Court File No. CV-15-11238-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B. 16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Crop., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

RESPONDING PARTY'S FACTUM

January 25, 2016

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PART I - INTRODUCTION

1. The Responding Party, The Catalyst Capital Group Inc. ("Catalyst"), opposes the approval of the Plan of Arrangement (the "Plan") involving Mid-Bowline Group Corp. ("Mid-Bowline").

2. Under the guise of a hearing to approve the Plan of Arrangement, the Court is being asked to make a final determination that would significantly prejudice Catalyst's claim in an action bearing Court File No. CV-14-507120 (the "Catalyst Claim"). The defendants to that claim are West Face Capital Inc. ("West Face"), a significant shareholder of Mid-Bowline, and Brandon Moyse, neither of whom are parties to this Application.

3. There are three reasons the Court should refuse to approve the proposed Plan of Arrangement. First, the Court cannot approve this Plan because it purports to extinguish aspects of the Catalyst Claim. The Court does not have the jurisdiction under s. 182 of the *OBCA* to compromise the claim of a third party.

4. Second and in the alternative, even if the Court did have such jurisdiction, this Plan of Arrangement has been put forward in a way that unduly prejudices the rights of Catalyst, as Catalyst will be denied its right to procedural fairness and its right to have its claims addressed on their merits through a fair trial.

5. Third and in any event, the Plan does not satisfy the Supreme Court's test for approval of a Plan of Arrangement because: a) it has not been put forward in good faith; b) it serves no valid business purpose; and c) it does not resolve competing interests in a fair and balanced way.

PART II - SUMMARY OF FACTS

6. Catalyst relies on the facts as set out in the Affidavit of Jim Riley, sworn January 25, 2016.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

7. Catalyst respectfully submits that there is one issue to be determined on this Application:

   (a) Should this Court approve the Plan of Arrangement of Mid-Bowline pursuant to s. 182 of the *OBCA*?

8. Catalyst submits that the Plan of Arrangement, as proposed, cannot be approved.

(A) UNILATERAL RELEASE OF THIRD PARTY CLAIM IS NOT WITHIN THE COURT'S POWER

9. The Court should not allow a party to proceed with a Plan of Arrangement approval hearing if at the outset that Plan cannot be sanctioned because its terms cannot be sanctioned at law. This is the same principle that applies in the context of a *CCAA* Plan of Arrangement.[1]

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[1] *Crystallex International Corp., Re,* 2013 ONSC 823, paras 9-13, and *Doman Industries Ltd., Re*, 2003 BCSC 376, paras. 8-11.

10. A Plan of Arrangement under s. 182 of the *OBCA* allows a corporation to undertake a fundamental change in the corporate ownership or structure. It does not permit an applicant to exterminate the substantive or procedural rights of third parties.

11. Commenced on June 25, 2014, the Catalyst Claim involves breach of confidence allegations against West Face and a then-employee of West Face, who was a former employee of Catalyst (Moyse).[2] The claim alleges that West Face misused Catalyst's confidential information in connection with its purchase of WIND Mobile Inc. Thus, the claim includes a claim for a constructive trust over the Mid-Bowline shares owned by West Face and a claim for an accounting of all profits earned by West Face, its officers, directors, employees, agents, any persons acting under its direction or on its behalf.

12. Articles 4.4 and 4.5 of the Plan of Arrangement would extinguish Catalyst's claim for a constructive trust and would preclude any attempt by Catalyst to trace the funds associated with West Face's shares. The effect of this would be to almost entirely remove any ability on the part of Catalyst to be compensated for its damages and to enforce its judgment.

13. There is nothing in s. 182 (or s. 192 of the *CBCA*) that suggests that interests other than those of securityholders can be affected by a plan of arrangement. The words of the statute do not permit any interpretation that a plan of arrangement could affect the rights of other third parties.

14. This must be contrasted with a plan of arrangement in the context of *CCAA* proceedings, which proceedings explicitly put at issue the interest of many different stakeholders, including unsecured creditors and, at times, third parties. The Court's power under a plan of arrangement in the *CBCA/OBCA* context is far more narrow than under the *CCAA* process because of the different

[2] Amended Amended Statement of Claim, Exhibit "A" to the Riley Affidavit, Responding Motion Record, Tab 1A.

circumstances (the corporation is not insolvent) and process (there is no claims process under the *CBCA/OBCA*).

15. The distinction between plans of arrangement under the *CCAA* and the *OBCA/CBCA* is further illuminated by the law on third parties releases in a plan of arrangement under the *CCAA*. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, Blair J.A. emphasized that it is the broad nature of the *CCAA* that allows for the inclusion of third party releases in a plan or compromise.[3] He reached this conclusion on the basis of the characteristics of the *CCAA* itself as well as the requirements and protections built into the arrangement process within that Act, which provides significant safeguards.

