

COURT FILE NO.: 08-CL-7415

DATE: 20080716

**SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)****RE:** IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, As AmendedAND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF COTTON GINNY INC., CG OPERATIONS (H/O) LIMITED, CG
OPERATIONS I LIMITED AND CG OPERATIONS II LIMITED**BEFORE:** Morawetz J.**COUNSEL:** *E. Patrick Shea*, for Applicant*M.D. Abramowitz*, for Mintz & Partners Limited, Monitor*David S. Murdoch*, for Black Saxon QRC and CSBA Asset Management*Richard B. Jones*, for 6301533 Canada Inc.*Jason Wadden and Daniel Cappe*, for Effigi Inc.*Linda Galessiere*, for Oxford, 20 Vic, Ivanhoe, Morguard*Colby Linthwaite*, for the Province of British Columbia**HEARD:** June 5, 20 and July 2, 2008**ENDORSEMENT**

[1] Cotton Ginny Inc. ("CG Inc."), CG Operations HO Limited ("H/O"), CG Operations I Limited ("CG Operations I") and CG Operations II Limited ("CG Operations II") and, together with CG Inc., H/O and CG Operations I, (the "Applicants" or "Cotton Ginny") brought a motion seeking an order sanctioning the first amended plan of compromise or arrangement in respect of CG Inc. and H/O dated May 30, 2008 (the "Amended Plan"). I heard argument on June 5 and June 20, 2008, and on July 2, 2008 I gave oral reasons granting the motion of the Applicants with reasons to follow. These are those reasons.

[2] Effigi Inc. ("Effigi") also brought a motion. It sought an order declaring that no person has a proven interest in or entitlement to approximately \$2.1 million (the "Garnishment Funds"), that Effigi garnished from H/O, in priority to Effigi's interest in the Garnishment Funds. It also sought an order directing the Sheriff of the Regional Municipality of Peel, who is currently holding the Garnishment Funds, to deliver the Garnishment Funds to Effigi. On July 2, 2008, I dismissed the motion of Effigi with reasons to follow.

[3] The Province of British Columbia also brought motions. B.C. sought to have a claim that it asserted against CG Inc. and H/O either placed into a separate class for the purposes of the Amended Plan; or treated as an unaffected claim. B.C. also sought an order directing that the Applicants pay to B.C. the sum of \$65,822.14 in Provincial Sales Tax collected by CG Inc. prior to

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February 21, 2008, but which became due after February 21, 2008, which amounts B.C. asserts Cotton Ginny is required to pay pursuant to the terms of the Initial Order dated February 21, 2008. On July 2, 2008, I dismissed the motion of B.C. to be placed in a separate class and I granted the motion of B.C. to require payment of the amounts which became due post-filing.

Background and Corporate Structure

[4] Cotton Ginny is a national retailer of privately branded casual women's wear. As of the date of the Initial Order, Cotton Ginny operated 129 retail stores located in all provinces, with the exception of Quebec. Cotton Ginny employed approximately 1,281 full and part-time employees.

[5] CG Operations I and CG Operations II are lease holding companies that hold the leases for Cotton Ginny stores.

[6] The Applicants contend that CG Inc. is the beneficial owner of all of Cotton Ginny's inventory and the other assets necessary to carry on the Cotton Ginny business (aside from leasehold interests). CG Inc. alleges that it acquired a beneficial interest in the operating assets of Cotton Ginny in 2004 when it purchased those assets from the limited partnership that purchased Cotton Ginny out of insolvency in 2003.

[7] The Applicants further contend that H/O was incorporated when the Cotton Ginny business was first acquired by the limited partnership in order to provide head office services and to, among other things, manage the Cotton Ginny business on behalf of the limited partnership. The Applicants acknowledged that issues appear to have arisen in 2004 when the operating assets were transferred from the limited partnership to CG Inc. The Applicants contend that it appeared that, in the course of the transition, the distinction between CG Inc. and H/O was not respected and there was no clear transition of the management of Cotton Ginny over to CG Inc.

[8] The division or distinction between CG Inc. and H/O was identified as being an issue early on in these proceedings. Mintz and Partners Limited (the "Monitor") conducted an analysis of H/O operations and delivered reports detailing the results of its analysis.

