

CANADA / JUDGMENT

Plus Products Inc. (Re)

2022 BCSC 206

COURT

Supreme Court of British Columbia

DECIDED

21 January 2022

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2022 BCSC 206 Plus Products Inc. (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Plus Products Inc. (Re), 2022 BCSC 206 Date: 20220121 Docket: S218089 Registry: Vancouver In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and In the Matter of Plus Products Inc. Before: The Honourable Madam Justice Watchuk Oral Reasons for Judgment In Chambers Counsel for the Petitioner Plus Products Inc. appearing by videoconference: K.M. Jackson G.P. Nesbitt Counsel for the Monitor PriceWaterhouseCoopers Inc. appearing by videoconference: P.L. Rubin Place and Date of Trial/Hearing: Vancouver, B.C. January 21, 2022 Place and Date of Judgment: Vancouver, B.C. January 21, 2022

- [1] THE COURT: The orders sought by the petitioner are granted in the form provided by the petitioner, and as amended by me with regard to paragraph 44 which is the aid and recognition provision. These are the brief oral reasons.
- [2] In this sanction hearing, the Petitioner relies on:
- (a) the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 [CCAA];
 - (b) the Supreme Court Civil Rules;
 - (c) the inherent and equitable jurisdiction of this Honourable Court; and
 - (d) such further and other legal basis as counsel may advise and this Honourable Court may allow.
- [3] As set out by the petitioner, this court first has jurisdiction to sanction the Plan of Compromise, Arrangement and Reorganization dated December 17, 2021 and amended January 18, 2022. The majority representing two-thirds in value of creditors present and voting at the meeting of creditors on January 13, 2022 has approved the Plan, indeed approved it unanimously (Section 6(1) of the CCAA).
- [4] The court also has discretion. With regard to the exercise of discretion to sanction the Plan, the court must be satisfied that:
- (a) the petitioner has strictly complied with all statutory requirements;

- (b) based on an examination of the material filed and the procedures carried out in these CCAA Proceedings, the petitioner has not done or purported to have done something which is not authorized by the CCAA; and
 - (c) the plan is fair and reasonable. (Bul River Mineral Corporation (Re), 2015 BCSC 113 at para. 40, citing Canwest Global Communications Corp., Re, 2010 ONSC 4209, para. 14.)
- [5] The requirements set out at (a) and (b) above are not in issue. There is strict statutory compliance and there has been nothing done or purported to have been done by the petitioner not authorized by the CCAA.
- [6] I am also satisfied with the third requirement at subparagraph (c) which is often, and certainly in this case, the most important condition. The Plan is fair and reasonable (Canwest at para. 20).
- [7] In this regard, I rely on the written submissions of the petitioner, the report of the monitor and the oral submissions of counsel for the petitioner and monitor. I would adopt these paragraphs from 9 to 23 of the petitioner's application: (ii) The Plan is fair and reasonable
9. In assessing the Plan, this Court should measure the fairness and reasonableness thereof against the available commercial alternatives, weight the equities, and balance the relative degrees of prejudice that flow from granting or refusing the relief sought. This Court's discretion should be informed by the objectives of the CCAA; namely; (a) to facilitate the reorganization of a debtor company for the benefit of its stakeholders; and (b) to avoid the social and economic losses resulting from liquidation of an insolvent company.
10. Factors that may be considered by this Court in evaluating whether the Plan is fair and reasonable include: (a) whether the Noteholder Claimant Claims were properly classified and whether the Required Majority approved the Plan; (b) what the Petitioner's stakeholders would receive in a bankruptcy or liquidation scenario as compared with under the Plan; (c) available alternatives to the Plan and bankruptcy; (d) oppression of the rights of creditors; (e) unfairness to shareholders; and (f) the public interest.
11. The Plan is fair and reasonable in the circumstances including for the following reasons:
- (a) the Meeting Order approved the classification of the Noteholder Claimants, and no creditor objected to such classification;
 - (b) the Plan was unanimously approved by the Voting Noteholder Claimants;
 - (c) there are no viable alternatives to the Plan Transactions and the Acquisition Transactions;
 - (d) the Monitor is of the view that the Plan provides far better recovery to the Noteholder Claimants and the Existing Securities-holders than in a liquidation or bankruptcy scenario. In such scenario, the Noteholder Claimants would receive far less than full recovery, and the Existing Securities-holders, no recovery;