16. As this matter is an Application under the *OBCA,* the Mid-Bowline Plan of Arrangement does not have these protections, which are conditions precedent to the inclusion of third parties releases. The Plan of Arrangement and specifically Articles 4.4 and 4.5 do not reflect a compromise – which is the basis of such outcomes in the *CCAA* context. If this were a Plan of Arrangement as is truly contemplated under the *OBCA*, it would simply be a re-arrangement of the company's corporate structure. It has involved no procedural safeguards for third parties precisely because the rights of third parties are not intended to be effected.

17. The Supreme Court's analysis in the *BCE* decision contemplates that only the interests of securityholders need to be explicitly considered by the Court when approving a plan of arrangement.[4] The Court's discussion clearly suggests that s. 192 contemplates that only the rights of securityholders will be affected by s. 192. There is no basis whatsoever for the proposition that third party interests may be compromised.

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[3] 2008 ONCA 587 ["*Metcalfe*"]
[4] *BCE Inc., Re*, [2008] 3 S.C.R. 560 ["*BCE*"], at paras. 130-5.

18. This view is echoed by the authors of the *Annotated Canada Business Corporations Act*, who wrote:

> Subsection 192(4) is silent on whether the court can grant a corporation's request for a stay of legal or arbitral proceedings or of termination of contracts pending the fairness hearing. One of the several arguments that could be made against the validity of stay orders is that the rights of ordinary creditors (*i.e.*, creditors other than those who hold debt obligations issued by the corporation) are not subject to an arrangement under s. 192. Staying the rights of ordinary creditors is inconsistent with their immunity from s. 192 proceedings.[5]

19. Thus, neither the words of the statute nor the case law nor the commentary supports the proposition that a Plan of Arrangement under the *OBCA* can exterminate third party claims as the Mid-Bowline Plan of Arrangement purports to do.

(B) THE PLAN UNDULY PREJUDICES CATALYST'S RIGHTS

20. In the alternative, even if the Court did have the requisite jurisdiction, this Plan of Arrangement has been put forward in a way that unduly prejudices the rights of Catalyst. If the Plan is approved, Catalyst will be denied its right to procedural fairness and to have its claims enjoy the protections of the *Rules of Civil Procedure*.

21. The Catalyst Claim is still at a very early stage, as set out in the Riley Affidavit. Pleadings are not closed, as the defendant Moyse has yet to deliver a statement of defence. As of the date of service of the Notice of Application, the parties had not even started the discovery process: they had not agreed on a Discovery Plan, exchanged Affidavits of Documents, or conducted examinations for discovery.

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[5] (Toronto: Carswell, 2013 [looseleaf]), p. 1-446.77 (emphasis added).

22. Leaving aside the jurisdictional issue, for the Court to curtail the Catalyst Claim under the guise of a plan approval application would be to ignore and disregard virtually all of the procedural and substantive rights afforded to Catalyst as a plaintiff under the Rules of Civil Procedure, including Rules 30 (Discovery of Documents), 31 (Examination for Discovery), 48 (Listing for Trial), 50 (Pre-Trials), and 53 (Evidence at Trial).

23. Furthermore, should this Plan be approved in its current state, Catalyst will be denied its right to have all substantive aspects of its Claim addressed on their merits through a fair trial. There will be no witnesses. There will be no evidence. There will simply be a Court Order with the effect of extinguishing broad aspects of the Catalyst Claim, in the absence of a trial.

(C) THE PLAN OF ARRANGEMENT FAILS THE *BCE* TEST

24. Even setting aside the serious concerns regarding the Court's jurisdiction and the denial of basic fairness to Catalyst with respect to its Claim, this Plan of Arrangement must fail because it does not satisfy the test set out by the Supreme Court of Canada in *Re BCE Inc.*[6]

25. Upon proposing a Plan of Arrangement, the applicant corporation bears the onus of satisfying the Court that the Plan ought to be approved.[7] The test for approval of a plan of arrangement under the *OBCA/CBCA* was established by the Supreme Court in *BCE* as follows:

(a) Have the statutory procedures been met?;

(b) Was the application put forward in good faith?; and

(c) Is the arrangement fair and reasonable?[8]

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[6] *BCE.*

[7] *Magna International Int., Re*, 2010 ONSC 4685 (Div Ct) ["*Magna Div Ct*"], at para. 35; *BCE*, at para. 137.

26. The Plan proposed by Mid-Bowline fails both the second and third criteria. It has not been put forward in good faith and it is not fair and reasonable.

