Bankrupt company obtains protection under the CCAA

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On March 30, 2021, the Supreme Court of British Columbia (the Court) made an initial order under the *Companies Creditors Arrangement Act* (the CCAA) in respect of EncoreFX Inc. (EncoreFX) one year after the commencement of its bankruptcy proceedings. The decision is unusual in that the applicant for the CCAA initial order was EncoreFX's trustee in bankruptcy (the Trustee), who also sought to be appointed as monitor of EncoreFX (with enhanced powers). On April 22, 2021, the Court released the reasons for its decision.[1]

The Court's decision highlights that, in certain circumstances, bankrupt companies can obtain relief under the CCAA and be granted the opportunity to file a plan of compromise or arrangement. This decision has particular significance as the first reported decision where a court has interpreted section 11.6(b) of the CCAA.

Background

EncoreFX provided foreign exchange risk management and cross-border payment services. A liquidity crisis resulting from market volatility during the COVID-19 pandemic led EncoreFX to make a voluntary assignment in bankruptcy on March 30, 2020. The bankruptcy proceedings were complicated by a number of disputes over claims made against the estate of EncoreFX (the Estate), the vast majority of which were disallowed by the Trustee. The largest claim consisted of a $35.9 million claim by EncoreFX's sole secured creditor, which was also disallowed.

The Trustee entered into negotiations with the key creditors, which resulted in a term sheet providing a framework to resolve the numerous claims against the Estate. The Trustee executed the term sheet with the approval of the inspectors of the Estate, and sought to commence proceedings under the CCAA such that the terms set out in the term sheet could be voted upon by the creditors as a CCAA plan of arrangement. Subject to approval by the Court at the sanction hearing, the plan would be binding upon all creditors.

Decision

Although the CCAA contemplates its protection applying to bankrupt companies subject to the restrictions of section 11.6 of the CCAA, such applications normally involve companies that have commenced proposal proceedings under the *Bankruptcy and Insolvency Act* (the "BIA") and seek to continue those proceedings under the CCAA (as contemplated by section 11.6(a)). The Court noted that there appears to be no existing jurisprudence on section 11.6(b), which contemplates the situation where a bankrupt company makes an application for CCAA protection.

The Court set out the following test to address the relevant issues:

1. did EncoreFX qualify for relief under the CCAA;
2. if so, was EncoreFX barred or limited from that relief by other statutory provisions; and
3. assuming EncoreFX qualifies for CCAA relief and is not barred from such relief, should the Court exercise its discretion to grant such relief.

The Court held that EncoreFX qualified for CCAA protection, given that it satisfied the requirements of being a "debtor company" with claims against it in excess of $5 million. "Debtor company," as defined in section 2(1) of the CCAA, includes a company that is bankrupt.

Further, the Court determined that EncoreFX was not barred from obtaining CCAA relief, given that this application was in compliance with section 11.6(b) of the CCAA. The Trustee brought the application with the consent of the inspectors appointed under the BIA. EncoreFX's bankruptcy also did not arise from a failed proposal under the BIA, either as a result of a refusal or deemed refusal of a proposal by the creditors or the court, the annulment of a proposal, or a deemed assignment under section 50.4(8) of the BIA, due to a failure to file a proposal or required documents.

Finally, the Court stated that even where the statutory requirements for CCAA protection are satisfied and the bankrupt company is not barred from such protection, the Court retains discretion as to whether the granting of CCAA relief is appropriate in the circumstances. The major consideration driving this analysis is whether the granting of CCAA relief is consistent with the objectives of the CCAA, which the Court identified as the following:

1. to permit the debtor to continue to carry on business and avoid the social and economic costs of liquidating its assets;
2. to provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided;
3. to avoid the social and economic losses resulting from liquidation of an insolvent company; and
4. to create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

Having regard to the statutory objectives of the CCAA, the Court found that the granting of CCAA protection to EncoreFX was appropriate in the circumstances, given that it would provide a process for the expeditious resolution of the numerous claims against the Estate through a plan that has been negotiated with the input of major stakeholders. It would also invoke a procedure for the submission of claims and establish a claims bar

date. An added benefit was the avoidance of paying a levy to the Superintendent of Bankruptcy pursuant to section 147 of the BIA, which would further reduce the value of the Estate and the creditors' recoveries.

Takeaways

This decision further highlights the flexibility of the CCAA. It applies even where the debtor is in the midst of a bankruptcy process that is ultimately not suited to address the issues at play, and a better solution may be pursued under a different statutory regime.

The decision appears to be the first case where a court has authorized a bankrupt company to seek CCAA protection outside of the proposal context. Importantly, it brings clarity to how section 11.6(b) of the CCAA operates and its impact on the existing bankruptcy proceeding. Although the application was initially presented as a "conversion" of the bankruptcy proceeding, the Court noted that there is no "conversion" or "continuation" of the BIA proceeding into a CCAA proceeding, given that the BIA proceeding and company's status as a bankrupt remain extant. The administration of the estate under the BIA is merely stayed while a resolution under the CCAA is being explored. As such, references to "conversion" or proceedings being "taken up and continued" are not appropriate for applications under section 11.6(b).

Interestingly, the Court raised the issue of how the outcome of the CCAA proceeding would affect the BIA proceeding. While an unsuccessful CCAA plan would result in the proceedings reverting back to a bankruptcy, the Court did not reach a conclusion as to the impact of a successful CCAA plan on the BIA proceeding. This issue will certainly be of interest as the CCAA proceeding of EncoreFX unfolds.

[1] 2021 BCSC 750.

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