- (e) under the Plan, the Noteholder Claimants are receiving Purchaser Notes (or Purchaser Notes and Alternate Purchaser Notes) having a value equivalent to the amount owed to the Noteholder Claimants as at the Filing Date;
 - (f) the Noteholder Claimants' rights are not oppressed. The Plan does not prohibit the Noteholder Claimants from pursuing actions against third parties, or against the Directors and Officers in respect of claims under Section 5.1(2) of the CCAA;
 - (g) the distribution of the Purchaser RSUs to the Plus Products Management and Plus Products Employees is reasonable. Such distributions ensure the engagement of these Persons through completion of the Plan and Acquisition Transactions and is for all intents and purposes a form of key employee retention plan; and
 - (h) the completion of the Plan Transactions will allow the Petitioner's core business to continue under the ownership of the Purchaser, thus preserving Plus' brands and the positions of employees of the Plus Group, all for the benefit of the Petitioner's stakeholders. Accordingly, it is in the public interest that the Plan be approved.
12. Remaining CPs: It is reasonable for the U.S. Recognition Condition to continue post-sanction because such is likely to be waived by the Purchaser if not satisfied within 45 days of the grant of the Sanction Order in accordance with the Acquisition Agreement.
 13. The Monitor has concluded that the Plan is fair and reasonable and at the time of the Meeting Order recommended that the Plan be approved by the Noteholder Claimants.
 14. Pursuant to Section 11 of the CCAA, this Court has the jurisdiction to make all other such orders necessary to implement the Plan, including in respect of the Plan Transactions. (iii) The Releases should be granted
 15. The Plan provides for the full and final release of the Released Parties (including the Purchaser and its counsel) from any and all of the Released Matters after the Effective Time on the Effective Date. However, the releases under the Plan do not release or discharge; (a) the Petitioner from any Unaffected Claim or its obligations under the Plan or any Order; or (b) any Released Party from conduct that is determined to be fraudulent, wilful misconduct or grossly negligent, or, in the case of Directors, in respect of any claim referred to in subsection 5.1(2) of the CCAA.
 16. The CCAA does not expressly provide for the granting of third party releases. However, it is well established that CCAA courts have the jurisdiction to sanction plans containing third party releases, and that in considering whether to approve such releases, a court may consider the following factors, including whether:
 - (a) the parties to be released from claims are necessary and essential to the restructuring of the debtor;

- (b) the claims to be released are rationally connected to the purpose of the plan and necessary for it;
 - (c) the plan could not succeed without the releases;
 - (d) the parties being released contributed to the plan;
 - (e) the releases benefit the debtor as well as the creditors generally;
 - (f) the creditors voting on the plan have knowledge of the nature and effect of the releases; and
 - (g) whether the releases are fair and reasonable and not overly broad.
17. Each of the above factors militates in favour of approval of the releases sought by the Petitioner under the Plan. In particular:
- (a) The proposed releases are narrow, rationally connected to the purposes of the Plan, and were set forth under the Plan with full notice and disclosure to the Noteholder Claimants prior to the Noteholder Claimant Vote.
 - (b) The Released Parties have each made tangible contributions to these CCAA proceedings, including the Purchaser by funding distributions under the Plan, and its counsel by providing critical and timely advice in to the Purchaser in respect of the Acquisition Agreement, the Plan, and these proceedings.
 - (c) The releases are integral and essential to the Plan Transactions and the Acquisition Transactions, each of which benefit the Petitioner's stakeholders generally as set out in the Fifth Report, and as demonstrated by the unanimous approval of the Plan by the Voting Noteholder Claimants.
18. The proposed releases are fair and reasonable and should be approved. (B) INCREASING THE INTERCOMPANY CHARGE
19. The Petitioner seeks orders authorizing it to borrow an additional USD \$150,000 by way of Intercompany Advances (as defined in the ARIO) from the Operating Subsidiaries, along with a corresponding increase in the Intercompany Charge (which secures the Intercompany Advances). The Intercompany Charge ranks in priority to all other encumbrances other than the Administration Charge.
20. Section 11.2(1) of the CCAA vests the court with the jurisdiction to grant an interim financing charge in priority to the claim of any secured creditor of the debtor company, on notice to the secured creditors who are likely to be affected by the security or charge.
21. In deciding whether to make such an order, the court is to consider, among others, the following factors:
- (a) the period during which the company is expected to be subject to proceedings under the CCAA;

- (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) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (f) the monitor's report, if any.
22. In the circumstances, the factors under Section 11.2(4) of the CAA support the granting of an increase of the Intercompany Charge. To date, the Petitioner has managed its expenditures and conformed with cash flow estimates. The incremental increase sought will--as contemplated under the Revised Cash Flow--allow the Petitioner to retain Nevada counsel further to satisfying the U.S. Recognition Condition, and to pay other professional fees required to facilitate Plan implementation and the closing of the Acquisition Transactions.
23. The Monitor is supportive of the Petitioner obtaining such additional funding to finance operations through to the anticipated conclusion of these CCAA Proceedings, and recommends that this Court authorize such advances and the corresponding increase in the Intercompany Charge.
- [8] In reviewing the Plan, I am particularly mindful that the Plan is fair and reasonable with regard to the following considerations: the releases, the foreign recognition, the amendments to the Plan, and the recovery proposed to the equity holders.
- [9] The Plan, in all respects, I conclude, is fair and reasonable. I am also satisfied that the petitioners are in compliance with the requirements of the CCAA and that they have not acted contrary to the CCAA or any court orders granted in these proceedings. The sanction order is therefore granted as drafted with the slight changes to the foreign court assistance request provision.
- [10] Thank you counsel for your most capable and gracious assistance throughout these proceedings. "The Honourable Madam Justice Watchuk"

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