

CANADA / JUDGMENT

1057863 B.C. Ltd. (Re)

2021 BCSC 2499

COURT

Supreme Court of British Columbia

DECIDED

29 October 2021

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2021 BCSC 2499 1057863 B.C. Ltd. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1057863 B.C. Ltd. (Re),

2021 BCSC 2499

Date: 20211029

Docket: S206189

Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C- 36

and

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

and

In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Ruling Re Application

(Extension of Stay, Interim Financing, Litigation Expenses)

In Chambers

(Hearing proceeded via video conference)

Counsel for the Petitioners:

S. Collins

L. Williams

Counsel for Paper Excellence Canada Holdings Corporation:

P.J. Reardon

Counsel for the Interim Lender, Pacific Harbor North American Resources Ltd.:

P. Flaherty

B. Brammall

Counsel for the Province of Nova Scotia:

R.G. Grant, Q.C.

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Counsel for the Monitor, Ernst & Young Inc.:

E. Pillon

L. Nicholson

Counsel for Pictou Landing First Nation:

K. Meagher

Counsel for Unifor, Local 440:

R.A. Pink, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

October 29, 2021

Place and Date of Ruling:

Vancouver, B.C.

October 29, 2021

[1] THE COURT: These are proceedings under the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 [CCAA] commenced by petitioners, who I will collectively refer to as "Northern Pulp". I have been the supervising judge in these proceedings since June 2020, when I granted the Initial Order in this proceeding.

- [2] In August 2020, I granted the amended and restated initial order (the "ARIO"), which continued the relief in the Initial Order and also provided for further relief, including the approval of an interim financing facility not exceeding \$15 million. The ARIO provided for an extension of the stay until December 2020.
- [3] In September 2020, I granted an order approving a subordinated interim financing facility. In December 2020, I granted an order extending the stay to April 30, 2021. In April 2021, a further hearing was convened to consider a number of matters, including approval of an increase in the interim financing facility to \$21 million and an extension of the stay to October 31, 2021.
- [4] Northern Pulp now brings a number of applications: firstly, an order extending the stay to April 30, 2022; secondly, an order approving certain amendments to the interim financing facility; and thirdly, an order approving Northern Pulp's expenditure of up to \$450,000 in respect of certain litigation expenses.
- [5] As has been the case on previous applications, substantial materials are before me. Those recently filed materials include the Affidavit #10 of Bruce Chapman sworn October 18, 2021, providing an updated from the Northern Pulp's point of view. I have also received the Monitor's Eighth Report dated October 26, 2021, which follows from its filed but unaddressed (at least by this Court) Seventh Report dated September 22, 2021.
- [6] As can be seen from the attendance list, counsel for a substantial number of stakeholders appear before the Court on these applications. The stakeholders include: Paper Excellence Canada Holdings Corporation ("Paper Excellence"), one of Northern Pulp's shareholders; Pacific Harbour North American Resources Ltd., the Interim Lender, the Province of Nova Scotia ("Nova Scotia"), Unifor, Local 440 ("Unifor") and Pictou Landing First Nation (PLFN). Finally, I have heard from the Monitor's counsel on the issues.
- [7] All of the applications are supported by Paper Excellence, the Interim Lender and Unifor. PLFN takes no position on the applications. Nova Scotia takes no position with respect to the application for the stay extension and the amendment to the interim financing facility, although it expresses a number of concerns generally. Nova Scotia opposes the application to approve Northern Pulp's expenditure of up to \$450,000 in litigation expenses.

Stay Extension

- [8] Again, no opposition has been raised with respect to Northern Pulp's application to extend the stay until April 30, 2022.
- [9] One of the major reasons advanced for the extension arises from the status of the environmental assessment process that has been ongoing since the start of these proceedings. Mr. Chapman has provided substantial detail on that process in his recently filed Affidavit.

