
CANADA / JUDGMENT

8640025 Canada Inc. (Re)

2017 BCCA 303

COURT

British Columbia Court of Appeal

DECIDED

17 August 2017

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2017 BCCA 303 8640025 Canada Inc. (Re)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

8640025 Canada Inc. (Re),

2017 BCCA 303

Date: 20170817

Dockets: CA44619; CA44620

Docket: CA44619

In the Matter of the Companies' Creditors Arrangement Act,

R.S.C. 1985, c. C-36, as Amended

In the Matter of the Canada Business Corporations Act,

R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Telephone Data Centers Inc.

Between:

8640025 Canada Inc. and Telephone Data Centers Inc.

Respondents

(Petitioners)

And

TNW Networks Corp.

Appellant

(Respondent)

And

Ernst & Young Inc., Court Appointed Monitor for the Petitioners

Respondent

Docket: CA44620

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Appellant

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And

Ernst & Young Inc., Court Appointed Monitor for the Petitioners

Respondent

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated July 18, 2017 (8640025 Canada Inc. and Telephone Data Centers Inc. (Re),

2017 BCSC 1291, Vancouver Docket No. S1610905).

Oral Reasons for Judgment

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Counsel for TELUS Communications:

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Counsel for Cascade Divide Enterprises:

D.F. Hepburn

Place and Date of Hearing:

Vancouver, British Columbia

August 14, 2017

Place and Date of Judgment:

Vancouver, British Columbia

August 17, 2017

Summary:

An order for sale of assets of a business made pursuant to s. 36 of the Companies' Creditors Arrangement Act ("CCAA") is challenged on the basis that some of the assets authorized to be sold were assets of entities not before the Court in the CCAA proceeding. Held: appeal allowed. The Court did not have the jurisdiction under the CCAA to authorize the sale of assets of entities that had not brought themselves within the CCAA proceeding.

[1] HUNTER J.A.: These appeals from an order made under the Companies' Creditors Arrangement Act ("CCAA") come to the Court with leave.

- [2] The order under appeal authorizes a sale of certain assets pursuant to s. 36 of the CCAA. The appellants argue that some of the assets to be sold under this authorization are owned by parties other than the companies that are subject to the CCAA proceeding. This, they say, goes beyond the jurisdiction of the CCAA court. If that is a correct characterization of the effect of the order under appeal, the issue is one of law and the standard of review is one of correctness.
- [3] The respondents' position is that the intent of the asset purchase agreement is to restrict the sale to the Petitioners' assets, but if some of the assets do in fact belong to other entities, the Monitor is nonetheless entitled to sell them with the Court's approval. The Monitor relies on orders of the CCAA court leading up to the sale approval and the broad discretion of a CCAA court under s. 11 of the CCAA.
- [4] Given the need for a decision on this appeal in a compressed timeline, I will not review all of the background to the order under appeal, but a brief review of the proceedings is necessary to provide context both for the order for sale and some of the arguments raised by the parties in this appeal.
- [5] These proceedings commenced on November 25, 2016, when 8640025 Canada Inc., which I will refer to as 864, and Telephone Data Centres Inc. filed a petition pursuant to the CCAA seeking the protection of that legislative regime in order to file a plan of compromise or arrangement. A third company, Telephone Canada Corp., was subsequently added as a Petitioner. I will refer to these three companies as the Petitioners.
- [6] The Petitioners are members of a group of telecommunication companies, referred to as the TNW Group of Companies. The appellants are also part of the TNW Group of Companies, although neither of the appellants is a petitioner in these proceedings.
- [7] The TNW Group sells telephone and long distance services to business and residential customers. They currently utilize the facilities of Telus Communications Company and Bell Canada, although Telus has served notice of its intention to disconnect the TNW Group for failure to meet their financial obligations to Telus.
- [8] On November 30, 2016, an amended and restated initial order was made by the Supreme Court of British Columbia pursuant to the CCAA. The order stated that the petitioners were companies to which the CCAA applies, thereby founding jurisdiction. The order went on to extend the stay of proceedings which had been issued a few days earlier and appointed a monitor to monitor the business and financial affairs of the Petitioners.
- [9] On December 21, 2016, a further order was made replacing the initial monitor with Ernst & Young, further extending the stay, and containing the following direction:

