURE DE TÉLÉCOPIE

11h43	2012.11.06

To / À:	Colleen Thompson
Firm / Bureau:	Stikeman Elliott
City / Ville:	Toronto
Telephone No. / N° de téléphone:	(416) 869-5236
Fax No. / N° de télécopieur:	(416) 947-0866
No. of pages including cover / N° de pages incluant couverture:	9
Original sent or retained? / L'originale envoyée ou retenue?:	Retained
File/Dossier:	**MM-114-12 – Landdrill Decision**
From / De :	Nancy Williamson Regional Supervisor – Court/Client Services
Telephone No. / N° de téléphone :	856-3848
Fax No. / N° de télécopieur :	856-2951

COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Citation: 2012 NBQB 355 **M/M/114/12**

Date: 2012/11/05

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 LANDDRILL INTERNATIONAL INC. (A BRITISH COLUMBIA CORPORATION), LANDDRILL INTERNATIONAL LTD. (A NEW BRUNSWICK CORPORATION), LANDDRILL ATLANTIC LTD. (A NEW BRUNSWICK CORPORATION), LANDDRILL CONTRACT MINING LTD. (A NEW BRUNSWICK CORPORATION), LANDDRILL INTERNATIONAL MEXICO S.A. DE C.V. (A MEXICAN CORPORATION), LANDDRILL INTERNATIONAL LLC (A MONGOLIAN CORPORATION) and LANDDRILL INTERNATIONAL INC. (A BARBADOS CORPORATION)

DECISION

BEFORE:	The Honourable Chief Justice David Smith
AT:	Moncton, New Brunswick
DATE OF HEARING:	November 2, 2012
DATE OF DECISION:	November 5, 2012
APPEARANCES:	Stephen Hutchinson, for the Applicants, Landdrill International Inc. et al; Jeff M. Lee, Esq. and R. Gary Faloon, Q.C., for Crown Capital Partners Inc. and Norrep Credit Opportunities Fund, LP; Ashley John Taylor, for Ernst & Young Inc.; Mary Buttery, for Sprott Resource Lending Partnership; Alissa K. Mitchell, for GE Canada Equipment Financing G.P.; Kelly Van Buskirk, for Roger Rogers and Michael Tripp; G. Robert Basque, Q.C., for Ronald J. Goguen.

D. SMITH, Chief Justice

[1] Norrep Credit Opportunities Fund LP, a principal secured creditor, moves to vary the Court's initial order dated August 31st, 2012, as amended on September 17th, 2012 and September 27th, 2012, under the *Creditors Arrangement Act* R.S.C. 1985, C-36:

> **"2. [...]**
> **(a) to enhance the powers of the Monitor to make and implement decisions related to the continued employment, dismissal, termination, lay-off and/or rationalization of personnel employed by the Applicants (including all executive and senior management personnel employed by the Applicants);**
> **(b) to authorize and direct the Monitor to have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants, but in consultation with the Senior Lenders) to make and implement decisions related to rationalizing and reducing operating costs of the Applicants, including (without limitation) decisions to wind up, discontinue, reduce, cease and downsize the business operations of the Applicants (in whole or in part);"**

The alleged grounds for the variations are:

> **"1. Contrary to and in breach of paragraphs 27 and 28 of the Initial Order, the Applicants have failed or refused to co-operate fully with the Monitor and have failed or refused to provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions, particulars of which failures or refusals are as follows:**
>
> **(a) The Monitor has conducted the Sale Process in accordance with the Initial Order and has identified a potential purchaser of the assets of the Applicants, which purchaser, in the opinion of the Monitor, has submitted the optimal bid (the 'Proposed Purchaser');**
> **(b) Ronald J. Goguen, Chief Executive Officer of Landdrill International Inc., has informed the Monitor that he objects to the Monitor concluding a transaction with the Proposed Purchaser;**
> **(c) Mr. Goguen has informed the Monitor that he intends to cause the Applicants to contest and oppose the decision by the Monitor to conclude a transaction with the Proposed Purchaser;**
> **(d) Mr. Goguen has instructed counsel for the Applicants to deny, limit or restrict access by the Monitor to communications with Mexican counsel for the Applicants, thereby actively impairing, disrupting or interfering with the ability of the Monitor to exercise its power under**

paragraph 28(g) of the Initial Order to have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to negotiate with the Potential Purchaser to conclude a transaction for the sale of the Mexican assets of the Applicants.

