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• PURCHASERS IN *CCAA* COURT-APPROVED ASSET SALES REMAIN SUBJECT TO THE JURISDICTION OF THE COURT EVEN AFTER CLOSING •

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In a recent decision *White Birch Paper Holding Company (Arrangement relatif à)* [*White Birch*],[1] the Quebec Court of Appeal ("QCA") examined the scope of the powers of a judge overseeing the restructuring of a company pursuant to the *Companies' Creditors Arrangement Act*.[2] Specifically, the QCA had to determine the extent of a judge's jurisdiction in ensuring the implementation of—and compliance with—the conditions precedent of a sale of assets that same had approved.

The QCA confirmed that a *CCAA* court has jurisdiction to issue compliance orders against the arm's length buyer of the assets, who is in principle not subject to the *CCAA*.

Context

In the context of the restructuring of the White Birch Paper group, BD White Birch Investment LLC (the "Purchaser") acquired nearly all of the assets of White Birch Paper, following a sales process, a stalking horse bid, and an auction of the assets, each of which were court approved. On September 28, 2010, the judge overseeing the restructuring, the Honourable Justice Robert Mongeon, signed an *Approval and Vesting Order* approving the sale.

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However, the closing of the transaction was subject to a number of conditions, including the execution of appropriate agreements with the various unions and retirees of the Stadacona, Papier Masson, and F.F. Soucy plants. With regard to the Stadacona paper mill, a Letter of Understanding was signed between Stadacona S.E.C., a corporation within the White Birch Paper group, and the Communications, Energy and Paperworkers Union of Canada[3] (the "Union"). This Letter of Understanding provided for both the termination of the existing pension plan and the implementation of a new one that was to be set up and take effect upon the closing of the sale.

Due to several factors, the sale of assets was finalized on September 13, 2012—almost two years after the approval of Mongeon J. At that time, the court-appointed Monitor[4] issued a Certificate pursuant to the *Approval and Vesting Order*, which confirmed that the purchase price had been paid and that all pre-closing conditions set out in the sales contract had been satisfied. However, although the conditions precedent had been met, an important commitment undertaken by the Purchaser to obtain the Union's acceptance of new working conditions remained unfulfilled: the setting up of a new pension plan.

Thus, the *Regroupement des employés retraités de la White Birch – Stadacona Inc.*[5] brought a motion before Mongeon J. to compel the Purchaser to communicate information pertaining to the setting up of the new pension plan. The request was granted from the bench on March 20, 2013, with the judge stating that "the way to ensure a better understanding of what is going on with the setting up and evolution of the matter of the new pension plan [...] lies in the disclosure of documents between parties".[6]

The Appeal

The Purchaser appealed from the decision on the ground that as a purchaser of White Birch Paper's assets, it is a third party and thus not subject to the *CCAA* and the jurisdiction of the court once the purchase price has been paid and the sale is closed. Since the Purchaser was not one of the debtors subject to the restructuring process, the supervising judge could not dictate to it how to operate its business or how to negotiate the agreements pertaining to the setting up of pension plans for either its new employees or the Stadacona paper mill retirees.

The Union supported the Purchaser in the appeal, arguing that once the Monitor's Certificate was issued, the sale was deemed finalized, and, as a result, the Stadacona paper mill was as of that moment excluded from White Birch Paper's patrimony. Thus, the *CCAA* court no longer had any authority to issue orders regarding the buyer's management of the company that was sold. Furthermore, the Union expressed the view that while its approval of the Letter of Understanding was conditional upon the Purchaser's fulfillment of certain commitments entered into by Stadacona S.E.C., it nonetheless did not constitute a condition precedent to the sale of assets approved by Mongeon J. Finally, argued the Union, should failure to honour these commitments occur, only it can seek legal redress by filing a grievance, which would fall within the jurisdiction of the labour arbitration regime.

Counsel for the White Birch Paper group expressed a similar opinion to the effect that upon the closing of the sale, the pension plans were no longer the concern of the *CCAA* court, which should therefore not intervene.