- [10] I do not propose to go through Mr. Chapman's evidence in detail in these reasons. Of particular note are the following events: in May 2021, the "Mill Vision" for the replacement effluent treatment facility (EFT) was produced indicating a new project description; in July 2021, while Northern Pulp had hoped that the new project would only need a Class 1 process, the Nova Scotia Ministry of Environment and Climate Change (the "Ministry") advised that it required a Class 2 process. I am advised that a Class 2 process is more rigorous process than that required under a Class 1 classification.
- [11] Mr. Chapman also outlines various other steps that been taken as part of the environmental process. A very high-level summary of those steps are as follows: the hiring of consultants; the issuing of a press release in terms of the Mill Vision; and finally, preparation of an environmental assessment registration document (EARD) for presentation to the Ministry. I understand that it is the EARD that formally commences the environmental assessment process that then requires the Ministry to consider whether the necessary approvals for the project will be granted.
- [12] Nova Scotia has expressed great concern and frustration with respect Northern Pulp and its activities, both prior to and during this proceeding: see, for example, 1057863 B.C. Ltd. (Re), 2020 BCSC 1359 (the "Reasons") at paras. 40-43. Nova Scotia's counsel continues to advance substantial concerns in that respect. A certain degree of criticism is levelled in hindsight in respect of Northern Pulp not forecasting or properly forecasting what became a change of direction or new approach toward the new Mill Vision that must now proceed to a Class 2 process rather than the hoped-for and more abbreviated Class 1 process.
- [13] Nova Scotia's counsel asserts that one of its frustrations arises from its conclusion that little, if anything, had been accomplished over the time that Northern Pulp has been in this proceeding, despite the expenditures of significant sums of money. I disagree with this assertion. I agree that there have been setbacks with respect to the environmental process, however, I conclude that Northern Pulp has made great strides in addressing other necessary matters, including hibernating the mill and dealing with the basin issue. All of that has taken some time and obviously taken some money. No stakeholder asserts that any of these steps were not reasonably and necessarily taken by Northern Pulp, particularly with respect to addressing environmental concerns.
- [14] As the Monitor's counsel notes in her submissions, Nova Scotia does not oppose the extension of the stay. For example, Nova Scotia does not seek to terminate these proceedings, including for the purpose of commencing a realization process under its security. At a very high level, at present, all parties appear to have the same objective to see the proceedings continue at this time.

- [15] Broadly speaking, I agree that there may be some reason for criticism as to how Northern Pulp has proceeded. However, I am not convinced that those are a basis upon which to end the Court's support of the continuation of these proceedings that will, in particular, allow Northern Pulp to pursue the environmental process. As I said, no stakeholder suggests that this proceeding should be terminated.
- [16] In coming to this conclusion, I have reviewed the Eighth Report of the Monitor. In that Report, the Monitor outlines in detail the activities of Northern Pulp since the Sixth Report dated April 20, 2021. At paras 26-27 of the Eighth Report, the Monitor states:
26. As expressed in the Petitioners' Application and the Province's Response, filing of the EARD is a critical next step which will commence the new EA process. The Monitor urges the parties to now focus on the commencement of this process going forward. The Monitor is not aware of any reason why the EARD will not be filed by November 30, 2021 and expects that significant costs related to the EA process will commence after receipt and review of the ToR [terms of reference]. Costs will also be incurred by NP as they and their consultants continue to engage with the Province and NSECC on the EA requirements and prepare for the receipt of the ToR.
27. The Monitor is of the opinion that the Petitioners have been working with due diligence and in good faith with respect to the current EA process and encourages the Petitioners, PEC, the Province, the Indigenous Communities, and any other relevant stakeholders to work together efficiently, collaboratively, and diligently to ensure that the timelines in the Revised Gantt Chart are met.
- [17] The Court encourages Northern Pulp and its stakeholders to continue to put their collective shoulder to the wheel as matters progress.
- [18] In addition, given the continued frustration and criticism of Nova Scotia, I would hope that Northern Pulp, with the assistance of the Monitor, will continue working efficiently or perhaps even more efficiently to keep the lines of communication open between them and Nova Scotia.
- [19] Accordingly, I am satisfied that the extension of the stay is appropriate for the purpose of allowing Northern Pulp to pursue the environment process. The Monitor confirms that Northern Pulp is proceeding in good faith and with due diligence. No stakeholder is suggesting that the stay should be terminated for the reason that these efforts serve no purpose. It remains the case that Northern Pulp has proposed a "kernel of a plan" and it continues its good faith efforts in that respect, sufficient to justify this proceeding continuing as being consistent with the objectives of the CCAA.
- [20] I grant the order to extend all of the relief in the ARIO, including the stay, to April 30, 2022.

Amendment of Interim Financing Facility

- [21] Northern Pulp seeks certain amendments to the interim financing facility. The Monitor's Eighth Report outlines the two major amendments at para. 50. There is also a further minor amendment as outlined in the attachment to the Affidavit #1 of Katerina Doumakis sworn October 27, 2021.
- [22] The two main amendments are:
- a) To extend the milestone to April 30, 2022, consistent with the stay extension being sought; and
 - b) to recognize the move from a Replacement ETF to an "advanced Replacement EFT" and the "transformation of the overall Mill operation to become an "Environmentally Best In Class Canadian operation substantially as described in the project description filed with the [Ministry] on May 14, 2021" with such amendments as may be consented to by each of the Lenders.
- [23] No stakeholder raises any objection to that relief. I agree that they are fairly nominal amendments.
- [24] Nova Scotia submits that it continues to have concerns about the milestones in the interim financing being met. In particular, Nova Scotia asserts that, given the current state of affairs, it appears more than likely that further amendments will be required.
- [25] As before, I would hope that these issues would be resolved through ongoing communications between Northern Pulp and Nova Scotia. Northern Pulp's counsel has certainly indicated that further discussions will need to take place and that it is premature to discuss what amendments will be needed in light of the uncertainty in the environmental approval process. I am satisfied the parties recognize what is required and that the Monitor will assist in ensuring that those matters are addressed on a timely basis, with proper communications to the stakeholders, including Nova Scotia. Needless to say, it is important that stakeholders are aware of events as they unfold within a reasonable time.
- [26] I grant the order to approve the amendment the interim financing facility as proposed.

