Court File No. CV-16-11582-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF OLD PSG WIND-DOWN LTD., OLD BHR WIND-DOWN CORP., OLD BPSU WIND-DOWN CORP., OLD BPSDS WIND-DOWN CORP., OLD EBS WIND-DOWN CORP., OLD PLG WIND-DOWN CORP., OLD PSGI WIND-DOWN CORP., OLD BHR INC., OLD BH INC., OLD BPSU INC., OLD BPSCI INC., OLD BPSUSH INC., OLD EBS INC., OLD PLG INC., AND OLD PSGI INC.

(Applicants)

BOOK OF AUTHORITIES OF THE MONITOR
(Re: Disallowance of Putative Class Claim)

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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 ScoZinc Ltd. (Applicant)

D.R. Beveridge J.

Heard: April 3, 2009
Judgment: April 3, 2009
Written reasons: April 28, 2009
Docket: Hfx. 305549

Counsel: John G. Stringer, Q.C., Mr. Ben R. Durnford for Applicant
Robert MacKeigan, Q.C. for Grant Thornton

Subject: Insolvency

Related Abridgment Classifications
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
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Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Company was granted protection pursuant to s. 11 of Companies' Creditors Arrangement Act ("CCAA") — Monitor was appointed pursuant to s. 11.7 of CCAA — Determination of creditors' claims was set by claims procedure order ("order") — Three creditors submitted proofs of claim by claims bar date set out in order and then submitted revised proofs of claim after claims bar date, but before date set for monitor to complete assessment of claims — Monitor determined errors in proofs of claims were due to inadvertence and issued notice of revision or disallowance, allowing claims as revised if it was determined monitor had power to do so — Monitor brought motion for directions on whether it had authority to allow revision of claim by increasing it after claim's bar date but before date set for monitor to complete assessment of claims — Monitor had necessary authority — Court creates claims process by court order — Determination that claims had to initially be identified and assessed by monitor, and heard first by claims officer, was valid exercise of court's inherent jurisdiction — Logical and practical that monitor, as officer of court, be directed to fulfil analogous role to that of trustee under Bankruptcy and Insolvency Act, and order accomplished this — Provision in order mandated monitor to review all proofs of claim filed on or before claims bar date and accept, revise or disallow them — While normally monitor's revision would be to reduce proof of claim, nothing in order so restricted monitor's authority — It did not matter that revised claims were submitted after claims bar date — In essence, monitor simply acted to revise proofs of claim already submitted to conform with evidence elicited by monitor or submitted to it.

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MOTION by monitor appointed under *Companies' Creditors Arrangement Act* for directions on whether it had authority to allow revision of claim after claim's bar date but before date set for monitor to complete its assessment of claims.

***D.R. Beveridge J.* (orally):**

1 On December 22, 2008 ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s.11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s.11.7 of the *CCAA*.

2 The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

3 The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

Background

4 The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

5 The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

6 The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

7 ScoZinc is 100% owned by Acadian Mining Corp. Theso two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

8 Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

9 Royal Roads claim was for $579, 964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

10 Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

11 The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

12 The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

13 The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

14 The request for directions and the circumstances pose the following issue:

Issue

15 Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

Analysis

16 The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s.11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

> 11.7(1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
>
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
>
> (iii) at such other times as the court may order;
>
> (c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and
>
> (d) carry out such other functions in relation to the company as the court may direct.
>
> ...

17 It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

18 Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

19 The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

> Determination of amount of claim
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of an unsecured claim shall be the amount
>
> (i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,
>
> (ii) 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, proof of which has been made in accordance with that Act, or
>
> (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and
>
> (b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

20 The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

21 Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s.135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

22 In contrast, the *CCAA* does not set out the procedure beyond the language in s.12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

23 The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

25 The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., Re*, 2007 NSSC 384 (N.S. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Air Canada, Re* (2004), 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial List]); *Triton Tubular Components Corp., Re*, [2005] O.J. No. 3926 (Ont. S.C.J.); *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 4087 (Ont. S.C.J.); *Pine Valley Mining Corp., Re*, 2008 BCSC 356 (B.C. S.C.); *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.); *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B. Q.B.).)

26 I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 *Commercial Insolvency Reporter* 6, endorsed the utilization of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Skeena Cellulose Inc., Re* (2003), 43 C.B.R. (4th) 187 (B.C. C.A.)) and *Stelco Inc., Re*, [2005] O.J. No. 1171 (Ont. C.A.)).

27 Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) *Current Legal Problems* 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

28 The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Freeman, Re*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (N.S. C.A.) (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c.158. Harris C.J. wrote:

> [17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.
>
> [18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities — done with despatch.
>
> [19] In the case of the Western &c R. *Co. v. Atlanta* (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544: —
>
> > "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

29 In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

30 The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s.11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s.11.7(3)(d)).