The QCA rejected all of the foregoing arguments and dismissed the appeal.

The QCA confirmed that, normally, when there is an Approval and Vesting Order signed by a judge and followed by a Monitor's Certificate stating that all closing conditions are met, the assets sold are thereafter excluded from the debtor's patrimony and no longer subject to the *CCAA* court's jurisdiction. However, according to the QCA, if the *CCAA* provides that a court can approve the sale of assets, it is only logical that it may also issue ancillary orders to ensure the implementation of, and compliance with, conditions precedent—especially those further to which creditors took a position on the sale, and which were at the heart of the judge's approval. A distinction must be drawn between judicial intervention targeting compliance with the conditions of a court-approved sale and an intervention targeting solely the operations of the purchaser. While the court's jurisdiction is clearly limited in the second case, it is not so in the first case, seeing as it is merely exercising the very jurisdiction that the *CCAA* contemplates:

> Here, in the process prior to the closing of the sale of assets, one of the debtors committed itself, and so did the Appellant [the Purchaser] in its capacity as the new acquirer, to the implementation of the conditions stipulated in the Letter of Understanding. The setting up of a new pension plan forms an integral part of this. The appellant cannot claim to escape the jurisdiction of the *CCAA* judge while this condition has still not been met. It is difficult to conceive, as Appellants would have it, that simply by reason of the Certificate [of the Monitor], the setting up of a new pension plan for the Stadacona paper mill does not fall under the jurisdiction of the *CCAA* judge who considered it as essential to his approval.[7]

Finally, the Union's argument relating to the exclusive jurisdiction of a labour arbitrator was deemed non-applicable in the context of a simple request for information.

Comments

Once again, the QCA affirmed that the *CCAA* establishes a restructuring regime that is flexible, and wherein the supervising judge possesses considerable discretionary powers, as stated by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*.[8] The QCA also took the opportunity to reassert the primary objective of the *CCAA*, which is to facilitate reorganization of debtor companies in order to avoid the socioeconomic costs associated with a straightforward liquidation of assets. In this regard, the judge overseeing the restructuring process should consider the impact thereof on all stakeholders, not solely the debtors:

> The objectives underlying the *CCAA* must not be analyzed solely in terms of the impact on the debtor(s) involved. Other interested parties, including the creditors, such as employees and retirees, remain at the heart of the concerns of the judge supervising the restructuring.
>
> […]
>
> The Court does not agree with the narrow view of the authority of the *CCAA* judge, which the Appellant's position seems to call for. In our opinion, it misrepresents the role of the judge during the approval process of a sale of assets. This process does not operate solely for the benefit of the debtors and the purchaser. Within the context of a restructuring process carried out under the aegis of the *CCAA*, the interests that the judge must take into account and protect go well beyond that of only the debtors and the purchaser.[9]

While the QCA seemed to suggest that the outcome could be different where the purchaser can demonstrate that it will suffer serious prejudice, Mongeon J.'s order did not cause serious prejudice to anyone. It was practical and will no doubt protect important interests—those of the debtors' retirees, who are directly affected by the restructuring process and the sale of the assets thereof.

In any event, in light of this jurisprudential development, it would be prudent to have commitments undertaken for the benefit of third parties confirmed by same as being fulfilled as of the date of closing of the sale. It would also be prudent to clearly indicate whether such commitments are key components of the proposed transaction, and limit or at least clarify the consequences that may arise from the failure to satisfy them rather than leave it up to the various stakeholders and, ultimately, the *CCAA* judge.

