

CANADA / JUDGMENT

New Skeena Forest Products Inc. (Re)

2005 BCCA 2

COURT

British Columbia Court of Appeal

DECIDED

5 January 2005

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2005 BCCA 2 New Skeena Forest Products Inc. (Re) COURT OF APPEAL FOR BRITISH COLUMBIA
Citation: New Skeena Forest Products Inc. (Re), 2005 BCCA 2 Date: 20050105 Docket: CA032484 In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 and In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended and In the Matter of the Company Act, R.S.B.C. 1996, c. 62, as amended and In the Matter of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corp. Respondents (Petitioners) And Kitwanga Lumber Co. Ltd. Respondent (Respondent) Before: The Honourable Mr. Justice Low (In Chambers) R.J.M. Janes Counsel for the Appellant City of Prince Rupert P.J. Reardon Counsel for the Respondent 646325 B.C. Ltd. D.J. Hatter Counsel for the Respondent H.M.T.Q. for B.C. D. Knowles, Q.C. Counsel for the Respondent 9753 Acquisition Corp. R. Leong Counsel for the Respondent Attorney General of Canada G.H. Dabbs Counsel for the Respondent City of Terrace R.A. Millar Counsel for the Respondent Court Appointed Receiver Ernst & Young Inc. Place and Date of Hearing: Vancouver, British Columbia 17 December 2004 Place and Date of Judgment: Vancouver, British Columbia 5 January 2005 Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] As a secured creditor of New Skeena Forest Products Ltd., the City of Prince Rupert seeks leave to appeal a provision included in an order made by Chief Justice Brenner on 1 December 2004 as part of continuing proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "Act"). Prince Rupert contends that the effect of the challenged provision is that Prince Rupert runs a considerable risk of having to pay significantly more than its equitable share of Debtor in Possession ("DIP") financing and administrative costs (collectively, the "CCAA Costs") under what is now known to be a failed attempt at corporate reorganization of the Skeena pulp mill in Prince Rupert and its sawmill in Terrace begun under the Act by an order made on 19 November 2003 (the "Initial Order"). As a result of this failure, the company is now in a full-blown process of bankruptcy liquidation of its assets, a process that requires the ongoing supervision of the court of which the order of 1 December 2004 is just one part.
- [2] The Province of British Columbia supports Prince Rupert's leave application. The Receiver, Ernst and Young Inc., and several interested parties oppose the application.

- [3] The cases set out the matters to be considered on an application for leave to appeal an interlocutory order. They are:
- (1) whether the point on appeal is of significance to the practice;
 - (2) whether the point raised is of significance to the action itself;
 - (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
 - (4) whether the appeal will unduly hinder the progress of the action. See *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.); *Chavez v. Sundance Cruises Corp.* (1993), 77 B.C.L.R. (2d) 328 (C.A.); and *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326.
- [4] It is important to note that the challenged provision is discretionary and that the applicant has a high hurdle to scale. This was clearly stated by Saunders J.A. in *Yang v. Yang*, 2000 BCCA 486 in the following terms:
- [3] Where, as here, the matter appealed is a matter of the exercise of judicial discretion the burden on the applicant is substantial. The reason is simple, this Court does not lightly interfere with the exercise of discretion of a chambers judge and will only do so when satisfied that the discretion was not exercised judicially or was exercised on a wrong principle.
- [5] The Initial Order contains a provision giving priority to DIP financing over the security of all other creditors. The Receiver later filed a report with the court proposing, among many other things, court approval of certain allocations of the CCAA Costs among the creditors. The chambers judge adopted the report in the order of 1 December 2004.
- [6] The challenged provision in the order reads as follows: THIS COURT ORDERS AND DECLARES THAT:
6. the Receiver's proposal:
- (a) to allocate the CCAA Costs (as defined in the Report) on a preliminary basis against only those assets consisting of equipment and real property which are identified in the illustrative chart attached to Appendix F to the Report (the "Assets") pro rata based upon the appraised or assessed value of the Assets at January, 2004, provided that such preliminary allocation will be subsequently adjusted based upon:
 - (i) the actual sale proceeds realized on the future disposition of the remaining assets of the Petitioners which do not have values attributed to them in Appendix F as aforesaid; or (ii) such other value as may be subsequently attributed to such remaining assets by the Court... is hereby approved...