2. Contrary to and in breach of paragraph 35 of the Initial Order, Mr. Goguen is causing the Applicants to withhold, delay and disrupt payment of the professional fees of the Monitor and its legal counsel on a weekly basis as authorized and directed by the Court in the Initial Order.

3. The acts and omissions of Mr. Goguen more particularly described above have caused or contributed to the present situation in which the Applicants:

(a) have failed to meet the Sale Process timelines set out in Schedule "B" to the Initial Order and have thereby breached the August 31, 2012 DIP Term Sheet;
(b) are operating without access to operating credit and/or debtor-in-possession financing; and
(c) are very quickly reaching the point where they will have run out of cash entirely and will be unable to fund continued business operations."

Facts

[2] The Landdrill group of companies operate an International Industrial drilling business (with operations in Canada, Mexico, Mongolia, Russia and Nicaragua) providing drilling services to mineral exploration companies worldwide.

The Landdrill Group has credit facilities with three principal service creditors, namely:

1) Norrep Credit Opportunities Fund LLP
2) Sprott Resource Lending Partnership
3) GE Canada Equipment Financing G.P.

[3] On August 31, 2012, the Applicants sought and were granted CCAA protection. D.I.P. financing was in place but some conditions were not met. The Monitor advises

that Landdrill probably has enough cash flow to continue to operate until the asset purchase approval hearing on November 13th, 2012.

[4] The Initial Order of August 31st, 2012, states under paragraph 28 (e) through (i):

> **"These *sui generis* provisions included paragraphs 28(e), 28(f), 28(g), 28(h) and 28(i) of the Initial Order, which paragraphs read as follows:**
>
> **THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:**
>
> **....**
>
> **e) (after having discussed such matters with the Applicants, where circumstances permit it to do so), have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to instruct Clarus Securities Inc. with respect to the development and implementation of an orderly process for the sale of the Business and/or the Property to be completed within 90 days (the "Sale Process") in accordance with the timelines set out in Schedule "B" hereto, and to take such steps and execute such documentation in the name of and on behalf of the Applicants as may be necessary or incidental to the Sale Process;**
>
> **f) have and exercise the authority (in the name of and on behalf of the Applicants), with the consent of the Senior Lenders, to replace Clarus Securities Inc. and disclaim the engagement letter with Clarus Securities Inc.;**
>
> **g) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to negotiate with potential purchasers of the Business and/or the Property pursuant to the Sale Process;**
>
> **h) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants), with the consent of the Senior Lenders, to dispose of redundant or non-material assets not exceeding $100,000.00 in any one transaction or $1,000,000 in the aggregate;**
>
> **i) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to accept one or more offers to purchase the Business and/or the Property pursuant to the Sale Process (subject to approval of the Court); "**

[5] Norrep (Crown) supported by the other principal secured lenders allege that Mr. Ronald Goguen Sr., the CEO of the Landdrill Companies is interfering with the sales process of the assets. Norrep (Crown) offers three specific examples of Mr. Goguen's interference :

> **"27. More particularly, Mr. Goguen has informed the Monitor that he intends to cause the Applicants to contest and oppose the decision by the Monitor to conclude a transaction with the proposed purchaser.**
>
> **28. Further, Mr. Goguen has instructed counsel for the Applicants to deny, limit or restrict access by the Monitor to communications with Mexican counsel for the Applicants by discontinuing an extant practice where counsel to the Monitor had been copied on all correspondence between the Applicants and Mexican counsel. When this extant practice was abruptly stopped by counsel for the Applicants, Monitor's counsel requested of counsel for the Applicants that this practice be reinstated and that he be copied with correspondence between the Applicants and Mexican counsel. Counsel for the Applicants refused, stating that: "given the situation that has unfolded as between the Monitor and the Companies, I am not in a position to do that"15.**
>
> **29. An additional act or omission of Mr. Goguen relied upon by Crown in the Amended Notice of Motion was that, contrary to and in breach of paragraph 35 of the Initial Order, Mr. Goguen caused the Applicants to withhold, delay and disrupt payment of the professional fees of the Monitor and its legal counsel on a weekly basis as authorized and directed by the Court in the Initial Order. Since this ground for the Crown Application was first brought forward by Crown in its Amended Notice of Motion, Mr. Goguen appears to have "seen the error of his ways". Payments of professional fees required to put the Applicants back in compliance with paragraph 35 of the Initial Order appear now to have been made. "**

