JG1793

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **FEBRUARY 23, 2011**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A" and "B"
Debtors

And
ERNST & YOUNG INC.
Monitor

JUDGMENT ON MOTION FOR AN ORDER ESTABLISHING A PROCEDURE FOR THE FILING, REVIEW AND DETERMINATION OF CLAIMS SECURED BY *CCAA* CHARGES (#875)

INTRODUCTION

[1] Courts often issue claims procedure and bar orders in *CCAA*[1] restructurings. These orders provide, on the one hand, a summary mechanism for creditors to file and value their claims against the debtor. They bring, on the other hand, finality to the process and facilitate a timely vote on the proposed plan and an orderly completion of the *CCAA* proceeding.

JG1793

1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("***CCAA***").

[2] Conversely, claims procedure and bar orders are seldom used to deal with potential claims against the beneficiaries of charges created by a *CCAA* initial order. The issuance of these orders is unheard of when these charges affect the property of a filing entity that turned bankrupt during its *CCAA* process.

[3] In dispute here is whether a *CCAA* restructuring judge should issue this kind of order in such a situation. For the reasons that follow, the Court concludes that it is neither justified nor appropriate to do so in the current context.

THE CONTEXT

[4] On September 23, 2010, the Court issued a Sanction Order in the *CCAA* restructuring process of the Abitibi Petitioners[2] and the Bowater Petitioners[3] (collectively, "**Abitibi**"). The Sanction Order approved Abitibi's *CCAA* Plan[4]. Since December 9, 2010, the *CCAA* Plan is implemented. Abitibi has now emerged from its *CCAA* restructuring process.

[5] The whole process started in April 2009, through an Initial Order sought at the request of Abitibi as well as another related filing entity, Bowater Canada Finance Corporation ("**BCFC**"). As it is common in these matters, the Initial Order created a number of *CCAA* Charges, including:

a) The Bowater D&O Charge of 25 million dollars, as security interest on the property of the Bowater Petitioners (including BCFC) for the latter's obligation to indemnify the Bowater directors in certain situations arising on or after the date of the Initial Order[5]; and

b) The Bowater Administration Charge of 2 million dollars, as security interest on the property of the Bowater Petitioners (including BCFC) for the latter's obligation to honour the payment of professional fees and disbursements incurred before and after the Initial Order[6].

[6] The Initial Order notably declared that these *CCAA* Charges were valid and enforceable notwithstanding any petition in bankruptcy filed subsequently in respect of either Abitibi or BCFC[7].

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2 Listed in Schedule A to this Judgment.

3 Listed in Schedule B to this Judgment.

4 The Plan of Reorganisation and Compromise (as modified, amended or supplemented by *CCAA* Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, *CCAA* Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) (collectively, the "***CCAA* Plan**") is included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

5 Paragraphs 51 and 53 of the Initial Order.

6 Paragraphs 75 and 77 of the Initial Order.

7 Paragraphs 94 to 97 of the Initial Order.

[7] Pursuant to the terms of the Sanction Order, upon implementation of the *CCAA* Plan, the *CCAA* Charges created by the Initial Order against the property of Abitibi were discharged and released.

[8] However, contrary to the Affected Unsecured Creditors of Abitibi who overwhelmingly approved the *CCAA* Plan, the Affected Unsecured Creditors of BCFC rejected it. Hence, the *CCAA* Plan did not release BCFC nor its directors or officers acting as such. BCFC did not either give or get release as a result of the Sanction Order.

[9] Accordingly, for BCFC, the above-mentioned Bowater D&O Charge and Bowater Administration Charge (the "**BCFC *CCAA* Charges**") were never discharged or released. Actually, the Stay Period in respect of BCFC expired on September 30, 2010. The *CCAA* protection that it enjoyed until that date consequently then stopped.

[10] Later, on December 17, 2010, the sole shareholder of BCFC passed a resolution authorizing the latter to file an assignment in bankruptcy under the *BIA*[8]. Green Hunt Wedlake Inc. (the "**Trustee**") was appointed trustee to the bankruptcy.

THE MOTION AT ISSUE

[11] By its Motion[9], Abitibi asks the Court to issue a rather unique and unprecedented order. It wants the Court to establish a claims process for the filing, review and determination of claims that may be raised against the beneficiaries of the BCFC *CCAA* Charges.