[9] The Monitor noted in its various reports that no clear distinction appeared to have been drawn between CG Inc. and H/O by Cotton Ginny's management or by Cotton Ginny's suppliers. This confused situation was compounded by the use of the business name "Cotton Ginny" by both CG Inc. and H/O. This business name was registered by CG Inc.

Financial Difficulties Leading to the Initial Order

[10] Cotton Ginny experienced poor financial performance in fiscal 2008. Cotton Ginny takes the position that the poor financial performance resulted from the impact of Effigi's garnishment. It contends that the garnishment reduced available working capital and thereby restricted Cotton Ginny's ability to purchase inventory. The reduction in inventory consequently resulted in reduced sales and cash flow difficulties. While Cotton Ginny may wish to allocate the blame for its financial difficulties on other parties, I note that the garnishment efforts undertaken by Effigi were pursuant to a Court authorized process. Effigi did obtain a judgment against H/O.

[11] On February 6, 2008, Retail Funding Inc. ("RFI") applied to this Court for the appointment of an Interim Receiver and Receiver and Manager of the Applicants. On February 8, 2008, the Applicants responded by bringing an application under the CCAA.

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[12] On February 11, 2008, I granted RFI's receivership application and dismissed the Applicants' CCAA Application with the proviso that there was no prohibition on the Management or Board of Cotton Ginny from continuing ongoing activities to refinance.

[13] On February 21, 2008, the Applicants again applied for CCAA protection, based on the representation that new financing had been arranged, such that RFI could be repaid in full. CCAA protection was granted through the Initial Order and an order was made terminating the receivership proceedings.

CCAA Plan

[14] On May 20, 2008, the "Plan Filing and Meeting Order" was granted. This order had the effect of accepting for filing the plan of compromise in respect of CG Inc. and H/O dated May 15, 2008 (the "Plan") and approved May 30, 2008 as the date for the meeting of affected creditors to consider the Plan.

[15] The Plan provides for one class of creditors -- "Affected Creditors" -- that includes creditors of CG Inc. and H/O, both secured creditors and unsecured creditors. The Plan also contemplates that CG Inc. and H/O will be amalgamated in accordance with s. 177 of the *Business Corporations Act* (Ontario). All Affected Creditors with claims not exceeding \$25,000 and all Affected Creditors with claims greater than \$25,000 that elect to value their claims at \$25,000 for distribution purposes are to receive their pro rata share of the \$400,000 pool funds. Affected Creditors with claims greater than \$25,000 who do not elect to value their claims at \$25,000 are to receive certificates in the amount of their claims in full and final satisfaction of their claims. Commencing in fiscal 2009, Cotton Ginny is to distribute to the Monitor an amount equal to 40% of Cotton Ginny's net cash flow from operations, up to a maximum of \$4,700,000, to be distributed among these remaining creditors.

[16] Black Saxon QRC ("Black Saxon") and CSBA Asset Management Inc. ("CSBA"), both being secured creditors of CG Inc., are designated to be unaffected by the Amended Plan. Counsel to the Monitor has opined that, in Ontario, the security interest of Black Saxon appears to have been properly perfected, and the security interest of CSBA appears to have been properly perfected with respect to "other assets".

[17] The Plan does not provide for a compromise of any claims of CG Operations I or CG Operations II. The Plan provides for Cotton Ginny to provide these two entities with sufficient funds to pay any outstanding obligations owed by those companies.

[18] At the meeting, Cotton Ginny tabled the Amended Plan, making one technical amendment to the Plan. The financial terms of the Plan were not altered. The Plan Filing and Meeting Order had authorized Cotton Ginny to amend the Plan at the meeting. The Monitor provided Affected Creditors with notice of the meeting and prepared a report in accordance with the Plan Filing and Meeting Order.

[19] The Monitor's Report on the Plan commented on the effect of the Plan. Assuming that CG Inc. makes the payments provided for in the Plan, the Monitor estimates that the creditors who have claims greater than \$25,000, who receive certificates in final satisfaction of their claims, will be eligible to receive 17.2% of their claims.

