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CCAA COURT ALLOWS DEBTOR TO PAY PRE-FILING UNSECURED DEBTS

Recently, in *Re Eddie Bauer of Canada Inc.*, Justice Morawetz ordered a debtor was entitled to pay amounts owing for goods and services actually supplied prior to the filing date.

Eddie Bauer of Canada, Inc. (“EBC”) and Eddie Bauer Customer Services Inc. (“EBCS”) are wholly owned Canadian subsidiaries of the American retail company, Eddie Bauer Inc. On June 17, 2009, EBC and EBCS obtained protection under the CCAA concurrently with the Chapter 11 filing of the American company. For both EBC and EBCS, the principal indebtedness was through inter-company loans between each applicant and the American parent, however, vendors and suppliers formed a large part of the pre-filing debt.

In granting the protection, Justice Morawetz ordered that EBC and EBCS were entitled but not required to pay amounts owing to the pre-filing vendors. He reasoned as follows:

The proposed order also provides that the Applicants shall be entitled but not required to pay amounts owing for goods and services actually supplied to the Applicants prior to the date of the Order. The RSM Report comments on this point. The Eddie Bauer Group is of the view that operations could be disrupted and its vendor relationships adversely impacted if it does not have the ability to pay pre-filing obligations to certain vendors and it further believes that the value of its business will be maximized if it can pay its pre-filing creditors. RSM has reviewed this issue and is supportive of this provision as the Eddie Bauer Group believes it is a necessary provision and the DIP Lenders are supportive of the Restructuring Proceedings. The relief requested in these proceedings is consistent with the relief sought in the Chapter 11 Proceedings. This provision is unusual but, in the circumstances of this case, appears to be reasonable.

This decision may open the door to allow for companies to pay pre-filing creditors where it would maximize the value of the business.

4. If relevant prejudice is found which cannot be alleviated, are there any other consideration which may nonetheless warrant an order permitting late filing?

Beveridge J noted that, when considering how the monitor should carry out its duties, it is important to note that the monitor is an officer of the Court and is obliged to ensure that the interests of the stakeholders are considered, including all creditors, the company and its shareholders.

According to his analysis, Beveridge J found that paragraph 10 of the Claims Procedure Order contemplated that the monitor must carry out some assessment of the claims that are submitted. His analysis of the monitor’s powers continued at paragraph 46, where he stated “...to suggest that the monitor did not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess claims that have been submitted. The notion that the monitor could not look at documentary evidence...and consider submissions would be to deny it any real power to consider and make a preliminary determination of the merits of the claim.”

The Court found that in this case it did not matter that the claims were submitted after the claims bar date. Essentially, the monitor was simply acting to revise the claims which were already submitted to conform with the evidence elicited by the monitor or submitted to it.

If a claimant seeks to revise its claim after the assessment date set out in the Claims Process Order, different considerations may come into play. Appropriate procedure will depend on the provisions of the Claims Procedure Order. It should also be noted that, as ultimate arbiter of disputed claims under s. 12 of the CCAA, the Court should always be viewed as having the jurisdiction to permit appropriate revision of claims.

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