[12] The ultimate goal of the Motion is to forever bar claims against these beneficiaries and to forever release them from any claims other than those that would have been filed. Conclusions [13] and [14] of the order sought, as amended, are clear to that effect:

> [13] **ORDERS** that, unless otherwise ordered by this Court, any Creditor who does not deliver a BCFC Proof of Claim in respect of a BCFC Claim in accordance with paragraph [8] shall be forever barred from asserting such BCFC Claim and such BCFC Claim shall be forever extinguished.
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> [14] **ORDERS** that save and except for the BCFC Claims filed with the Monitor on or before the BCFC Claims Bar Date, all Persons shall be deemed to have released and shall be forever barred from asserting a BCFC Claim.

[13] Abitibi submits it is appropriate and necessary to identify and value any potential claims under these BCFC *CCAA* Charges in respect of any obligations that may be secured by such. In the end, the objective is to forever bar potential creditor from

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[8] *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("***BIA***").

[9] See Motion for an Order Establishing a Procedure for the Filing, Review and Determination of Claims Secured by *CCAA* Charges, dated December 21, 2010 (the "**Motion**").

asserting claims against the beneficiaries of the BCFC *CCAA* Charges and release and discharge them in a manner similar to that which occurred for Abitibi through the implementation of the *CCAA* Plan.

[14] The Trustee opposes the Motion[10].

[15] It argues that the Affected Unsecured Creditors of BCFC rejected the *CCAA* Plan and that the Stay Period of the Initial Order expired on September 30, 2010 in its case. It considers that the Court is therefore without jurisdiction to implement a claims process with respect to the BCFC *CCAA* Charges.

[16] It adds that the contemplated procedure duplicates the claims process provided under the relevant provisions of the *BIA,* which is now the statute that applies to BCFC as a result of its filing for bankruptcy.

ANALYSIS

[17] With due respect to the position advocated by Abitibi, the Court agrees with the Trustee's submission. The order sought cannot be granted.

[18] It is not disputed that the Initial Order included the creation of *CCAA* Charges to secure certain obligations of Abitibi and BCFC. It is not disputed either that these *CCAA* Charges created by the Initial Order are valid. In fact, in its Contestation, the Trustee insists, at paragraph 29, that "[...] *the beneficiaries of the CCAA Charges are secured creditors and protected under the BIA.*"

[19] This notwithstanding, it does not follow that, as a result, this Court has jurisdiction or authority to impose upon potential creditors a claims process for the benefit of the beneficiaries of the *CCAA* Charges created upon the property of a company, BCFC, that is no longer under *CCAA* protection.

[20] No doubt, a *CCAA* court may make a claims procedure order and a claims bar order for the benefit of an entity that filed for *CCAA* protection. The case law shows that pursuant to Section 12 of the *CCAA* (as it applied to Abitibi's *CCAA* restructuring)[11],

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[10] See Contestation of Green Hunt Wedlake Inc., Trustee in Bankruptcy for Bowater Canada Finance Corporation, in connection with a Motion for an Order Establishing a Procedure for the Filing, Review and Determination of Claims Secured by *CCAA* Charges, dated January 26, 2011 (the "**Contestation**").

[11] Prior to September 18, 2009, this Section read as follows:

> 12. (1) Definition of "claim" – For the purposes of this Act, "claim" means 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.*
>
> (2) Determination of amount of claim – 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

courts did issue claims procedure and bar orders whereby the creditors of a filing entity were required to file their claims by a fixed date, after which their claims were barred.

[21] Such orders provided a timely mechanism to allow creditors to assess and vote on a proposed plan, while at the same time facilitating the court ordering completion of a *CCAA* proceeding. In that context, a court usually directed how to provide notice of the claims procedure and, sometimes, appointed claims officers that were given authority to adjudicate disputed claims. Appeals of the claims officers' determinations could be made to the supervising *CCAA* judge[12].

[22] The goal was to deal in a summary manner with the claims of the creditors in order to allow the presentation of a *CCAA* plan and, ultimately, the vote of the creditors upon it. The reference, in Section 12, to the courts' power to determine the amount of the claims on summary application and the *CCAA*'s underlying objectives provided the basis for the courts' authority to issue these orders.

(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.

(3) Admission of claims – Notwithstanding subsection (2), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

12 Janis P. SARRA, "*Rescue! : The Companies' Creditors Arrangement Act*" (Toronto: Carswell, 2007), at 169.

[23] This rationale cannot be transferred and applied to a claims procedure order or a claims bar order for the benefit of beneficiaries of a *CCAA* charge, even less so when the charge at issue concerns an entity like BCFC that is not under *CCAA* protection anymore.