5. The Monitor is authorised and directed as part of the Petitioners restructuring to carry out a process for the solicitation of all offers to invest in the Petitioners or to purchase all or part of the Petitioners' assets, whether as a going concern or otherwise In determining the Solicitation Process and Solicitation Plan, the Monitor will review and evaluate the assets of the Petitioners, and the costs and values associated with the Business.
- [10] The distinction between the assets of the Petitioners and those associated with the Business has emerged as the most difficult challenge for the Monitor in this proceeding. The evidence was that all of the companies in the group operated seamlessly together as one business. The companies in the TNW Group use the same facilities and the degree of integration is so great that financial statements of most of the companies in the Group are prepared on a consolidated basis. It quickly became apparent that the integrated nature of the business of the TNW Group would create difficulties in separating out what assets belonged to the Petitioners and what assets used in the Petitioners' Business were owned by other parties not within the CCAA process.
- [11] To address this problem, in January of 2017, six of the secured creditors of the Petitioners applied to the CCAA judge for an order adding three parties, TNW Networks Corp. and Telephone Corp., (who are appellants in this appeal) and a subsidiary of Telephone Corp. called Telephone Canada Corp., as petitioners to the CCAA proceedings. TNW Networks Corp. was identified as a critical part of the operations of the TNW Group. Telephone Corp. and Telephone Canada Corp. were characterized as being involved in the Petitioners' business.
- [12] This application was dismissed by Mr. Justice Affleck with reasons indexed as 2017 BCSC 303. The reasons for judgment of Affleck J. are significant in light of the issue before this Court.
- [13] Mr. Justice Affleck began his analysis by reference to s. 3(1) of the CCAA in these terms:
- [24] Subsection 3(1) on its face makes the Act applicable to a company which is a debtor or affiliated debtor company. A debtor company is defined in s. 2 of the Act as a company that is bankrupt or insolvent, has committed an act of bankruptcy, or has made an assignment in bankruptcy or is in the course of being wound up because of insolvency.
- [25] The record before me does not demonstrate that the proposed petitioners are insolvent.
- [14] He described s. 3 as a gateway to applying the Act to an eligible company, and held that since the proposed petitioners were neither insolvent debtors nor affiliated insolvent debtors, the Act was not applicable to them.
- [15] He also observed that:

[52] If the prospective petitioners could be added, despite their opposition, the court would then become engaged in reorganizing their businesses, perhaps even selling them, and probably imposing the stay contemplated by s. 11.02(2) of the Act. I do not accept that Act is intended to be applied to a company that objects to coming under its constraints.

[Emphasis added.]

[16] No further attempt was made to bring Telephone Corp. into the CCAA proceedings. The appellant Telephone Corp. relies in part on this judgment, which was not appealed, for the proposition that the CCAA court does not have jurisdiction over it or its assets in the CCAA proceeding.

[17] Further efforts were made, however, to bring TNW Networks Corp. into the proceeding, primarily because it emerged that the customer contracts, which were a significant asset of the Petitioners' business, had been assigned to TNW Networks Corp. prior to the initial CCAA order.

[18] Following further applications and cross-applications, on March 21, 2017, the appellant TNW Networks Corp. provided the Monitor with an Undertaking and Acknowledgement that assigned to the Monitor "all of the assets of TNW Networks Corp. that are used in or necessary for the business of the petitioners, as determined by the Monitor, including without limitation, all customer agreements of the Petitioners and all material supplier contracts, insofar as they are held by TNWN."

[19] On April 6, 2017, Mr. Justice Bowden made a further order providing a detailed process by which the Monitor was authorized to determine which assets of TNW Networks Corp. were derived from the property of the Petitioners and which were not. The Monitor was also given powers to market the property of the Petitioners, including any property of TNW Networks Corp. derived from the property of the Petitioners.