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[20] The meeting proceeded on May 30, 2008. The Monitor confirmed that a quorum was present and a resolution to adopt the Amended Plan was duly proposed and seconded. The Monitor also reported that a majority in number, representing more than two thirds in value of the Affected Creditors who voted at the meeting, voted in favour of the Amended Plan. In addition, the required majorities in favour of the Amended Plan were also achieved when the votes were tabulated on the basis of there being two separate classes -- one for CG Inc. Affected Creditors and one for H/O Affected Creditors. In a previous endorsement, I directed the Monitor to ensure that a separate tabulation was kept in respect of these two classes.

[21] The voting particulars were:

Claims Subject to the Plan

Company	No. of Admitted Claims	\$ Amount of Admitted Claims
Cotton Ginny Inc.	135	\$21,912,139
CG Operations (H/O) Limited	56	8,950,892
Total	191	\$30,863,031

Voting Results

	Number of Claims			Value of Claims		
	In favour	Total	% in favour	In favour	Total	% in favour
Affected Creditors of CG Inc.	73	77	94.8%	\$12,444,479.12	\$14,778,917.40	84.20%
Affected Creditors HO	27	29	93.1%	\$5,455,523.90	\$7,766,629.38	70.24%
All Affected Creditors	100	106	94.3%	\$17,900,003.02	\$22,545,546.78	79.39%

[22] The Applicants take the position that CG Inc. and H/O have complied with all statutory requirements of the CCAA and all previous orders of the Court and that they have not done or purported to have done anything that was not authorized by the CCAA.

[23] The Monitor, in its Eleventh Report, stated that it believes that the Amended Plan will result in a better prospect of a recovery for Affected Creditors than the liquidation of Cotton Ginny. The Monitor expressed the views that in the event of a receivership, there would be no funds available for any creditor, other than those secured by a priority charge.

[24] The Monitor also reported that the Amended Plan received a strong level of support from the stakeholders. The Monitor is of the view that the terms of the Amended Plan are fair and reasonable and the Monitor recommended that the Amended Plan be sanctioned.

Claim of Effigi

[25] Effigi filed a proof of claim asserting a \$2,091,835.76 unsecured claim against H/O. Effigi's claim is based on a judgment obtained by Effigi against H/O.

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[26] Effigi's motion seeks an order that the Garnishment Funds be paid to Effigi. The Applicants take the view that if this motion were granted, Effigi's affected claim would be paid in full and would seriously prejudice Cotton Ginny's ability to implement the Amended Plan.

[27] Assuming the Amended Plan is sanctioned, Cotton Ginny intends to use the Garnishment Funds to:

- a. pay professional fees subject to the administrative chart;
- b. pay the electing creditors;
- c. fund the claims of the landlord; and
- d. purchase inventory, the proceeds of which fund Cotton Ginny's going forward operations.

[28] The Applicants contend that the money in the H/O bank account was being held by H/O in trust for CG Inc., and CG Inc.'s secured creditors have asserted claims to the Garnishment Funds. CG Inc. has also confirmed to Effigi that it is asserting a claim to the Garnishment Funds.

[29] The Garnishment Funds are also subject to certain of the priority charges granted by the Initial Order. The liquidation analysis prepared by the Monitor indicates that, in liquidation, there is not likely to be sufficient funds realized to pay the priority charges created by the Initial Order. Under the liquidation analysis, B.C. and the affected creditors, including Effigi, would receive no recoveries.

Claim of British Columbia

[30] The Province of British Columbia filed a proof of claim asserting that it is a secured creditor of CG Inc., CG Operations I and CG Operations II. The Applicants contend that as a result of an oversight, the Monitor has not yet disallowed B.C.'s claims. The Applicant accepts that B.C. may have an unsecured claim against CG Inc.

[31] H/O registered in British Columbia as a "vendor" under the Social Services Tax Act (the "SSTA") on the basis that it was the entity that was operating the Cotton Ginny stores in British Columbia.

[32] Cotton Ginny's SSTA account was in the name of H/O and "Cotton Ginny". CG Inc. registered the business name "Cotton Ginny".

[33] Prior to the commencement of the CCAA proceedings, B.C. registered its security interest against H/O (but not against CG Inc.) for \$143,000 in unremitted provincial sales tax ("SST") relating to the period prior to the commencement of these proceedings. B.C. did not register against CG Inc., CG Operations I and CG Operations II.