[24] Neither the relevant provisions of the *CCAA* nor its underlying objectives or purpose could justify such an extension of the claims procedure orders or claims bar orders commonly issued by *CCAA* courts.

[25] In *Century Services Inc.* v. *Canada (Attorney General)*[13], the Supreme Court of Canada recently emphasized the following. The most appropriate approach for the source of a *CCAA* court authority during a *CCAA* proceeding is a hierarchical one, where courts must rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor the measures taken.

[26] In this judgment, the Supreme Court noted[14] that one of the *CCAA* distinguishing features was a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganisation of the debtor and achieve the *CCAA*'s objectives. That is, to permit the debtor to continue to carry on business and to avoid the social and economic costs of liquidating its assets.

[27] More specifically, the Supreme Court wrote:

> [70] […] the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. […]
>
> (Our emphasis)

[28] Applying these guidelines to the situation at hand, there are simply no provisions of the *CCAA* text that would support the Court's authority to issue a claims procedure order solely aimed at potential claims that may be raised against beneficiaries of *CCAA* Charges affecting the property of an entity no longer under *CCAA* protection.

[29] The claims covered by Section 12 concern the creditors of the debtor company under *CCAA* protection, nothing else. No explicit or implied reading of the *CCAA* would suggest that these claims could include claims directed towards the beneficiaries of charges created by an initial order.

[30] Similarly, turning to the general language of the *CCAA*, neither in the judicial discretion it grants, nor in the inherent jurisdiction it may acknowledge, can the Court reasonably find the authority Abitibi seeks exercise. The Court is unable to conclude

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[13] 2010 SCC 60, at paragr. 65.
[14] 2010 SCC 60, at paragr. 15 and 19.

that the appropriateness of the order sought here would be justified in furtherance of efforts to achieve the remedial purpose of the Act, that is, to avoid the social and economic losses resulting from liquidation of an insolvent company.

[31] Inasmuch as BCFC is concerned, we are well beyond this point. The *CCAA* Plan has been rejected by its unsecured creditors. No stay period applies to BCFC anymore. It has, in fact, filed for bankruptcy. In its case, the reorganisation has failed. The remedial purpose of the *CCAA* has been set aside by those entrusted with the responsibility of deciding to rely upon it or not, namely its creditors.

[32] That is not all. In the Motion, neither BCFC nor the Trustee is the applicant. Abitibi is. Yet, it has now exited *CCAA* protection and has no further interest in the property or assets of BCFC that are subject to the *CCAA* Charges. Similarly, the Monitor has no handling role with respect to BCFC given that the latter is now bankrupt.

[33] Abitibi contends that the Court's statutory or inherent jurisdiction under the *CCAA* should be exercised in support of granting the order sought because it relates to the *CCAA* Charges created by its own Initial Order.

[34] While this argument may appear, at first sight, appealing, it is, with respect, without merit.

[35] The validity of the *CCAA* Charges created by the Initial Order is not at issue here. Indeed, the Trustee does not dispute this. It even confirms that the beneficiaries of the *CCAA* Charges are secured creditors under the *BIA*.

[36] The mere fact that these *CCAA* Charges exist, are valid and may entail potential claims as secured creditors by its beneficiaries in the BCFC bankruptcy is not sufficient to justify this Court exercising any alleged statutory jurisdiction, discretionary power or inherent jurisdiction to grant the claims procedure and bar orders sought.

[37] The contemplated process simply does not concern any debtor company subject to the *CCAA*. It relates to the beneficiaries of the charges, namely, in this case, the directors of BCFC. It is apparently conceded by all concerned that under the Bowater Administration Charge, there is no amount outstanding that could be owed to the beneficiaries of the charge and that may trigger a claim of any sort.

[38] No doubt, the beneficiaries of the Bowater D&O Charge affecting the property of BCFC would like to know the extent of claims, if any, one may have against them and which may prompt its application. To that end, the establishment of a claims procedure order, and notably a claims bar date, may certainly assist them in assessing any potential exposure that may remain at this stage.

[39] While the Court understands the reasons for such a request, it fails to see the legal basis pursuant to which it could be granted. Establishing claims procedure orders, and most importantly claims bar dates, remain an exception that has been applied and used in the context of *CCAA* proceedings to provide an expeditious manner of dealing

with a claims process, where Section 12 of the Act precisely refers to the treatment of claims as having to be made upon summary application.

