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on

Insolvency Law

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FRASER MILNER CASGRAIN LLP

AGREEMENTS VERSUS PLANS

In a recent decision of Madam Justice Romaine of the Alberta Court of Queen's Bench in *Re Calpine Canada Energy Limited*, it was determined that not all settlements and agreements made between parties in CCAA proceedings are required to be approved by the general body of creditors. The Alberta Court of Appeal refused to grant leave to appeal the Court of Queen's Bench decision.

In December 2005, Calpine Canada Energy Limited and eight other affiliates and/or subsidiaries ("Calpine") sought and obtained protection under the CCAA. At the same time, Calpine's American affiliates sought and obtained similar protection under Chapter 11 of the U.S. Bankruptcy Code.

The Calpine insolvency was very complex, involving many related corporations and partnerships, and highly intertwined legal and financial obligations. The goal of restructuring and realizing maximum value for assets was made more difficult by a number of cross-border issues.

In the course of the proceedings, it was determined by Calpine's Canadian and American estates that the most appropriate way to resolve the issues between them was to arrive at a global agreement that would essentially decide all of the material cross-border issues between them. To this end, they negotiated a global settlement agreement (the "Agreement"), subject to the approval of the Courts supervising both the Canadian and American proceedings.

At the application before the Court of Queen's Bench of Alberta to have the Agreement approved, a number of creditors opposed its approval, arguing that it constituted a compromise

or plan of arrangement and, consequently, needed to be approved by a vote of Calpine's creditors in accordance with s. 4 and 5 of the CCAA.

Firstly, Romaine J. recognized that not every agreement or settlement reached during the course of a CCAA proceeding constitutes "a compromise or plan of arrangement" which requires approval via a vote of the creditors. In determining that the Agreement did not constitute a "compromise or plan of arrangement", the Court noted that the Agreement did not compromise the rights of creditors that were not parties to it (or had not consented to it) and it did not have the effect of unilaterally depriving creditors of contractual rights without their participation in the Agreement. The Court further noted that, simply because an agreement reached during the course of a CCAA proceeding acts to affect the size of the debtor's estate available for distribution, it does not mean that it must be voted on by all creditors:

As recognized in [prior cases], transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the [CCAA].

After determining that the Court had the authority to consider approving the Agreement without having the creditors vote on it, Romaine J. then examined the factors which a Court must examine when deciding whether or not to approve such an agreement. The Court went on to find:

The test of whether such an adjustment [of certain creditors' rights pursuant to a settlement agreement within the context of a CCAA proceeding] results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

In applying the foregoing test, Romaine J. approved the Agreement largely based on the following facts:

1. The Calpine CCAA proceedings had been hampered by complex cross-border issues which were resolved by the Agreement and permitted the CCAA proceedings to progress.
2. If the Agreement was approved, the Canadian creditors' claims would likely be paid in full.
3. The only parties whose rights were affected by the Agreement were those who had consented to the Agreement or were party to it.

While the Court's decision in Calpine was influenced by the foregoing factors, which may not always be present, it nevertheless supports the position that, in the right circumstances, Courts will be willing to approve agreements and settlements reached in CCAA proceedings without requiring that those agreements or settlements to be voted on by the general body of creditors.

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