31 In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

Power of the Monitor

32 The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

33 The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

> 9. Upon receipt of a Proof of Claim:
>
> > a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
> >
> > b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and

...

> 10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

34 Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

35 The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

36 Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.). As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

37 The chambers judge allowed the late and amended claims to be filed. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?
>
> *Blue Range Resource Corp., Re*, 2000 ABCA 16 (Alta. C.A. [In Chambers])

38 Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Order that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

> [26] Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.
>
> 2000 ABCA 285 (Alta. C.A.)

39 The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

40 In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]).

41 In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.) commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

42 In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to *the manner* to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to *completion* and the *execution* of a Proof of Claim.

43 Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

44 In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

45 Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

46 To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a

claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

47 The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

48 In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to conform with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

49 If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

Order accordingly.

End of Document

TAB 2

2017 ONSC 1967
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2017 CarswellOnt 5825, 2017 ONSC 1967, 278 A.C.W.S. (3d) 465

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

H. Wilton-Siegel J.

Heard: March 15, 2017
Judgment: April 19, 2017
Docket: CV-14-10695-00CL

Counsel: Heather Meredith, Sharon Kour, for Applicant, U.S. Steel Canada Inc.
Robert Staley, Kevin J. Zych, for Monitor, Ernst & Young Inc.
Gale Rubenstein, Melaney Wagner, for Superintendent of Financial Institutions and Province of Ontario
Lily Harmer, for United Steelworkers International Union and United Steelworkers International Union, Local 8782
Sharon L.C. White, for United Steelworkers International Union, Local 1005
James Harnum, for Non-unionized active employees and retirees
Michael Barrack, Mitch Grossell, Leanne Williams, for United States Steel Corporation
Michael Kovacevic, for City of Hamilton
Lou Brzezinski, for Robert and Sharon Milbourne
Patrick Riesterer, for Brookfield Capital Partners Ltd.
Mario Forte, for Bedrock Industries Canada LLC and Bedrock Industries L.P.
Vlad Calina, for Plan Advisor, USSCF

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements
XIX.3.c Amendment

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Proposed plan of arrangement and compromise under Companies' Creditors Arrangement Act (CCAA) contemplated acquisition of substantially all of debtor's operating business and assets on going-concern basis by company through acquisition of all of debtor's outstanding shares — Debtor brought motions seeking relief respecting proposed plan, including approval of supplementary claims process order — Motions granted — Purpose of order was to crystallize pool of claims that would be affected under plan, and proposed supplementary claims process applied to subset of creditors whose claims were excluded from general claims process order — Court had authority under s. 11 of CCAA to make orders it considered were appropriate in circumstances, subject to restrictions set out in CCAA, and that authority included approving process to solicit and determine claims against debtor company and its directors and officers — Claims process sought was necessary for approval and implementation of plan, for voting purposes, and to determine universe of claims subject to releases contemplated by plan — There was no suggestion that proposed claims process was not fair, and timeline provided was expedient — Monitor would have supervisory role to ensure that claimants were dealt with reasonably and fairly — Proposed supplementary claims process order should be approved.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Proposed plan of arrangement and compromise under Companies' Creditors Arrangement Act (CCAA) contemplated acquisition of substantially all of debtor's operating business and assets on going-concern basis by company through acquisition of all of debtor's outstanding shares — Debtor brought motions seeking relief respecting proposed plan, including meetings order — Motions granted — In determining whether to approve filing of plan under initial order and order convening meeting of creditors to vote upon plan, court must be satisfied that plan was not doomed to failure, and that standard was satisfied in circumstances given level of support of motion and absence of any objections — Creditors in each of classes had necessary commonality of interest required by s. 22(2) of CCAA — Two classes of creditors received different treatment under plan, but creditors within each class was unsecured creditor who received similar treatment under plan and would have similar remedies if plan was not accepted — Monitor supported proposed classification of creditors as being appropriate based on fact that classes had different interests and were treated differently under plan — It was appropriate that representative counsel act as deemed proxy — Other terms of proposed meetings order regarding notice of meetings, conduct of meetings, and voting at meetings did not raise substantive issues of fairness and reasonableness, and proposed meetings order was approved.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Amendment