Litigation Expenses

- [27] The third issue relates to Northern Pulp's application for approval for expenditures of up to \$450,000 for certain litigation costs.
- [28] The background relating to that issue is as follows.
- [29] At the outset of this proceeding, Northern Pulp identified that it had a variety of options in terms of pursuing litigation against Nova Scotia, dependant to some extent on how matters progressed in the proceeding. Those litigation options were described generally as: firstly, an appeal from certain Ministerial orders, secondly, a judicial review of a certain Ministerial order; and thirdly, litigation against Nova Scotia with respect to certain agreements arising

from the early termination of the old EFT that was required after Nova Scotia's enactment of the Boat Harbour Act, S.N.S. 2015, c. 4 [BH Act].

- [30] The first two potential options - the appeal and the judicial review - were withdrawn or discontinued by Northern Pulp throughout summer 2021. These steps were taken, as I understand it, as a good faith gesture to resolve concerns, if not preconditions, by both Nova Scotia and the PLFN.
- [31] Previously, in the Reasons, I addressed the issue of funding for the litigation as sought by Northern Pulp in September 2020:
- [49] Finally, Nova Scotia takes great umbrage in having an Interim Financing Charge placed ahead of its own charge when some of the funds under the Financing and Interim Budgets are to be used to some extent to advance litigation (or potential litigation) against it. Paragraph 10 of the Term Sheet provides that the purpose of the facility is in part to fund expenses associated with:

the evaluation, settlement or progression of claims and other legal remedies that may be available to the Borrowers and to pay transaction costs, fees and expenses [including all reasonable fees and expenses in connection with any other proceeding pursued or defended by the Borrowers relating to the Northern Pulp facility and business]

- [50] It is common ground that the "claims and other legal remedies" include the Judicial Review, the Appeal and the potential BH Claim against Nova Scotia. The estimated cost in the Interim Budget of professional fees toward those matters is approximately \$575,000. Nova Scotia questions whether the Interim Financing Facility is simply to improve the Petitioners' negotiating position with Nova Scotia.
- [51] The Petitioners state that they remain committed to pursuing the re-start of the Pulp Mill in an environmentally responsible manner by ultimately constructing the RETF and resuming operations. The Petitioners believe that a re-start of operations affords Nova Scotia the best opportunity to recover its secured claims for money advanced. Nova Scotia disagrees and appears to have considered the consequences of a complete and permanent shutdown of the Pulp Mill.
- [52] The Petitioners say that they have continued the litigation - and are still considering the BH Claim - against Nova Scotia only as a backstop if they are not able to resolve their outstanding claims against Nova Scotia through negotiation and settlement. As noted by the Petitioners' counsel, the rights of the Petitioners under the Judicial Review, the Appeal and the BH Claim are choses in action and part of the Petitioners' assets. In *Callidus* at para. 96, the Court recognized that funding to preserve a "litigation asset" may be appropriate if it is intended to preserve and realize upon that asset for the benefit of the stakeholders.

- [53] In my view, in the overall context, the limited amount of litigation funding proposed to be spent between now and December 2020 is justified in these circumstances. If the proceedings are extended beyond that date, and further funding for that purpose is requested, the Court may revisit the matter.
- [32] As a result of that application, I approved Northern Pulp's budget of \$1.2 million for the purpose of allowing potential funds to deal with that litigation. As matters have progressed, Northern Pulp has only spent approximately \$230,000 of those monies.
- [33] In any event, the potential for Northern Pulp to seek further funding for litigation (Reasons at para. 53) has now come to the fore, necessitating the revisiting of that issue. Northern Pulp now seeks permission to spend up to \$450,000 with respect to the potential litigation against Nova Scotia, arising from the early termination of the EFT as a result of the BH Act.
- [34] Nova Scotia continues to adamantly dispute that it bears any liability arising from the enactment of the BH Act and the ensuing consequences to Northern Pulp. Notwithstanding, Northern Pulp has made attempts to engage Nova Scotia in settlement discussions on that matter. Those efforts have been rebuffed.
- [35] The important circumstance that has arisen relating to Northern Pulp's potential claim and that has become more pressing is that the limitation period with respect to Northern Pulp's claim is looming. Unless Northern Pulp files a proceeding soon, the limitation period will expire and the claim will be barred or extinguished.
- [36] Northern Pulp has made attempts to engage Nova Scotia in discussions about the potential for a tolling or reservation of rights agreement, which would obviate the need for commencing litigation now. Those efforts have also been rebuffed.
- [37] Accordingly, Northern Pulp is in the position where it must, if it wishes to preserve its cause of action, file a claim. Northern Pulp has already taken a preliminary step in that regard. On October 14, 2021, Northern Pulp served Nova Scotia with a two-month notice of its intended action, as required by s. 18 of Nova Scotia's Proceedings Against the Crown Act, R.S., 1989, c. 360. The next step for Northern Pulp would be the filing of an action.
- [38] On October 26, 2021, Nova Scotia filed its Response to this aspect of Northern Pulp's application. Nova Scotia opposed that relief and asserts that it will be prejudiced if such relief is granted.
- [39] Nova Scotia asserts that Northern Pulp's pursuit of such an action must fall outside of the CCAA process. I agree that the proposed claim would not be filed in this proceeding and presumably would be filed in the Nova Scotia Supreme Court. Having said that, it remains within the jurisdiction of this Court to address the funding for that litigation if it is commenced, and also the activities of Northern Pulp within the course of that litigation to the extent that it is relevant to the CCAA proceedings. I also agree that the merits of that litigation will not be addressed within this proceeding, but certainly this Court does have jurisdiction to address that litigation in some respects.

