Focus BANKRUPTCY & INSOLVENCY

Don't pin your hopes on claims bar expiry

Monique Jilesen

Until an appeal court says otherwise, directors and officers and their insurers can't count on the expiry of a claims bar date in a liquidating Companies' Creditors Arrangement Act (CCAA) where no Plan of Compromise is contemplated.

Timminco Ltd. (Re) [2014] O.J. No. 3270 is the latest decision dealing with the insolvency of Timminco Ltd. and related class action litigation. As is customary in CCAA proceedings, a stay of proceedings and a claims procedure order were issued in *Timminco*, which applied not only to the company, but also its directors and officers. As set out by Justice Geoffrey Morawetz, the claims bar order and stay were issued and were "intended to assist the debtor in the restructuring process, which may assist asset realizations."

St. Clair Pennyfeather is the representative plaintiff in a proposed securities class action against Timminco and its directors and officers. Timminco sought CCAA protection in January 2012, three years after the class action against the company was issued. This was Pennyfeather's second motion to lift the stay to proceed with the class action. On the first motion (before the issuance of a claims procedure order, in [2012] O.J. No. 1949), Justice Morawetz refused to lift the stay, accepting the directors' arguments that defending a class action claim would distract them from the work of liquidating Timminco's assets under the CCAA proceedings.

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A claims procedure order was later issued, setting a claims bar date of July 23, 2012. Pennyfeather did not file a claim by that date, notwithstanding that he appeared in the CCAA proceedings. As Justice Morawetz noted, a partial, but not complete explanation for the delay was the litigation related to applicability of the statutory limitation period under the *Securities Act*. In another class action against the company, the Court of Appeal held that the applicable three-year limitation period under the *Securities Act* does not stop running until a motion for leave to proceed has been filed (see *Sharma v. Timminco Ltd.* [2012] O.J. No. 719). The court's recent decision in *Green v. Canadian Imperial Bank of Commerce* [2014] O.J. No. 419 (leave to appeal to SCC granted on Aug. 7), reconsidered and reversed that decision, opening the door to Pennyfeather's class action to proceed.

On Pennyfeather's most recent motion, Justice Morawetz lifted the stay of proceedings and modified the claims procedure order to allow the filing of the claim, effectively extending the time for filing. The court's main consideration was that Timminco had nearly finished liquidating and distributing its assets, and had admitted that it had no intention to file a Plan of Arrangement.

The Timminco board of directors was the main respondent to the motion, as Pennyfeather targeted the directors and officers insurance and, if necessary, the directors' personal assets. The claim would not have any effect on Timminco's assets or restructuring — the assets had been sold and distributions had been made to secured creditors.

The defendant directors argued that the claims procedure was "initiated for the purpose of determining, with finality, the claims against the directors and officers" and that the claims procedure order was not contingent on the filing of a plan.

In allowing the claim to proceed, Justice Morawetz highlighted the discretionary nature of the decision to lift the stay and considered the historical case law dealing with late filed claims. He noted, however, that all the previous decisions involved a CCAA plan considered by creditors.

Justice Morawetz held that the former directors' interest in seeing a final resolution to the claim was outweighed by the plaintiff class' right to have the case heard on its merits. He also held that the CCAA claims bar provisions are meant to facilitate companies in restructuring, not to provide indefinite peace of mind for their directors and officers.

Justice Morawetz also noted, but did not consider, Pennyfeather's argument that the class action should be able to go forward regardless of the CCAA stay and claims bar, because directors and officers insurance that would likely pay any claims would not be accessible for the benefit of creditors or other CCAA claimants. His decision to lift the stay on other grounds meant that this point went largely unexplored. It remains ambiguous whether future claims bar orders in CCAA proceedings will shield directors and their insurers from claims targeting liability insurance.

Although stakeholders in CCAA proceedings are always aware that there is a potential for late filed claims, the decision in *Timminco* is unusual in that the claimant was a participant in the CCAA process and was aware of the claims bar date. More importantly, the decision suggests that directors and officers and their insurers may not be able to rely upon a claims bar expiry as a final resolution of any possible claims against the directors and officers, until and unless there is a Plan of Compromise which formally compromises and/or releases such claims.

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Priority: Make immediate execution searches on notice of bankruptcy

Continued from page 18

Following the decision in *Re Drysdale*, Justice Randall Wong of the B.C. Supreme Court sitting in bankruptcy provides an insightful analysis of the principles underpinning the priority in *Walker (Re)* [2010] B.C.J. No. 651. The intention of section 70(2) is to provide for the first execution creditor's costs which extend to the "costs of recovering judgment" and the costs involved in "prosecuting the claim into judgment and execution." The court held that execution proceedings which come after judgment, including appeals and execution proceedings, are caught within section 70(2) and that the initial "judgment" cannot be the dividing line. It is of no consequence that the creditor's costs may not have been taxed. That does not deprive a first execution creditor of the priority. This in turn provides a first execution creditor with a remarkable opportunity to recover its costs in priority to the other estate creditors, provided it files a proof of claim claiming the priority. Having acted for trustees it is surprising to note how infrequent s. 136(1)(g) claims are received.

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> Commercial litigator

Counsel should also be mindful that priority can be claimed to obtain payment on an outstanding account rendered to the first execution creditor client. Seeing as the priority belongs to the client, it will be necessary to obtain an Authorization & Direction to have the preferred claim paid directly to counsel. If counsel has been paid, then the priority would of course be paid directly to the client.

As a further benefit, the five per cent superintendent's levy on all dividends payable (to assist in defraying the expenses of its supervision) is exempt on dividends paid to the first execution creditor under the s.136(1)(g) priority.

It is good practice for counsel acting for execution creditors to immediately conduct execution searches in the jurisdictions whereat writs were filed upon receiving notice of a bankruptcy. It will then become apparent whether the client can claim the priority if it filed the first execution and so long as the bankrupt has exigible property that became bound therefrom.

Sean Zeitz practices commercial litigation with an emphasis on bankruptcy and insolvency matters. He is certified by The Law Society of Upper Canada as a specialist in civil litigation and bankruptcy and insolvency law.