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THE MONITOR'S POWER TO REVISE CLAIMS AFTER A CLAIMS BAR DATE

In *Re ScoZinc Ltd.*, 2009 NSSC 136 the monitor appointed under the *Companies' Creditors Arrangement Act* ("CCAA") brought a motion for directions on whether it had the authority to allow the revision of a claim after the claim's bar date, but before the date set for the monitor to complete its assessment of claims.

On December 22, 2008 ScoZinc. Ltd. ("ScoZinc") was granted protection by way of a stay of proceedings of all claims pursuant to s. 11 of the CCAA. The determination of creditor's claims was set by a Claims Procedure Order. This Order set dates for the submission of claims to the monitor, as well as dates by which the monitor must assess the claims.

The Monitor brought this motion to seek direction as to whether it had the necessary authority to allow a revision to a claim after the passing of the claim's bar date, but before the deadline set for the monitor to assess the submitted claims.

In its fifth report, the monitor concluded that the errors in the proofs of claim were due to inadvertence. The Monitor issued a Notice of Revision or Disallowance, allowing the claims as revised "if it is determined by the Court that the monitor has the power to do so".

The court found that the jurisdiction of the monitor stems from the jurisdiction of the Court granted to it by the CCAA. Section 11.7 of the CCAA states that whenever an Order is made under s. 11 of the CCAA, the Court is required to appoint a Monitor. Unfortunately, the CCAA does not set out a process for identification or determination of claims. Instead, the Court creates a claims process by court order. The only guidance provided by the CCAA is that in the event of a disagreement the amount of a claim shall be determined by the Court on "summary application" by the company or by the creditor.

Under the *Bankruptcy and Insolvency Act*, the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. In contrast, the CCAA does not set out the procedure beyond the language in s. 12. Section 12 of the CCAA defines a claim to mean any obligation that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*. The language only accomplishes two things. First, that the debtor company can agree on the amount of the secured or unsecured claim. Second, that if there is a disagreement, then on application of either the company or the creditor the amount shall be determined by the Court on "summary application".

The court noted that the practice has arisen for the Court to create by order a claims process that is both flexible and expeditious. The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice. Justice Beveridge also concluded that whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the Court that claims must initially be identified and assessed by the monitor, is a valid exercise of the Court's inherent jurisdiction.

In its analysis, the Court considered the Alberta Court of Appeal's decision in *Re Blue Range Resource Group Corp.*, 2000 ABCA 285 ("*Blue Range*"). In *Blue Range*, various creditors either filed or amended their notices of claim after the bar date and the monitor disallowed their claims. Justice Wittman in *Blue Range* set out the test for determining when a late claim may be included:

1. Was the delay caused by the inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

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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