- [40] It is abundantly clear that it is necessary that this action be commenced in order to preserve the value of this potential asset. Both parties have referred me to 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10 [Callidus]. In Callidus, the Court discussed litigation funding agreements. The major issue was whether a litigation funding agreement (or LFA) constituted a plan of arrangement that required a vote by the creditors. The parties agree that what is proposed here is not a LFA.
- [41] Nevertheless, the court's discussion in relation to debtors funding litigation in CCAA proceedings generally has some relevance here. In Callidus, the Court stated:
- [96] That said, insofar as third party litigation funding agreements are not per se illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see Royal Oak, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.
- [97] We conclude that third party litigation funding agreements may be approved as interim financing in CCAA proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the CCAA. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.
- .
- [102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the CCAA.
- ..

- [105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing Bayens, at para. 41; Hayes, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of CCAA proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing Houle). His consideration of those objectives is also apparent from his reliance on Crystallex, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.
- [42] As one counsel succinctly stated, this litigation is a chose in action. It is a potential asset. In CCAA proceedings, it is generally considered that the debtor, Northern Pulp in this case, will take reasonable steps to preserve its assets for the benefit of the stakeholders. This litigation or chose in action is no different than any other asset that the stakeholders would like preserved in the event that it is of value and can be realized for distribution to the stakeholders.
- [43] Funding for litigation is a different issue, and it remains to be considered whether funding to preserve this potential asset is appropriate. The jurisdictional basis is found in s. 11.2 of the CCAA and the relevant factors are set out in s. 11.2 (4):
- (4) In deciding whether to make an order, the court is to consider, among other things,
 - (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

- [44] I have considered all of those factors. In my view, all of those factors support the granting of the financing for the purpose of preserving this potential asset. In particular, I have considered s. 11.2(4)(f) as to whether any creditor will be materially prejudiced as a result of this financing. I conclude that this financing will result in some prejudice, however, I cannot conclude that there is any material prejudice to any creditor as a result, including to Nova Scotia.
- [45] I reach that conclusion for the same reasons as expressed in the Reasons, cited above, at paras. 49-52. In essence, it is the same issue now as it was then - although the stakeholders now have the benefit of Northern Pulp not spending the whole of the approximately \$1.2 million that I approved in the previous budget.
- [46] Nova Scotia also raises some concern regarding the quantum of the funding.
- [47] I am satisfied that Northern Pulp has provided a satisfactory explanation when their counsel advise that the \$450,000 figure is driven by a \$75,000/month estimate. This amount is simply an upper limit and it does not, of course, dictate what amount will actually be spent. In addition, I agree with Northern Pulp that approval of this total amount will provide some flexibility depending on what reaction Northern Pulp faces from Nova Scotia after the filing of the action. I agree that \$450,000 is a significant amount, but this approval does not necessarily mean that amount will be spent. The experience in relation to the previous budget is a clear example of that having happened.
- [48] My final comment in relation to the incurring of these litigation up to \$450,000 is that there will be substantial oversight by the Monitor. The Monitor has been tasked with keeping the overall budget in mind and reporting any untoward events to both the Court and the stakeholders. I expect this would include any events relating to the proposed litigation with Nova Scotia.
- [49] In summary, I am satisfied that a budget amount of up to \$450,000 for the litigation expenditures by Northern Pulp is appropriate. In addition, I conclude that the proposed financing for that litigation is also appropriate and is consistent with s. 11.2 of the CCAA and the CCAA objectives generally.

"Fitzpatrick J."

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