[20] The text of this order is of some consequence to the issues in this appeal. Paragraph 6 is relied on by the Monitor as providing authority for the asset purchase agreement that was ultimately negotiated, and was also referenced by the chambers judge who approved the agreement. Paragraph 6 reads as follows:

Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the Applicants' security (the "Networks Property"), and report the same to the Court. Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty, until determined as set out herein, none of the Property shall be Networks Property. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis.

[21] Networks is defined in the order as TNW Networks Corp.

[22] The other part of the April 6 order of relevance to this appeal is para. 7(l) which reads in relevant part as follows:

The Monitor is hereby empowered and authorized, but not obligated, to act at once in respect of all of the assets and undertakings of the Companies (the "Property") and, without in any way limiting the generality of the foregoing, the Monitor is hereby empowered and authorized to sell, convey, transfer, lease or assign the Property (other than the Networks property) or any part or parts thereof with the approval of this Court

[23] Companies is defined collectively in the order as TNW Networks Corp. and the Petitioners.

[24] The effect of these provisions is to provide the Monitor with the authority to sell, subject to the approval of the court, all of the assets of the Petitioners, together with those assets of TNW Networks Corp. that are not excluded by the process established in para. 6. Nothing in the April 6 order authorizes the Monitor to sell any other assets.

[25] In the end, no plan of arrangement was presented to the creditors for approval. Having resolved the problem of the integration of operations between the Petitioners and TNW Networks Corp. through the Undertaking and the April 6 order, the Monitor focussed his efforts on a sale of the Petitioners' assets as a going concern.

[26] The problem of separating out the assets of the Petitioners from other assets of the other companies in the TNW Group remained. On June 7, 2017, if not before, the Monitor became aware that several of these companies were asserting ownership in some of the assets used in the Business of the Petitioners.

[27] In his 7th Report to the Court, issued June 27, 2017, the Monitor outlined the steps he had taken to determine the scope of the Petitioner's assets:

111. As indicated in the response of the Monitor's legal counsel to the May 27 Letter, the Monitor, on numerous occasions and over several months, requested of Mr. Laliberte a list of property, including assets, customer agreements, property, plant and equipment or otherwise which were being used in the Business; but were not property of the Petitioners or TWN Networks.
112. On June 7, 2017, Mr. Laliberte presented the Monitor with a report (the "Asset Report") which purported to outline Telephone Corp. and subsidiaries' interest in various property in the possession of the Petitioners and TNW Networks.
113. The Asset Report provided by Mr. Laliberte provides an overview of a series of acquisitions made by Telephone Corp., the Petitioners and other related parties that sought to segregate the ownership of assets and customer relationships between the various legal entities that were party to those transactions.

115. Notably, the Asset Report asserts that various property in the possession of the Petitioners and TNW Networks are owned by legal entities other than the Petitioners (the "Outside Property"), including:

- a) 101234472 Saskatchewan Ltd.;
- b) Investel Capital Corporation (the parent company of the Petitioners);
- c) Telephone Corp. (a related company); and
- d) 8583498 Canada Ltd. (a related company);

[28] The Monitor expressed some skepticism as to the accuracy of this report, but pointed out the difficulty in determining ownership of the assets used in the Petitioners' Business:

119. The Monitor is of the view that the assets of the Business are highly integrated in nature and there is no meaningful way to segregate the assets and customer relationships of the Business to various legal entities without a major examination, which would be extremely costly and would likely conclude that all of the assets, at minimum, are subject to the security interests of the Secured Creditors.

120. The complex organizational structure of the Petitioners and the use of different entities makes it extremely difficult to trace the ownership of assets.

[29] The Monitor went on to note that the secured creditors had advised that they held security over the entities identified as the owners of the Outside Property.