Proposed plan of arrangement and compromise under Companies' Creditors Arrangement Act (CCAA) contemplated acquisition of substantially all of debtor's operating business and assets on going-concern basis by company through acquisition of all of debtor's outstanding shares — Debtor brought motions seeking relief respecting proposed plan, including amending agreements — Motions granted — Court had authority under ss. 11 and 11.02(2) of CCAA to approve debtor entering into agreement to facilitate restructuring — Amendments to agreements should be approved as necessary for, and as furthering purposes of, proposed restructuring of debtor pursuant to plan.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Proposed plan of arrangement and compromise under Companies' Creditors Arrangement Act (CCAA) contemplated acquisition of substantially all of debtor's operating business and assets on going-concern basis by company through acquisition of all of debtor's outstanding shares — Debtor brought motions seeking relief respecting proposed plan, including extension of stay — Motions granted — Court had discretion to extend stay if requirements of s. 11.02(3) of CCAA were met — Debtor established that it acted in good faith and with due diligence to implement plan of restructuring and compromise — Proposed extension of stay provided debtor with time required to allow creditors to vote on plan at creditors meeting and, if approved, to seek court's approval at sanction hearing — Proposed extension of stay provided debtor with sufficient time to negotiate necessary agreements and to finalize necessary arrangements that were conditions to implementing plan — Extension of stay of proceedings was approved.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 22 — considered

s. 22(2) — considered

MOTIONS by debtor seeking relief respecting proposed plan of arrangement and compromise.

***H. Wilton-Siegel J.*:**

1 The applicant, U.S. Steel Canada Inc. ("USSC"), sought a number of orders in respect of a proposed plan of arrangement and compromise (the "Plan") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Plan contemplates the acquisition of substantially all of USSC's operating business and assets on a going-concern basis by Bedrock Industries Canada LLC ("Bedrock") through the acquisition of all of USSC's outstanding shares. At the conclusion of the hearing of the motions, I advised the parties that the motions were granted for written reasons to follow. This Endorsement sets out the reasons for such relief.

2 As a preliminary matter, it should be noted that the motions were supported by Her Majesty the Queen in Right of the Province of Ontario ("Ontario") and the United States Steel Corporation ("USS") and were not opposed by Representative Counsel for the current and former non-unionized employees of USSC or by the United Steelworkers International Union (the "USW"), USW Local 8782 or USW Local 1005. In addition, in its thirty-seventh report, dated March 13, 2017 (the "Monitor's Report"), the Monitor recommended approval of each of the motions for the reasons set out therein. Such level of support constituted an important consideration in the Court's approval of each of the motions, in addition to the specific considerations set out below.

The Supplementary Claims Process Order

3 USSC seeks approval of an order providing for a process to identify and determine claims not previously determined pursuant to the order dated November 13, 2014 (the "General Claims Process Order"). The General Claims Process Order excluded claims of current and former employees respecting outstanding wages, salaries and benefits, claims relating to USSC's retirement plans, claims relating to non-pension post-employment benefits ("OPEB"s), and claims against the directors and officers of USSC.

4 The purpose of the order sought is to crystallize the pool of claims that will be affected under the Plan. The proposed supplementary claims process would pertain to a subset of the creditors whose claims were excluded from the General Claims Process Order, being: (1) current and former non-unionized employees with pension claims, OPEB claims and supplemental pension claims; (2) former non-unionized employees with claims pertaining to the termination of their employment; (3) persons with claims against the directors and officers of USSC; and (4) persons who filed a claim after December 22, 2014 but before March 1, 2017.

5 The Court has the authority under s. 11 of the CCAA to make orders it considers appropriate in the circumstances, subject to restrictions set out in the CCAA. It is not disputed that such authority includes the authority to approve a process to solicit and determine claims against a debtor company and its directors and officers.

6 In this case, the claims process sought is necessary for the approval and implementation of the Plan, both for voting purposes and in order to determine the universe of claims subject to the releases contemplated by the Plan. There is no suggestion from the stakeholders appearing on this motion that the proposed claims process is not fair to the potential claimants in terms of notice or process. The timeline provided for the determination of the relevant claims is also expedient in as much as it is consistent with the timing of the proposed meetings of creditors dealt with below. In this regard, the Monitor has advised in the Monitor's Report that it believes the proposed claims process provides sufficient and timely notification to allow creditors to submit proofs of claim or dispute notices, as applicable, prior to the claims bar date under the proposed order, being April 20, 2017, particularly in view of the fact that non-unionized employees and retirees will not need to file individual proofs of claim in most circumstances. Further, the Monitor will have a supervisory role to ensure that claimants are dealt with reasonably and fairly. In respect of the late-filed claims in item (4) above, the Monitor does not believe their inclusion in the claims process will materially prejudice the other creditors in view of the *de minimus* amount of these claims and the current status of the Plan.

7 Based on the foregoing, including the support for the motion and the absence of any objections thereto as set out above, I am satisfied that the proposed supplementary claims process order should be approved.

The Meetings Order

8 USSC seeks an order accepting the filing of the Plan; authorizing USSC to convene creditors meetings to vote on the Plan; approving the classification of creditors as set out in the Plan for the purposes of the meetings and voting on the Plan; approving the distribution of the notice of meeting and materials pertaining to the Plan; approving the procedures to be followed at the meetings; and setting May 9, 2017 as the date for the hearing of USSC's motion for an order of the Court sanctioning the Plan.