[34] B.C.'s claim for unremitted SST was included in the same class as the claims of Cotton Ginny's unsecured creditors, based on the realizable value of Cotton Ginny's assets, the relative ranking of B.C.'s security and the quantum of the claims ranking in priority to B.C.'s security. In a liquidation, the Applicants contend that there appears to be no possibility that B.C. would receive a return on its secured claim.

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[35] B.C. has taken steps to enforce a claim for unremitted SST against Ms. Julie Rulli, a former director of CG Inc. and H/O. Such steps were taken notwithstanding the stay of proceedings imposed by the Initial Order.

[36] In addition, SST in the amount of \$43,930.16 was accrued by H/O in January 2008 and became owing by H/O on February 25, 2008. SST in the amount of \$29,209.70 was accrued by H/O from February 1, 2008 through to February 21, 2008 and became owing by H/O on March 25, 2008. B.C. registered a lien against H/O in B.C. on February 18, 2008. B.C. takes the position that pursuant to paragraph 7(b) of the Initial Order, these amounts (together with interest, \$65,822.14) are Post-Filing Sales Tax and must be paid in full.

Issues

[37] With respect to the proposed sanctioning of the Amended Plan, the issues to be determined are:

- a. Has there been strict compliance by Cotton Ginny with all statutory requirements and adherence to previous orders of the Court?
- b. Has anything been done or purported to be done in the Amended Plan that is not authorized by the CCAA?
- c. Is the Amended Plan fair and reasonable?

[38] With respect to the motion brought by Effigi, Cotton Ginny submits that the issue to be determined depends on whether the Amended Plan is sanctioned. If sanctioned, the issue to be determined is whether Effigi is bound by the Amended Plan. If the Amended Plan is not sanctioned, the issue to be determined is whether Effigi should receive the Garnishment Funds prior to determination as to whether the Garnishment Funds are necessary to satisfy the claims secured by the priority charge created by the Initial Order and the claims of the Applicants' other secured creditors.

[39] Effigi approaches the situation differently. It seeks a declaration that no person has proven an interest in or entitlement to the Garnishment Funds that Effigi garnished from H/O in priority to Effigi's interest and seeks an order directing the sheriff, who is currently holding the Garnishment Funds, to pay the Garnishment Funds to Effigi, plus any interest, or alternatively, its proportionate share.

[40] In my view, Effigi's argument presupposes that the *Creditors' Relief Act* governs the distribution of the Garnishment Funds.

[41] It also presupposes that the CCAA proceedings do not impact on the distribution of the Garnishment Funds.

[42] I have concluded that the position put forth by Effigi with respect to its entitlement to the Garnishment Funds is flawed for a number of reasons.

[43] The garnishment process has not been completed. The monies remain with the sheriff. The garnishment has been disputed by 6301533 Canada Inc. ("630") and by Black Saxon. CGI has also provided notification that it has an interest in the funds. Black Saxon holds a security interest over CG Inc. for approximately \$2 million. 630 is a secured creditor of Continental Saxon (CG) Limited

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Partnership and obligations of the Limited Partnership have arisen from secured promissory notes delivered by the Limited Partnership which were subsequently assigned in favour of 630.

[44] H/O is a CCAA debtor that has declared itself to be insolvent. A stay of proceedings is in effect and H/O has filed an Amended Plan. The Plan provides for a compromise to be offered to unsecured creditors. Notwithstanding its judgment, Effigi is still an unsecured creditor. Fifty-six unsecured claims have been filed in the amount of \$8,950,892.

[45] To give effect to the position being put forth by Effigi would require this Court to ignore the CCAA plan. It would also provide Effigi with preferred treatment over all other unsecured creditors of H/O (without even considering the issue of consolidation). It would also require this Court to ignore one of the fundamental tenets of insolvency law, namely that all unsecured creditors rank equally.

[46] To give effect to the position put forth by Effigi would result in Effigi receiving full payment or substantial payment of its outstanding debt. In my view, such a result cannot be justified.

[47] If the Amended Plan, as proposed, is sanctioned, Effigi will have an unsecured claim. This potential recovery of 17.2% is not what Effigi wants to achieve.

[48] If the Amended Plan is not sanctioned, the result for Effigi will also not be what it seeks on this motion. If the Amended Plan is not sanctioned, the parties do not return to the pre-February 21, 2008 status.

[49] The Monitor indicated that if the Plan is not sanctioned the likely outcome will be bankruptcy or receivership. I agree.