[30] The Monitor reported on the progress of the Solicitation Plan as follows:

129. The Monitor received seven (7) LOIs [Letters of Intent] from Prospective Offerors (collectively, the "Offerors") seeking to purchase the assets of the Business. No LOIs were received from parties interested in making an investment in the Business or in the Petitioners.

[Emphasis added.]

[31] On June 28, 2017, an affidavit was filed by Lawry Trevor-Deutsch, the former President of Telephone Corp. providing details of the assets used in the Petitioners' Business that he asserted belonged to Telephone Corp. and its subsidiaries, and also details of additional assets that were said to belong to other companies, primarily affiliates of the Petitioners. Copies of source documents substantiating the ownership of these assets were provided as exhibits to this affidavit.

[32] At this point, time was becoming very tight. The stay of proceedings that was protecting the Petitioners was set to expire July 14, 2017. The question of what assets were available for a going concern sale was unresolved.

- [33] On July 7, 2017, the Monitor issued his 8th Report to the Court in which he advised the Court of an Asset Purchase Agreement or APA that had been negotiated, subject to the Court's approval, with an affiliate of the Distributel Group of Companies. Once again the subject matter of the sale was referred to as the assets of the Business. The Monitor specifically referred to the ownership dispute in these terms:
29. The purchase price (the "Distributel Purchase Price") payable by Distributel for all of the assets of the Business, wherever located, including accounts receivable and other current assets, property plant and equipment, other network assets and all customer agreements and relationships (the "Purchased Assets") include assets that the Shareholder Representatives assert are assets of other entities,
- [34] He also commented briefly on the assertion of ownership of assets by Telephone Corp. in the Trevor-Deutsch affidavit in these terms:
39. (f) The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Telephone Corp. and has prepared a schedule attached as Appendix "H" to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.
- [35] The Monitor maintained this position before the chambers judge and in his submissions before us. The effect of this position is to assert that even if the assets that are part of the Purchased Assets were not assets of the Petitioners, they may be transferred if they were assets of one of the petitioners' subsidiaries or if the assets are subject to the Secured Creditors security, Secured Creditors being the secured creditors of the Petitioners.
- [36] An application was then made to approve the Distributel APA, returnable July 13, 2017. The appellants opposed approval of the sale on the ground that the assets that were subject to the sale included assets belonging to Telephone Corp. or other companies not part of the CCAA process, and accordingly the CCAA court did not have jurisdiction to approve the terms of the sale in the Distributel APA. A second ground was advanced relating to the process followed by the Monitor.
- [37] The status of the proceedings at the time of the July 13 application was described by the chambers judge in these terms:
- [7] At this stage, the decision reduces itself to the approval of this one sale, or an alternative outcome, which is difficult to know or define. There is no evidentiary base from which to conclude that the Respondents are in a position to carry on. They are about to run out of money and have no credit. Their business relationships with those they must deal with to carry on business, Telus being a prime example, are damaged beyond repair. The Distributel deal, on the other hand, can likely save the employment of dozens of employees, and allow a business to carry on. I do not see a viable alternative to the requested orders.

[38] I agree with the practical wisdom of these comments, and if what was being sold was the assets of the Petitioners I would agree with the disposition approved by the chambers judge. The impediment to this disposition, however, is the dispute over the ownership of the assets that the Monitor had been unable to resolve.

[39] The chambers judge addressed this jurisdictional question in these terms:

[19] The Respondents also argue that the Monitor lacked the authority to sell the assets which are the subject of the Distributel agreement. However, para. 6, in one of this Court's orders made on April 26, 2017, contains a presumption against the assets being the property of an entity whose assets the Monitor could not sell. Moreover, the Monitor further addressed the asset question in its seventh report, dated June 27, 2017, at paragraphs 110-123. I quote here paragraphs 122 and 123:

Based on the foregoing, the Monitor is of the view that it has appropriately and in a cost effective manner carried out the responsibilities pursuant to Paragraph 6 of the Enhanced Monitor Powers Order that directed the Monitor to review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any, was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the security interests of the Secured Creditors.