- [7] Prince Rupert contends that the asset over which it holds statutory security for unpaid property taxes of more than \$25M (the pulp mill) has been given an unrealistic appraised value of \$3.92M in Appendix F to the Receiver's Report referenced in the order. Since the appraisal was done, it has come to light that the property requires environmental cleanup that Prince Rupert says will cost about \$103M. On the other hand, the Receiver points out that the Province has already expended substantial sums on the cleanup and the final cost has not yet been determined.
- [8] Prince Rupert does not argue that it ought not to pay any of the CCAA Costs as it stood to benefit from the incurrence of those costs if the reorganization attempt had been successful. But it says that assessment of its share of those costs based upon a value ascribed to real property that has no value at all is unfair. It says that this arises because the proceeds received from the auction of unappraised assets (such as tree farm licences) will determine the pro rata share of the CCAA Costs for some creditors while Prince Rupert's share will be determined by an invalid appraisal. It says that the effect of the order might be that secured creditors other than Prince Rupert will walk away with money while it will have to write a cheque. Prince Rupert claims that it might have to pay \$1M to \$1.3M of the CCAA Costs now totalling about \$4.7M.
- [9] The legal issue Prince Rupert wishes to argue on appeal is whether the court has jurisdiction under the Act to order a secured creditor to pay CCAA Costs in excess of the actual value of the creditor's interest in the estate of the debtor. It says that there is no appellate guidance as to how CCAA Costs, especially DIP financing, should be allocated. The precedence of the challenged provision is said to be that it would have a profound effect on creditors and it is arguable that the approach of the court should be more cautious than the approach taken by the chambers judge. Prince Rupert says that therefore the point it wishes to argue on appeal is of importance both to the insolvency bar and in these proceedings.
- [10] Prince Rupert also contends that the appeal will not delay the ongoing proceedings in the trial court. It says the focus now is on liquidation and there is no reason that process cannot continue apace pending determination of the appeal, especially if the appeal is expedited.
- [11] The Receiver emphasizes both the discretionary nature of the challenged provision and the fact that it is forward-looking. The Receiver also says that Prince Rupert overstates the impact on it of the challenged provision and that what Prince Rupert fears will not come about without further order. In its written submission, the Receiver says this: "The allocation proposal itself is interim in nature and is susceptible to re-allocation or alteration depending on how the assets are in fact liquidated. As such the proposed appeal is anticipatory of a set of facts that are not certain to take place."
- [12] The recommendations in the Receiver's Report relied upon by the chambers judge were carefully considered. It was imperative that the Receiver recommend a plan for liquidation and the sharing of costs. Much had to be considered by the Receiver and by the Chief Justice. Prince Rupert has not identified any basis for this court to conclude that the

chambers judge did not exercise his discretion judicially or that he acted upon a wrong principle. The challenged provision is but one aspect of lengthy and complex proceedings presided over by the Chief Justice who is most familiar with all aspects of the case and is in the best position to balance competing interests.

- [13] In addition, I am persuaded that the challenged provision is forward-looking and that adjustment based upon future events is contemplated. Borrowing from the wording of the Receiver's report, the provision states that the CCAA Costs are allocated "on a preliminary basis" and later adjustment is anticipated. Whether the result predicted by Prince Rupert will come about and whether such a result would be unfair to it will clearly depend upon future events and future orders of the court. It is not necessary to appeal the present order to address the concerns advanced.
- [14] In my opinion, granting of leave would risk interference with the orderly liquidation of assets to the detriment of the creditors generally and would not settle a point of interest to the practice or be of significance in the proceedings.
- [15] Leave to appeal is denied. "The Honourable Mr. Justice Low"

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