9 The Plan is the outcome of an initial sales and restructuring/recapitalization process and a subsequent sale and investment solicitation process. These activities have been addressed fully in other endorsements of the Court, and are summarized in the affidavit of the chief restructuring officer of USSC, William Aziz, sworn March 10, 2017, and therefore need not be repeated here.

10 There are two classes of "affected creditors" pursuant to the Plan:

(1) General unsecured creditors, which for this purpose do not include Ontario and USS, who would receive a cash distribution in respect of their claims which would be released, discharged and barred; and

(2) Creditors having claims for non-unionized pension benefits and OPEBs, which would be replaced by new non-unionized pension benefits and OPEBs, with these creditors' existing claims to be released, discharged and barred.

11 USSC proposes that the meetings of these two classes of creditors be held on April 27, 2017.

12 In determining whether the Court should approve the filing of the Plan under paragraph 3 of the initial order in these proceedings under the CCAA (the "Initial Order") and order the convening of a meeting of creditors to vote upon the Plan, the Court must be satisfied that the Plan is not doomed to failure. This standard is amply satisfied in the present circumstances, given the level of support for the motion and the absence of any objections as described above. The Court is not to determine the fairness and reasonableness of the Plan at this stage, such issues being reserved for the sanction hearing after the creditors meetings.

13 Section 22 of the CCAA requires approval by the Court of the division of creditors into the classes contemplated by the Plan. The two classes of creditors contemplated by the Plan have been described above. For clarity, the Plan leaves the treatment of the claims of other creditors to be addressed pursuant to contractual arrangements to be negotiated between those creditors and USSC.

14 I am satisfied that the creditors in each of the classes contemplated have the necessary commonality of interest required by s. 22(2) of the CCAA. The creditors in class (1) will receive a cash distribution in respect of their claims. The creditors in class (2) will not receive a cash distribution but will instead receive replacement benefits. Accordingly, the two classes of creditors receive different treatment under the Plan while each of the creditors within each class is an unsecured creditor who receives similar treatment under the Plan and would have similar remedies if the Plan is not accepted. I note as well that the Monitor supports the proposed classification of creditors as being appropriate based on the fact that the two classes have different interests and are treated differently under the Plan.

15 Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.

16 The other terms of the proposed meetings order regarding the notice of the meetings, the conduct of the meetings, and voting at the meetings do not otherwise raise any substantive issues of fairness and reasonableness.

17 Based on the foregoing, the proposed meetings order is approved.

Amendment of the Plan Support Agreement

18 USSC also seeks an order authorizing USSC to enter into:

(1) An agreement (the "PSA Amending Agreement") amending the "CCAA Acquisition and Plan Sponsor Agreement" dated December 9, 2016 between USSC, Bedrock and Bedrock Industries L.P. (the "PSA"); and

(2) An agreement (the "Support Amending Agreement") amending the "Support Agreement" made December 9, 2016 between USSC and Ontario.

19 The Court has the authority under ss. 11 and 11.02(2) to approve a debtor company entering into an agreement to facilitate a restructuring. The Court has previously authorized the PSA and the Support Agreement pursuant to such powers.

20 The PSA Amending Agreement and the Support Amending Agreement, among other things, amend the timetable for various milestones to reflect the timetable contemplated by the meetings order. They also amend the existing agreements to reflect the term sheets as finalized to date respecting various aspects of the Plan arrangements.

21 I am satisfied that the PSA Amending Agreement and the Support Amending Agreement should be approved as necessary for, and as furthering the purposes of, the proposed restructuring of USSC pursuant to the Plan.

Extension of the Stay Period

22 Lastly, USSC seeks an order extending the stay of proceedings under the Initial Order in these proceedings to May 31, 2017.

23 Section 11.02(2) of the CCAA gives the Court the discretion to extend the stay of proceedings if the requirements of s. 11.02(3) are satisfied.

24 In this case, USSC has established that it has acted, and is acting, in good faith and with due diligence to implement a plan of restructuring and compromise. The proposed stay extension provides USSC with the time required to allow the creditors to vote on the Plan at the creditors meetings and, if approved, to seek the Court's approval at the sanction hearing. It also grants USSC sufficient time to negotiate the necessary agreements and to finalize the necessary arrangements that are conditions to implementation of the Plan. The Monitor advises in the Monitor's Report that the revised cash flow forecast of USSC contemplates that USSC will have sufficient liquidity to continue to operate throughout the proposed stay extension period.

25 Accordingly, I am satisfied that it is appropriate to approve the extension of the stay of proceedings under the Initial Order to May 31, 2017.

Motions granted.

End of Document

TAB 3

2006 CarswellOnt 7877
Ontario Superior Court of Justice

Muscletech Research & Development Inc., Re

2006 CarswellOnt 7877

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

Ground J.