[40] This bears no analogy with and has no application in the context of beneficiaries of *CCAA* Charges affecting the property of a bankrupt debtor to whom the *CCAA* does not apply anymore.

[41] In fact, Abitibi cannot cite any authority, be it in the case law or in the doctrine, that would support the type of order being sought for the benefit of the beneficiaries of *CCAA* Charges, particularly when the charges at issue affect the property of an entity no longer subject to the *CCAA*.

[42] The mere fact that it would avoid uncertainty in that regard for these beneficiaries is not sufficient to justify the Court's authority to grant such relief.

[43] The other argument of Abitibi to the effect that the order sought is needed to close the *CCAA* process is not any more convincing.

[44] BCFC is no longer part of that process. It is now bankrupt. Moreover, Abitibi has now exited *CCAA* protection. The beneficiaries of the BCFC *CCAA* Charges are not prejudiced by that. The charges remain and are valid. The beneficiaries simply do not know, at the moment, the extent of any exposure since the discharges and releases of the *CCAA* Plan does not affect BCFC.

[45] For the time being, it appears that no such claims have been raised or put forward against the beneficiaries of the *CCAA* Charges still affecting the property of BCFC. The charges created by the Initial Order are, in fact, rather limited. They only cover liabilities and obligations arising post-filing. For an entity like BCFC that has apparently been inactive for years, it appears difficult to figure out the kind of claim that would ever fall within the limited scope of the charge.

[46] Be that as it may, this is not enough to justify the Court exercising any jurisdiction under the *CCAA* to impose a claims procedure order, and mostly a claims bar order, upon potential creditors under circumstances where neither the provisions nor the remedial purpose of the Act are applicable.

[47] From that standpoint, if worst comes to worst and, because of potential claims against them, the beneficiaries of the charges are to exercise any rights in the context of the bankruptcy of BCFC, they would indeed be secured creditors under the *BIA*. In that regard, the Trustee is right in saying that this legislation and the existing orders of this Court protect their interests.

[48] It is true that, to some extent, the claims process outlined in the Motion duplicates the statutory scheme provided for under the *BIA*. By setting up a claims procedure with a claims bar date and a claims determination mechanism, one of the objectives is to value potential claims against the beneficiaries of the BCFC *CCAA* Charges, who could in turn assess whether they should then claim a secured creditor

status in the BCFC bankruptcy. The contemplated process thus indirectly touches upon the valuation of the extent, if any, of these beneficiaries' secured creditor status under the *BIA*.

[49] That the basis of the secured creditor status of these beneficiaries is a *CCAA* Charge is not sufficient to justify implementing a parallel process such as the one proposed.

[50] In closing, although the Court concludes that the Motion sought should be dismissed, it is of the view that no costs should be awarded in favour of any party under the circumstances.

[51] The purpose of the Motion was to convey a degree of finality to the beneficiaries of the BCFC *CCAA* Charges created by the Court in its Initial Order. This objective was legitimate, even though the Court concludes it does not have the authority to grant the Motion. As further issues may arise in the future in the context of the BCFC bankruptcy with regard to the extent of the secured creditor status of these beneficiaries, it is appropriate not to award costs on the current Motion given that its dismissal does not put a final end to the debate.

FOR THESE REASONS, THE COURT:

[52] **DISMISSES** the Motion;

[53] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C. J.S.C.

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Date of hearing: January 31, 2011

SCHEDULE "A"
ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. **BOWATER CANADIAN HOLDINGS INC.**
2. **BOWATER CANADA FINANCE CORPORATION**
3. **BOWATER CANADIAN LIMITED**
4. **3231378 NOVA SCOTIA COMPANY**
5. **ABITIBIBOWATER CANADA INC.**
6. **BOWATER CANADA TREASURY CORPORATION**
7. **BOWATER CANADIAN FOREST PRODUCTS INC.**
8. **BOWATER SHELBURNE CORPORATION**
9. **BOWATER LAHAVE CORPORATION**
10. **ST-MAURICE RIVER DRIVE COMPANY LIMITED**
11. **BOWATER TREATED WOOD INC.**
12. **CANEXEL HARDBOARD INC.**
13. **9068-9050 QUÉBEC INC.**
14. **ALLIANCE FOREST PRODUCTS (2001) INC.**
15. **BOWATER BELLEDUNE SAWMILL INC.**
16. **BOWATER MARITIMES INC.**
17. **BOWATER MITIS INC.**
18. **BOWATER GUÉRETTE INC.**
19. **BOWATER COUTURIER INC.**