Issues

[6] Does the Court have authority to confer powers on the Monitor to remove Mr. Goguen from management and assume management of Landdrill.

[7] If the answer is "yes" to the first question, then should Mr. Goguen be removed from the management of Landdrill for his actions in regard to the sales process.

[8] There is no authority found in the CCAA which allows the Court to remove or replace management with the Monitor.

[9] Counsel for Norrep cites 843504 Alberta Ltd;

> 2003 Carswell Alta 1786, 2003 ABQB 1015, 30 Alta. L.R. (4^{th}) 91, 351 A.R. 222, 4 C.B.R. (5^{th}) 306 843504 Alberta Ltd., Re
>
> In the Matter of the Bankruptcy and Insolvency Act R.S.C. 1985, C.B-3, As Amended and 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 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

an Alberta Court of Queen's Bench case in support of its motion. In 843504 Alberta Ltd. the company made arrangements with its creditors to seek protection under the CCAA, but days later changed its position and filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*. The creditor applied for a CCAA stay of proceedings with the creditor being successful with a 30 day stay and an accounting firm appointed Monitor with power to operate the business. The creditor and the Monitor applied to have the stay extended at the end of the 30 day period. At the extension hearing, the creditor and Monitor relied on the Monitor's third report with an affidavit from the creditor stating that the Monitor was acting diligently, in good faith and that circumstances exist to warrant an extension. At the extension hearing, the company took no position.

[10] The company in the Alberta case acquiesced to the Monitor to manage its affairs during the CCAA proceedings.

[11] The facts before the Court are that the Landdrill Group is clearly not acquiescing to the present motion to have the Monitor manage its affairs and, in fact, vigorously oppose it. The decision in the Alberta case is irrelevant to the matter before the Court.

[12] There is no statutory authority for the Court to authorize the Monitor to make managerial decisions for a debtor company, that is, to replace management.

[13] The Court must now examine if it has the inherent jurisdiction to dismiss management. Justice Robert Blair of the Ontario Court of Appeal in *Re Stelco Inc.*, 2005, 75 O.R. (3d) 5, [2005] O.J. No 1171, holds that a Court cannot authorize a Monitor to remove management of a debtor company under a CCAA arrangement.
He gives his reasons throughout the decision, but one in particular is worth noting at paragraph 51:

> **"Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation."**

[14] Counsel for the Applicants also cites *Re Jameson House Propectors Ltd.*, 2009, BCSC 844 aff'd, 2009 BCCA 339, (2009), 96 B.C.L.R. (4^{th}) 208 and in conclusion, I adopt the reasoning of Chief Justice Donald Brenner wherein he states at paragraph 25:

> **"No receiver, liquidator or trustee in bankruptcy has been appointed. The court-appointed monitor in this case is in a materially different position from those parties. Unlike a receiver, liquidator or trustee, the monitor has no control over the management of the business. That remains in the hands of the petitioners."**

[15] Having decided that the Court has no authority to confer powers on the Monitor to remove Mr. Goguen , there is no need to examine Mr. Goguen's actions in relation to the sales process.

The second report of the Monitor is hereby approved.

The request to enhance the powers of the Monitor to manage the company is denied for the reasons above.

A hearing on costs will be scheduled on request of counsel.

SIGNED this 5th day of November, 2012, at Moncton, New Brunswick.

David Smith

The Honourable David Smith
Chief Justice, Court of Queen's Bench