Heard: November 3, 2006
Judgment: December 11, 2006
Docket: 06-CL-6241

Counsel: Jay A. Carfagnini, Frederick Myers, David Bish for Applicants, Muscletech Research & Development Inc. et al
D.J. Miller, Kyla E.M. Mahar for Krys Osborne & similarly situated California consumers

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

IX Proving claim
IX.4 Practice and procedure
IX.4.g Miscellaneous

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Miscellaneous issues

Several product liability actions were filed against applicants in United States pertaining to sale of product that contained ephedra — Applicants sought and obtained relief under Companies' Creditors Arrangement Act as means of achieving global resolution of claims against it — Court issued "Call for Claims" order that provided deadline by which claims must be filed failing which claims were barred — Monitor also commenced ancillary proceedings in United States — Monitor sent proofs of claim to all known creditors of applicants, filed proof of claim package electronically on U.S court dockets, advertised in newspapers and took other steps to inform potential creditors — Only proof of claim filed was that of creditor who sought to represent other creditors as member of class — Applicants brought motion for order that proof of claim was nullity to extent it purported to advance representative claim on behalf of other persons — Motion granted — Creditor brought cross-motion for order permitting claim to be filed on behalf of other persons and for related relief — Cross-motion dismissed — Although court had inherent jurisdiction to permit class proof of claim to be filed in proceedings determination as to whether to do so was to be made based on factual circumstances and equities between parties — "Call for Claims" order specifically permitted representative claims to be brought by legal personal representatives but creditor was not legal personal representative within meaning of order — Creditor did not have documentary evidence that she had authority to file claim on behalf of class or court order permitting her to do so — Although this did not preclude court from determining that creditor could file claim on behalf of class on facts, other creditors were given notice of proceedings and failed to file claims, applicants had resolved almost all other product liability claims — To permit filing of class proof of claim at this stage would seriously disrupt and extend proceedings as well as increasing costs and decreasing benefits to all stakeholders — There were also substantial doubts as to whether allegedly false and misleading advertising that was basis of class action would be found to be established and as to whether class was certifiable — There was no evidence that claims order or process was unfair or unduly prejudicial to creditors.

Table of Authorities

Cases considered by *Ground J.*:

Alton, Re (2003), 45 C.B.R. (4th) 25, 2003 CarswellOnt 3044 (Ont. S.C.J.) — considered

Air Canada, Re (September 24, 2003), Farley J. (Ont. S.C.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 24, 2000 CarswellAlta 728 (Alta. Q.B.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1999), 12 C.B.R. (4th) 194, 1999 CarswellOnt 3234, 39 C.P.C. (4th) 362 (Ont. S.C.J. [Commercial List]) — considered

Ephedra Products Liability Litigation, Re (2005), 329 B.R. 1 (U.S. Dist. Ct. S.D. N.Y.) — considered

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 218, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]) — considered

Perez v. Metabolife International Inc. (2003), 218 F.R.D. 262 (U.S. Dist. Ct. S.D. Fla.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 124(3) — considered

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Business and Professions Code, California
s. 17200 — referred to

MOTION for order that proof of claim was nullity to extent it purported to advance representative claim on behalf of other persons; CROSS-MOTION for order permitting claim to be filed on behalf of other persons and for related relief.

***Ground J.*:**

1 This motion is brought by the Applicants in the within proceeding (collectively "Muscletech") for an Order that the proof of claim filed by Krys Osborne ("Osborne") in this proceeding is invalid and a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

Background

2 In response to call for claims in this proceeding, Osborne filed a proof of claim in respect of claims against the Applicants Iovate Health Sciences Group Inc., Iovate Health Sciences U.S.A. Inc., General Nutrition Corporation and other entities in a purported class representative capacity (the "Osborne Proof of Claim"). The Osborne Proof of Claim is based on alleged false and/or misleading advertising pertaining to the sale of Hydroxycut containing the ingredient ephedra and asserts a claim in the estimated amount of U.S. $100 million.

3 Muscletech sought and obtained relief under the CCAA pursuant to an order of this court of Justice dated January 18, 2006 (the "Initial CCAA Order"). The Initial CCAA Order granted a stay of proceedings to and including February 18, 2006 in respect of the Applicants and certain non-applicant parties and appointed RSM Richter Inc. as Monitor of the Applicants (the "Monitor"). By subsequent Orders of this court, the Stay of Proceedings has been extended to and including February 1, 2007.

4 On January 18, 2006, the Monitor commenced ancillary proceedings in the United States of America in respect of the Applicants under Chapter 15 of the *U.S. Bankruptcy Code* and those proceedings are now before the United States District Court for the Southern District of New York (the "District Court").

5 The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants (collectively, the "Product Liability Claimants") against Muscletech and others in the United States that related to products formerly sold by Muscletech (collectively, the "Product Liability Actions").