(i) The Plan Is Not Proposed in Good Faith

27. The Plan cannot be approved because it has not been proposed in good faith. Instead, it has been proposed and specifically structured in order to curtail Catalyst's ability to advance its Claim.

28. In its factum, Mid-Bowline states: "The only reason the proposed transaction is proceeding by way of a plan of arrangement is to provide Shaw with title to the shares of WIND free and clear of a claim by The Catalyst Capital Group Inc. for a constructive trust over the shares of WIND that are indirectly held by West Face Capital Inc. through Mid-Bowline."[9] In actual fact, the Plan goes farther than simply providing Shaw with the shares "free and clear". The Plan puts up a blockade to Catalyst's ability to trace the funds associated with the transaction.

29. A Plan of Arrangement cannot be used to extinguish another party's claims. Using the Plan or Arrangement process in this way is an abuse of process and is not a good faith basis on which to seek the Court's blessing.

(ii) The Plan is Not Fair and Reasonable

30. Furthermore, the Mid-Bowline Plan fails both prongs of the test to determine whether a Plan is fair and reasonable:

(a) It does not serve a valid business purpose; and

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[8] *Magna Div Ct*, at para. 35; citing *BCE*, at para. 137.
[9] Moving Party's Factum, para. 2.

(b) It does not resolve interests in a fair and balanced way. [10]

31. In *BCE*, the Supreme Court commented on the purpose of plans of arrangement:

> The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose lights [sic] may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests.[11]

32. The Supreme Court has said that when considering the approval of a plan of arrangement, the focus is on the terms and impact of the arrangement itself and whether "viewed substantively and objectively" it is suitable for approval.[12]

The Plan Does Not Have a Valid Business Purpose

33. There is no valid business purpose to the Plan. The Applicant has stated explicitly that the *only reason* the transaction is proceeding by way of a plan of arrangement is to extinguish parts of Catalyst's claim. The unilateral extinguishment of third party claims is not a valid business purpose that would satisfy the Supreme Court's analysis in *BCE*.

34. In *BCE*, the Supreme Court held that a valid business purpose recognizes that the burden imposed by the arrangement must be justified by the interests of the corporation.[13] The Court further held that "[a]n important factor for courts to consider when determining if the plan of

[10] *Magna Div Ct*, at para. 36; citing *BCE*, at para. 138.
[11] *BCE*, at para. 128.
[12] *BCE*, at para. 136.
[13] *BCE*, at para. 145.

arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation."[14]

35. Extinguishing third party claims is not necessity to the continued operations of Mid-Bowline or, for that matter, of WIND.

The Plan is Not A Fair Balancing of Rights

36. Moreover, the Plan is not a fair balancing of rights. The question of whether the arrangement is "fair and balanced" must be answered in a contextual and fact-specific way. The Supreme Court has set out a number of non-exhaustive factors:

(a) the outcome of an informed and procedurally fair shareholder vote;

(b) the approval of the arrangement by a special committee of independent directors;

(c) the presence of a fairness opinion from a reputable expert;

(d) the repute of the directors and advisors who endorse the arrangement;

(e) the proportionality of the compromise between securityholders,

(f) the position of securityholders before and after the arrangement;

(g) the impact of the arrangement on the rights of securityholders;

(h) the access of shareholders to dissent and appraisal remedies;

(i) the market reaction to the announcement of the arrangement; and

(j) the presence (or absence) of a liquid trading market into which securityholders can sell their securities.[15]

37. Even setting aside the issues raised above regarding whether the interests of third parties can be affected at all by a plan of arrangement, the factors set out by the Supreme Court indicate

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[14] *BCE*, at para. 146.
[15] *BCE*, at paras. 152-3; set out in *Magna Div Ct*, at paras. 38 to 40 and 56 to 57.

clearly that a Court will look at, *inter alia*, the proportionality of the compromise and the outcomes for certain groups (see, for example, items e, f, and g).

38. It is neither proportionate nor a "fair balancing of rights" for interests of a third party to be unilaterally extinguished in exchange for no consideration. This is particularly true when there is a method of achieving the same goal (carrying out the transaction) without the necessity of extinguishing these rights.

39. In *9171665 Canada Ltd.*, the Court refused to approve a Plan of Arrangement proposed under the *CBCA*, *inter alia,* because the interests of one group of creditors had not been adequately protected.[16] The Plan purported to fully extinguish a right of the first secured lien noteholders, although that group had not been given an opportunity to vote on the Plan. The Court commented:

> The reasonable expectations of creditors regarding priorities should be a factor to consider in assessing fairness. This is especially true when those creditors have not been given a vote. I find the Plan unfair because it unfairly purports to extinguish a right which may have accrued to the first secured lien noteholders. I can understand the motivation to restructure, but I can also understand the first secured lien noteholders' motivation to resist where their contractual rights have been potentially altered without the chance to vote.[17]

40. Similar reasoning could be applied here. Catalyst was given no opportunity to participate in the Plan of Arrangement process and its interests are not being protected.