If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking.

[20] In my view, the further work offered by the Monitor in paragraph 123, quoted above, would be wasteful of time and money, and the Court does not require it. The ownership and transfer of assets among the group of companies owned and controlled by the Respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I also note Appendix A to the Monitor's eighth report, dated July 7, 2017, which contains an acknowledgment and undertaking on behalf of the Respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor.

[40] After commenting on the second ground advanced by the appellants, the chambers judge approved the sale in the terms sought.

[41] In considering the issues before this Court, I note that the chambers judge who heard the application for approval of the APA was the third judge to hear and determine applications in this CCAA proceeding. It is unclear how much of the voluminous material presented to us was presented and explained to the chambers judge hearing the application for approval of the sale. I recognize that trial scheduling for an ongoing matter such as this can be very

complicated, but if possible, given the complexity of proceedings such as this it would be desirable to have a single judge supervise the proceedings throughout.

- [42] On this appeal, the appellants renew their jurisdictional argument that the CCAA court did not have the authority to approve this APA because some of the assets included in the sale belonged to parties not within the CCAA proceedings. The threshold question on this appeal is whether the APA does in fact purport to sell assets belonging to Telephone Corp. or the other parties not before the Court. In these reasons I will refer to these assets as third party assets.
- [43] The July 18 order on its face does not purport to sell third party assets, but the APA approved by the order does contain asset schedules including both physical assets and intellectual property which the appellants say demonstrably include third party assets. The order approving the sale also includes a provision whereby the "ownership and other adverse claims" of Telephone Corp. in addition to seven other entities not before the Court are "expunged and discharged".
- [44] Because of the basis by which the Monitor sought to support his authority to sell the assets listed in the APA, we do not have the benefit of a finding of fact by the chambers judge on the question of whether the assets to be conveyed in the APA include third party assets. It will be recalled that the Monitor based his authority on the April 6 order and the proposition previously noted that if the assets were assets of the Petitioners' subsidiaries or were subject to the security of the Petitioners' Secured Creditors, that was sufficient to found authority to include them in the sale.
- [45] In my view it is necessary to determine this factual point in order to assess whether the jurisdictional issue argued by the appellants arises in this case.
- [46] The appellants have identified specific items in the schedules to the Distributel APA that they say belong to Telephone Corp., its subsidiaries or other entities. They have provided source documentation substantiating their claims to ownership. The Monitor was unable to determine whether the claims are valid due to the complexity of the interrelated business operations of the TNW Group. As a consequence, at the time he appeared before the chambers judge, the Monitor was unable to confirm that all of the scheduled assets belonged to the Petitioners. On a review of the record before the CCAA court, the preponderance of evidence is that third party assets are included in the asset schedules attached to the APA.
- [47] The fact that the Monitor referred in both his 7th and 8th Reports to the sale of assets of the Business lends support to the conclusion that the Monitor was of the view that he had been authorized to sell the assets of the Business of the Petitioners, whether or not those assets included third party assets, as long as the third party assets were either assets of the Petitioners' subsidiaries or assets over which the Petitioners' Secured Creditors held security.

[48] I then approach this appeal on the footing that the APA does include third party assets. The question is whether the CCAA court had the jurisdiction to sell third party assets as part of the assets of the Business of the Petitioners.

[49] The Monitor has advanced three arguments said to support his authority to sell third party assets as part of the sale of the assets of the Petitioners. The first is that the April 6 order conferred that authority. The Monitor expressed this argument in the following way in his factum:

Paragraph 6 of the Expanded Monitor Powers Order [i.e. the April 6 order] provides the Monitor with authority to sell assets of persons that are not necessarily the assets of the Companies but where such assets are subject to the interests of the Secured Creditors.

[50] The chambers judge interpreted the April 6 order in a similar manner, holding that it contained "a presumption against the assets being the property of an entity whose assets the Monitor could not sell."