6 In addition to Muscletech, a number of affiliated and non-affiliated parties were also named as defendants or otherwise involved in certain of the Product Liability Actions (collectively, the "Non-Applicant Defendants"). The liability of the Non-Applicant Defendants is derivative of, and inextricably linked to, the liability of the Applicants.

7 On March 3, 2006, this court granted an order (the "Call for Claims Order") that established a process for the calling of: (a) all Claims (as defined in the Call For Claims Order) in respect of the Applicants and its officers and directors; and (b) all Product Liability Claims (as defined in the Call For Claims Order) in respect of the Applicants and the Non-Applicant Defendants. The Call For Claims Order required persons who wished to advance claims to file Proofs of Claim (as defined in the Call For Claims Order) with the Monitor by no later than 5:00 p.m. (EST) on May 8, 2006 (the "Claims Bar Date"), failing which the proposed claims would be barred. The Call For Claims Order was approved by Order of the District Court dated March 22, 2006.

8 In accordance with the Call For Claims Order, the Monitor: (a) sent a package containing the requisite proof of claim forms (the "Proof of Claim Package") to all known creditors of the Applicants; (b) filed electronically on the court dockets of the District Court the Proof of Claim Package and a notice to creditors advising of the call for claims process; (c) caused to be published a notice to creditors in The Globe and Mail (National Edition), The Wall Street Journal, and USA Today; and (d) posted a copy of the notice to creditors and the Proof of Claim Package on the Monitor's website. No Proof of Claim was filed by anyone, other than Osborne, who would be a member of the putative class sought to be represented by Osborne pursuant to the Osborne Proof of Claim.

9 The Call For Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, with the input of various key stakeholders, the Applicants established a claims resolution process (the "Claims Resolution Process") approved by this court and incorporated in a Claims Resolution Order dated June 8, 2006 (the "Claims Resolution Order") and approved by order of the District Court dated June 22, 2006.

10 The Claims Resolution Order provides: (a) a process for the review of all Proofs of Claim filed with the Monitor; (b) a process for the acceptance or dispute, in whole or in part, by the Applicants, with the assistance of the Monitor, of Claims and/or Product Liability Claims for the purpose of voting and/or distribution under a plan of compromise or arrangement in respect of the Applicants (a "Plan"); (c) the appointment of a claims officer to resolve disputed Claims or Product Liability Claims; and (d) an appeal process from the determination of the claims officer to this court.

11 Muscletech has, with the assistance of the Monitor, reviewed the proofs of claim filed with the Monitor with a view to accepting or objecting to them for voting and/or distribution purposes under a Plan and has reviewed the Osborne Proof of Claim and denies that the claim advanced therein can succeed on the merits with respect to the allegations of false or misleading advertising.

12 On August 10, 2006, in accordance with the Claims Resolution Process, the Monitor issued a Notice of Objection to the Osborne Proof of Claim. In response to the Notice of Objection, Osborne filed a Dispute Notice dated August 23, 2006.

13 Paragraph 18 of the Claim Resolution Order authorizes Muscletech to move before this court to resolve or seek directions in respect of the validity, effect and/or quantum of proofs of claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the date of the Initial CCAA Order.

14 The Osborne Proof of Claims pertains to an action that was brought against Muscletech and certain Non-Applicant Defendants in the Superior Court of the State of California on February 16, 2005, prior to the commencement of these CCAA proceedings alleging violations of Section 17200 of the *California Business & Professions Code*, which prohibits "unlawful, unfair or fraudulent" business practices. The case was subsequently transferred to the United States District Court of California (Los Angeles) and a motion to transfer the case to the District Court was heard and granted on June 19, 2006.

15 As stated above, the Applicants' motion now before this court seeks an order that the Osborne Proof of Claim is invalid as a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

16 The class of claimants purported to be represented by Osborne was uncertified as of the date of the filing of the application in this CCAA proceeding and, as a result of the stay of proceedings, remains uncertified as of this date.

17 The cross motion filed by Osborne and now before this court seeks an order for, among other things:

(a) a declaration that the Call for Claims Order permits the filing of a proof of claim by Osborne, on behalf of herself and all other similarly situated California consumers, as the class representative of the putative class;

(b) in the alternative, to vary the Call for Claims Order *nunc pro tunc* to allow for the filing of the Osborne Proof of Claim to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order;

(c) in the further alternative, to lift the stay of proceedings to allow Osborne, as the class representative of the putative class, to take the necessary steps to certify the class action (the "California Class Action") and, contingent upon obtaining certification of the class, allow for the filing of the Osborne Proof of Claim in this proceeding to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order; and

(d) in the further alternative, to lift the stay of proceedings as against (i) Iovate Health Sciences Group, Inc. ("Iovate Group"), (ii) Iovate Health Sciences USA, Inc. ("Iovate USA") and (iii) General Nutrition Corporation ("GNC") (collectively the "Relevant Non-Applicant Defendants") to allow Osborne as the class representative of the California Consumers to continue the California Class Action as against the Relevant Non-Applicant Defendants.