This decision is also interesting for emphasizing the importance and independence of the role assumed by the Monitor. Indeed, even though the Monitor did not officially take a position on the merits of the appeal, it stated that in its view, the satisfaction of the pension plan commitments for the Stadacona paper mill, as stipulated in the Letter of Understanding, was intimately connected to the sale of the assets authorized by the trial judge, and thus constituted an integral part of the conditions thereof. Furthermore, according to the Monitor, the Purchaser could not claim to be a "third party" to the restructuring process because it had been participating in the said process from the start. Thus, the Purchaser was necessarily subject to the *CCAA* court's jurisdiction for all matters arising from the sale of the assets. The QCA pointed out that such divergence of opinion between the Monitor and other key players of the restructuring process, including the debtors, was far from trivial. According to the QCA, it was a prime example of the independence of the Monitor in a restructuring process, thus reinforcing the credibility of the Monitor's statements.

Lastly, as the QCA recognized, this appeal provides a case in point that pension plan actuarial deficits and the major difficulties that they engender are often among the most complex and sensitive aspects of a restructuring process. The White Birch Paper matter is no exception.

[*Editor's note*: **Messrs. Gerry Apostolatos and Pascal Archambault** represent the interests of Normandin Beaudry, Consulting actuaries inc., provisional administrator of seven union and non-union pension plans in the matter of the plan of arrangement and compromise of White Birch Paper Holding Company *et al*. The actuarial deficit of the various pension plans is approximately $400 million.

Gerry Apostolatos is a senior litigation Partner at LKD in Montreal. His practice focuses on corporate/commercial, insolvency, and arbitration matters. He has served the profession as President of the Quebec Branch of the Canadian Bar Association ("CBA"), as National and Quebec Chair of the Bankruptcy and Insolvency Sections of the CBA, and as Chair of the Liaison Committee of the Montreal Bar with the Commercial Division of the Superior Court of Montreal.

Like Mr. Apostolatos, **Pascal Archambault** graduated from the Faculty of Law of McGill University with degrees in civil law and common law. He is an Associate in the litigation group at LKD.]

1 *White Birch*, [2013] J.Q. no 8749, 2013 QCCA 1302.
2 R.S.C. 1985, c. C-36.
3 In 2013, the Communications, Energy and Paperworkers Union of Canada merged with the Canadian Auto Workers ("CAW") to form a new union named Unifor.
4 The Monitor is an officer of the court appointed under the *CCAA* to monitor the business and financial affairs of the debtor company during the restructuring process. Only a trustee under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, may be appointed to act in that capacity. In this case, it was Ernst & Young Inc. (Mr. Martin Rosenthal, CPA, CA, CIRP, and Mr. Jean-Daniel Breton, CPA, CA, FCIRP).
5 This organization was created to defend the interests of unionized and non-unionized retirees of the Stadacona White Birch Paper plant.
6 *White Birch Paper Holding Company (Arrangement relatif à)*, [2013] J.Q. no 2910, 2013 QCCS 1322, para. 12 [authors' translation].
7 *White Birch*, *supra* note 1, para. 43 [authors' translation].
8 *Century Services Inc. v. Canada (Attorney General)*, [2010] S.C.J. No. 60, 2010 SCC 60.
9 *White Birch*, *supra* note 1, paras. 38 and 40 [authors' translation].

• SUSPENSION DENIED: ONCA CONFIRMS THAT AN AUTOMATIC STAY PENDING APPEAL OF A BANKRUPTCY ORDER DOES NOT SUSPEND THE LIMITATION PERIOD •

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The recent decision of the Ontario Court of Appeal in *msi Spergel Inc. v. I.F. Propco Holdings (Ontario) 36 Ltd.* [*msi Spergel*][1] is an important warning to trustees and creditors who have a potential preferential payment claim under s. 95 of the *Bankruptcy and Insolvency Act* [*BIA*].[2] In this case, the court confirmed that the automatic stay of a bankruptcy order pending appeal does not suspend the two-year limitation period for bringing a preference claim. If the automatic stay prevents the trustee from initiating the claim, the onus is on the trustee to apply to lift the stay—or risk having the future preference claim dismissed as statute barred.

Background

In July 2006, Propco obtained a default judgment against the bankrupt, Dilollo, for over $22 million. In December 2006, Propco commenced a bankruptcy application against Dilollo. By the end of 2007, Dilollo had paid approximately $1.1365 million to Propco, which