[51] In my opinion, the April 6 order does not confer this authority. The April 6 order sets up a mechanism for separating the assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were in the former category. Paragraph 6 relates solely to the assets of TNW Networks Corp., not to the assets of Telephone Corp. or any other entity.

[52] These provisions of the April 6 order were based on the irrevocable assignment by TNW Networks Corp. of its assets to the Monitor through the Undertaking and Acknowledgement of March 21, 2017. That Undertaking and Acknowledgement also related solely to the assets of TNW Networks Corp.

[53] The second argument made by the Monitor before the chambers judge and this Court is the proposition set out in his 8th Report in these terms:

The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Telephone Corp. and has prepared a schedule attached as Appendix "H" to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.

[54] With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the CCAA process unless the subsidiaries have been brought within that process as debtor companies, which they have not.

[55] The fact that the assets of Telephone Corp. and the other entities may be subject to security held by the secured creditors of the Petitioners cannot provide a basis for authorizing their sale in this transaction. The secured creditors have not taken steps to realize on that security

and they cannot do so in this proceeding to which Telephone and the other entities are not parties. As Affleck J. held in his January 30 reasons for judgment, Telephone Corp. is not part of the CCAA proceedings and there is no basis on which its assets could be sold in that process.

- [56] The final argument raised by the Monitor before the chambers judge and briefly addressed before us is that the while the ownership claims of Telephone Corp. and the other entities were being "expunged and discharged" by the order under appeal, the expungement related to claims to the assets themselves, whereas the order deferred the question of distribution of the proceeds to another day. The suggestion was that Telephone Corp. and the other entities in question could still advance a claim against the purchase funds. The July 18 order is based on the B.C. Model Approval and Vesting Order under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-83, and the Monitor pointed out that Explanatory Note 6 from the B.C. Model Insolvency Order Committee states that claims being vested out may in some cases include ownership claims.
- [57] This submission was not fully argued before us and it would not be appropriate for this Court to embark upon a detailed assessment of whether this Model Order has the meaning suggested in relation to ownership claims or whether such a process is appropriate for a sale under s. 36 of the CCAA. I note that even if there was authority to convert third party assets into cash, the claims preserved for further assessment appear to be limited to security interests or other financial or monetary claims, not claims of outright ownership. In any event, it is sufficient for purposes of this appeal to observe that to give effect to this argument would not only be inconsistent with the previous order of Affleck J. refusing to include Telephone Corp. in these proceedings, but would also require a source of jurisdiction under the CCAA that has not been established in this appeal.
- [58] In my opinion, the documented evidence of Telephone Corp. that some of the assets scheduled to the APA belonged to it or other entities not before the Court, in combination with the inability of the Monitor to confirm that the assets were all the property of the Petitioners, precluded the ability of the Court to approve the asset purchase agreement presented for approval. The CCAA Court had no jurisdiction to authorize the sale of assets other than the assets of the Petitioners and TNW Networks Corp.
- [59] In light of my conclusions concerning the assets that are included in the APA, it is not necessary to consider the appellants' further argument concerning the process of this CCAA proceeding.
- [60] For these reasons, I would allow the appeals and set aside the order approving the Distributel APA. I would extend the stay of proceedings to August 28, 2017 in order to give interested parties an opportunity to consider the implications of this judgment. Further proceedings in this matter are remitted back to the Supreme Court of British Columbia.
- [61] GOEPEL J.A.: I agree.

[62] FITCH J.A.: I agree.

[submissions by counsel re. costs]

[63] GOEPEL J.A.: If the appellants wish to pursue the question of costs, they are at liberty to file written submissions concerning that because, it seems to me, that it raises a somewhat potentially important practice point which we are not going to attempt to deal with summarily. If, as I say, the appellants wish to seek costs, they have liberty to file written submissions. Those submissions should be filed within the next 15 days. The Monitor will have a week to respond to those submissions. If the appellants, upon reflection, decide not to pursue the issue of costs, then there will be no costs of the appeal.

"The Honourable Mr. Justice Hunter"

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