

focus

on

Insolvency Law

November, 2008

The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a dark blue square background.

FRASER MILNER CASGRAIN LLP

LIQUIDATING CCAAS - THE DEBATE CONTINUES

The Humber Valley Resort Corporation and related companies (collectively, "Humber Valley") applied for, and was granted, an Initial Order from the Newfoundland and Labrador Supreme Court (Trial Division) staying proceedings against it for one month under the CCAA. On this same date, the Court authorized a DIP lending facility of up to \$600,000.00, with a first priority charge over various of Humber Valley's assets. At the end of the initial stay period, Humber Valley brought two further applications. The first was for an extension of an additional two months, and the second for approval of additional secured DIP financing in the amount of \$1,400,000.00.

In assessing these applications, the Court first looked at the commonly accepted principles of the CCAA, being generally to allow an insolvent company room to maneuver whilst serving all parties interested in the outcome of the reorganization. The CCAA, where an extension of stay is sought, requires an applicant to firstly prove to the Court that it has acted, and continues to act, in good faith and with due diligence. In Humber, the Applicant was able to prove this fairly easily, through evidence of its scaling down of operations, soliciting the sale of substantial assets, and maintaining ongoing discussions with investors and the Province. Secondly, an applicant must prove that an extended stay is "appropriate".

In considering what is "appropriate", the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. v. Fiskard Capital Corp.*, 2008 BCCA 327 stated earlier this year that a CCAA stay of proceedings "should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors." The reasoning of the B.C. Court of Appeal was that the purpose of the CCAA, that is to facilitate a restructuring and compromise between a debtor and its creditors, would not be fulfilled where a plan or arrangement was not evidenced in an application for a continued stay.

In Humber, the Court noted that "no plan or arrangement nor any outline thereof" had been presented or prepared by the Applicant. The Court did not, however, consider this as grounds to reject the extension application. Instead, in consideration of all the circumstances surrounding the resort and its financial difficulties, the Court granted the extension for the primary reason that otherwise the resort was likely to fail. The Court stated that it was "satisfied that the present lack of a plan [was] not reflective of a situation where the Applicant [had] engaged the Court only to defer liquidation without any real prospect of devising a plan acceptable to creditors".

Humber and Maple Bay are seemingly at odds with each other, as the Court in each focused on a different, yet equally prominent, underlying principle of the CCAA. In Maple Bay, the Court placed importance on the goal of the Act being to facilitate compromises, which necessarily requires evidence of a plan going forward. In Humber, the Court looked at the ultimate goal of facilitating the reorganization from a different angle, noting that if the stay were not granted in that case, the reorganization and ultimately the resort would fail. Both perspectives have merit.

In considering the application for the additional DIP financing, the Court did not address the lack of any plan or arrangement, and presumably therefore did not see it as a relevant consideration to that part of the application. The Court carefully reviewed the cash flows presented, noted the amount requested was not sufficient to greatly prejudice the existing creditors should an eventual plan be rejected, and granted an Order allowing the additional financing without stipulation as to how and where it was to be utilized.

For further information please contact David Mann at 403 268-7097 or David LeGeys at 403 268-3075, or visit our website www.fmc-law.com/insolvency.