Issues

18 The motions before this court raise the following issues:

(1) Is there any authority for the filing of uncertified class action claims in proceedings under the CCAA?

(2) Is Osborne the legal personal representative of the members of the putative class as referred to in the definition of "person" in the Call for Claims Order and what is the proper law for the determination of whether Osborne is a legal personal representative?

(3) Whether or not there is any such authority, should this court, in considering the equities of the case, exercise its inherent jurisdiction and accept the Osborne Proof of Claim for filing on behalf of the putative class.

Analysis

Class Proofs of Claim in CCAA Cases

19 The CCAA is silent as to whether class proofs of claim may be filed in a CCAA proceeding and it would appear that no Canadian court has definitively held that class proofs of claim may not be filed in a CCAA proceeding.

20 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), the applicant sought an order to lift the CCAA stay to commence a class proceeding on behalf of those who received blood tainted with Creuzfeld-Jakob Disease ("CJD"), and an order to file a class proof of claim. Blair, J. concluded that the real issue raised by the applicant was the adequacy of the notice of the established CCAA claims filing procedure. He dismissed the application on the basis that there was no evidence of inadequate notice to CJD claimants and the CCAA proceedings having gone on for one year and having had a very high profile, Blair, J. doubted that permitting a class action to proceed would yield different results, and concluded that allowing the class action to proceed would disrupt the CCAA proceedings with only marginal benefit to CJD claimants. Regarding the last point, Blair, J. stated at paras. 9-11:

> In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where ___ as I have indicated ___ I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place ___ with the concurrence of the various groups of Transfusion Claimants ___ is one which is founded upon individual voting by claimants with respect to the Plan.
>
> I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order the Claimants receive what compensation they are entitled to as early as possible.
>
> This is not the case, in my view ___ because it is not necessary to do so ___ to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has ___ as Mr. Wright's factum put it ___ a "lengthier history of class proceedings", class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. Ill. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 2989). As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

21 In *Air Canada, Re* (September 24, 2003), Farley J. (Ont. S.C.) (unreported), the applicants sought an order to lift the CCAA stay to commence a class proceeding in Federal Court on behalf of various travel agencies and requested

an order permitting them to thereafter file a class proof of claim. Farley J. dismissed the applicants' request that they be permitted to apply as a class of creditors if their class action was certified, and dismissed their request to submit a favourable judgment in the class action as a class proof of claim. Since the applicants' claims under the CCAA would have to be dealt with in the near future, and it was not likely that the Federal Court would be able to dispose of the class action in time, Farley J. concluded that "nothing is gained by their request". Farley, J. therefore did not definitively rule on the appropriateness of class proofs of claim.

22 In *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]), four plaintiffs in yet-uncertified American class actions relating to physical damages alleged to be caused by prohormones in certain products sold by Muscletech and others, applied to submit class proofs of claim and to have the CCAA stay lifted. In her Endorsement, Mesbur, J. noted that the CCAA neither expressly permits nor forbids class proofs of claim and, referring to the BIA and the cases noted above, she concluded that class proofs of claim under the CCAA were possible and the question was whether this was a proper case to permit the representative claims. For the reasons stated in her Endorsement, Mesbur, J. did not allow the class proofs of claim to be filed. It has been agreed between the parties that the Order of Mesbur, J. does not constitute *res judicata* or issue estoppel with respect to the motions now before this court relating to the Osborne claim.

23 In *Alton, Re* (2003), 45 C.B.R. (4th) 25 (Ont. S.C.J.), the bankrupt Alton applied for a discharge. One Claude Millard opposed Alton's application. The issue was whether Millard was a proven creditor. Millard was the representative plaintiff in a certified class action against Alton for losses arising from an allegedly fraudulent investment scheme operated by Alton. A previous Order of Farley J. dated January 31, 2001, stated that Millard,

> may file a proof of claim in the bankruptcy of [Alton] on behalf of himself and all Class Members in the amount of $5,000,000...and such proof of claim shall be accepted by the Trustee for voting purposes only in the place and stead of proofs of claim filed on behalf of each of the Class Members individually.

Lax, J. accordingly found that this Order made Millard a proven creditor for all purposes other than distribution.

24 It would appear from the above authorities that this court has inherent jurisdiction to permit a class proof of claim to be filed in a CCAA proceeding but that the determination of whether it should be permitted in any particular case will depend upon the factual circumstances of the case and the equities between the parties.

Osborne as Legal Personal Representative

25 The Call for Claims Order defines "claim" as a claim of any "person" and "person" is defined as meaning:

> ... any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government, agency, regulatory body or instrumentality thereof, legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted.