41. Furthermore, while it is important to note the many differences between the *OBCA* context and the *CCAA* context, many of which have been noted above, the law relating to the inclusion of third party releases in a plan or compromise in the *CCAA* context can be applied by analogy.

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[16] 2015 ABQB 633["*917*"].
[17] *917*, at para. 40.

42. In *Nelson Education Limited, Re*, the Court was asked to approve a sale transaction of substantially all the assets of a company under *CCAA* protection.[18] As part of the sale, the applicants requested broad releases be ordered by the Court. Newbould J. refused to allow the releases.

43. His Honour applied the test established by Blair J.A. in *Metcalfe* that a release was valid if there was a reasonable connection between the third party claim being compromised and the benefits of restructuring afforded by the plan. Newbould J. found that the releases were improper because the beneficiaries of the release were providing nothing to those whose claims were being released.[19]

44. Even ignoring the significant differences between the *CCAA* and *OBCA* context, this reasoning applies here. The extinguishment of Catalyst's rights in the Mid-Bowline Plan of Arrangement is improper because the beneficiary of the release (West Face) is providing nothing to those whose claims are being released (Catalyst).

45. In a situation where the Plan of Arrangement does not serve a valid business purpose and is not a fair balancing of rights, it ought not to receive this Court's approval.

PART IV - ORDER REQUESTED

46. Catalyst respectfully submits that the Application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2016.

Rocco DiPucchio

Lauren Epstein

[18] 2015 ONSC 5557 ["*Nelson*"].
[19] *Nelson*, at para. 50.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Crystallex International Corp., Re*, 2013 ONSC 823

2. *Doman Industries Ltd., Re*, 2003 BCSC 376

3. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587

4. *BCE Inc., Re*, [2008] 3 S.C.R. 560

5. *Magna International Int., Re*, 2010 ONSC 4685 (Div Ct)

6. *9171665 Canada Ltd.*, 2015 ABQB 633

7. *Nelson Education Limited, Re*, 2015 ONSC 5557

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. ***Business Corporations Act*, RSO 1990, c B.16**

182. (1) In this section,

"arrangement", with respect to a corporation, includes,

(a) a reorganization of the shares of any class or series of the corporation or of the stated capital of any such class or series,

(b) the addition to or removal from the articles of the corporation of any provision that is permitted by this Act to be, or that is, set out in the articles or the change of any such provision,

(c) an amalgamation of the corporation with another corporation,

(d) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act,

(e) a transfer of all or substantially all the property of the corporation to another body corporate in exchange for securities, money or other property of the body corporate,

(f) an exchange of securities of the corporation held by security holders for other securities, money or other property of the corporation or securities, money or other property of another body corporate that is not a take-over bid as defined in Part XX of the Securities Act,

(g) a liquidation or dissolution of the corporation,

(h) any other reorganization or scheme involving the business or affairs of the corporation or of any or all of the holders of its securities or of any options or rights to acquire any of its securities that is, at law, an arrangement, and

(i) any combination of the foregoing.

2. ***Canada Business Corporations Act*, RSC 1985, c C-44**

Definition of "arrangement"
192. (1) In this section, "arrangement" includes

(a) an amendment to the articles of a corporation;

(b) an amalgamation of two or more corporations;

(c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act;

(d) a division of the business carried on by a corporation;

(e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;

(f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate;

(f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation;

(g) a liquidation and dissolution of a corporation; and

(h) any combination of the foregoing.

Where corporation insolvent

(2) For the purposes of this section, a corporation is insolvent

(a) where it is unable to pay its liabilities as they become due; or

(b) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.

Application to court for approval of arrangement

(3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

Powers of court

(4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;

(b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;

(c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;

(d) an order permitting a shareholder to dissent under section 190; and

(e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

Notice to Director

(5) An applicant for any interim or final order under this section shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Articles of arrangement

(6) After an order referred to in paragraph (4)(e) has been made, articles of arrangement in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

Certificate of arrangement

(7) On receipt of articles of arrangement, the Director shall issue a certificate of arrangement in accordance with section 262.

Effect of certificate

(8) An arrangement becomes effective on the date shown in the certificate of arrangement.

R.S., 1985, c. C-44, s. 192; 1994, c. 24, s. 24; 2001, c. 14, s. 96.

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