26 The Call for Claims Order accordingly contemplates claims being brought in a representative capacity. In addition, paragraph 18 of the Claims Resolution order contemplates a motion before this court with respect to proofs of claim submitted on a representative basis. Paragraph 18 provides as follows:

> 18. THIS COURT ORDERS that, notwithstanding anything herein to the contrary, the Monitor or the Applicants may move before the Court to resolve or seek directions in respect of the validity, effect and/or quantum of Proofs of Claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the Filing Date.

27 In my view, the terms of these Orders clearly contemplate that this court may order the acceptance of a claim filed on a representative basis by a legal personal representative, including a class action claim. The issue then becomes whether Osborne qualifies as a "legal personal representative" for the purposes of this proceeding.

28 Although under the law of California Osborne may owe certain duties to members of the putative class having purported to institute a proceeding on their behalf, I am of the view that the law of Ontario must be applied to determine whether Osborne is a legal personal representative for purposes of orders of this court such that she has authority to file a proof of claim on behalf of such persons in the CCAA proceeding before this court.

29 It is not alleged that Osborne has any specific authority from any member of the putative class to file a proof of claim on his or her behalf. It is to be noted that the reference to "legal personal representative" in the definition of "claim" in the Call for Claims Order is in the context of "legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted". It would seem to me that the definition implies that a legal personal representative must have been designated or constituted or in some way obtained authority from the persons alleged to be represented by way of power of authority, proxy, court order or some other document. In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 24 (Alta. Q.B.) at paragraph 50, Paperny, J. stated:

> A proxy signed by a participant and beneficial owner will be sufficient to authenticate a claim. However, a proxy signed by a participant and a third party claiming to have authority on behalf of a beneficial holder absent something from the beneficial holder itself is insufficient to extend to voting on behalf of the beneficial holders.

30 The definition of "claim" in the Call for Claims Order also makes reference to claims that "would have been claims provable in bankruptcy under the *Bankruptcy and Insolvency Act*". Subsection 124(3) of the *Bankruptcy and Insolvency Act* provides as follows:

> 124. (3) Who may make proof of claims ___ The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

31 This again indicates that for a proof of claim to be made by a legal personal representative such representative must have some authority from the person on whose behalf the claim is being filed.

32 Accordingly, I am of the view that absent some documentary evidence that Osborne has authority from the members of the putative class to file a proof of claim on their behalf or a court order granting such authority, she is not a "legal personal representative" for purposes of Call for Claims Order.

Equities and Inherent Jurisdiction

33 As stated above, in order for the court to determine whether a class proof of claim should be accepted in a particular proceeding, the court must consider the factual circumstances of the case and the equities between the parties. In addition, in my view, the inherent jurisdiction of this court under the CCAA would enable this court to permit the acceptance of the Osborne Proof of Claim even though Osborne does not strictly qualify as a legal personal representative.

34 In making such determination there are, in my view, a number of factual matters which the court should take into account in addition in considering the equities as between the parties. Among the factual matters to be considered are the following. This CCAA proceeding was commenced for the purpose of achieving a global resolution of all product liability and other lawsuits commenced in the United States against Muscletech and others, including the Non-Applicant Defendants, relating to products formerly sold by Muscletech. As a result of strenuous negotiation and successful court-supervised mediation through the District Court, the Applicants have succeeded in resolving virtually all of the outstanding claims with the exception of the Osborne claim and, to permit the filing of a class proof of claim at this time, would seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no member of the putative class other than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of

Rakoff, J. in *Ephedra Products Liability Litigation, Re* [329 B.R. 1 (U.S. Dist. Ct. S.D. N.Y. 2005)] U.S. Dist. LEXIS 16060 at page 6 are particularly apt.

> Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be $ 30, entitling each claimant to a distribution of about $ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering $ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

35 In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez v. Metabolife International Inc.* [218 F.R.D. 262 (U.S. Dist. Ct. S.D. Fla. 2003)] U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file individual claims if they were so inclined and none, other than Osborne, has done so. There is no evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

36 In summary, taking into account the factual circumstances of this case and the equities as between the parties, I am of the view that this court should not exercise its inherent jurisdiction to permit the filing of the Osborne Proof of Claim. An order will issue that the Osborne Proof of Claim is invalid and a nullity to the intent that it purports to advance a representative claim on behalf of other persons. The Cross-Motion is dismissed.

37 Counsel may make brief written submissions to me as to the costs of this proceeding, on or before December 29, 2006.

Schedule A

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Trademark Ltd.

MT Canadian Supplement Trademark Ltd.

MT Foreign Supplement Trademark Ltd.

HC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a New HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

Motion granted; Cross-motion dismissed.

End of Document

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 OLD PSG WIND-DOWN LTD. ET. AL.

Court File No.: CV-16-11582-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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