[50] Effigi has put forth the position that the Sheriff should pay out the monies to Effigi. However, the priority charges created in the CCAA process would have to be addressed. Further, the stay of proceedings in the CCAA proceeding is still in effect and if the Amended Plan is not sanctioned, it does not automatically mean that the stay is vacated. Black Saxon and 630 previously gave notice of their intention to enforce security under section 244 of the BIA and did so as part of the garnishment dispute. Black Saxon and 630 are part of the CCAA process, albeit they are unaffected creditors. However, they are not unaffected by the stay of proceedings currently in effect. In the event that the Amended Plan is not sanctioned, the status of the stay of proceedings will still have to be addressed.

[51] Given the impact of the CCAA and the admitted insolvency of H/O, the argument that the distribution of the Garnishment Funds falls under the *Creditors' Relief Act* -- to the benefit of Effigi and to the detriment of the other creditors of H/O -- is not tenable. Priority and secured claims will be recognized and unsecured creditors will share pro rata. Effigi's argument on this point is consequently rejected.

[52] Turning to the issue of consolidation, the Amended Plan treats creditors of CG Inc. and creditors of H/O as one large pool of creditors. The evidence put forth by the Applicants is that following the reorganization, H/O, to the extent that it holds assets, holds such assets in trust for CG Inc. The Monitor has set forth its view that consolidation is appropriate. The Monitor has stated that H/O did not have an independent existence in the minds of either Cotton Ginny or its creditors. From the Monitor's standpoint, there was a great deal of confusion in the minds of any party that was dealing with Cotton Ginny.

[53] The issue of whether consolidation was appropriate was identified early in the proceedings, yet it was not challenged by any party until this sanction hearing. On the other hand, the Applicants did not take any steps to clarify the situation, notwithstanding being invited by the Court to do so.

[54] Effigi points to a number of references in the affidavits and the reports filed by the Monitor that suggest that H/O did have an independent existence. Effigi points to the provisions of the 2003 Accounting and Services Agreement executed as between Continental Saxon (CG) Limited, Continental Saxon CG Limited Partnership and CG Operations H/O Limited. This agreement, according to Effigi, provides that H/O operates its bank account in trust for Continental Saxon (CG) Limited Partnership (now CG Inc.) and that the beneficiary of the trust, in this case CG Inc. (as a successor), is only entitled to the net cash flow after payment of all expenditures. Expenditures in this case include the debt owing to Effigi.

[55] The Accounting and Services Agreement makes reference to the "Business". Business is defined as the business consisting of the retail sale of women's clothing under the name and with the brand of what is known as "Cotton Ginny", "Cotton Ginny Plus" and "Plus Intimates" as carried on by Continental LP from time to time. It seems to me that the Business has to be considered in the broad perspective, namely the overall retail operation. Inventory is obtained from suppliers. Inventory is sold through the retail outlet. Proceeds are received by the operating entity and suppliers are ultimately paid. In order for suppliers, such as Effigi, to be paid, it follows that there must be proceeds being generated by the retail operations. The Accounting and Services Agreement depends upon the entire cycle being completed. When considering the legal position of H/O, it seems to me that one has to consider the overall cycle and not one particular aspect.

[56] In my view, the interpretation of the Accounting and Services Agreement urged by Effigi is too narrow. It does not give effect to the nature of Cotton Ginny operations. The comments of the Monitor at paragraph 37 of the Fourth Report bear repeating:

Counsel for the purchasers of the Cotton Ginny assets also advised that the only reason for the incorporation of and indeed the existence of H/O was to hold certain obligations, such as those to employees, of the Cotton Ginny operation. H/O was not intended to nor did it operate, or generate any revenue or income of any kind. As H/O held the employee liabilities it needed funds to pay those employee liabilities, such as payroll. Those funds were provided to it by CSCGLP, while it was operating the business, and subsequently by CGI.

[57] In *Re Atlantic Yarns Inc.*, 2008 Carswell NB 195, Glennie J. referred to the text "Rescue! The Companies' Creditors Arrangement Act", by Dr. Janis Sarra, Carswell 2007, where the author writes at page 242:

Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case.

[58] Justice Glennie went on to list seven factors that the Courts have developed to assist in the balancing of interests. Those factors are:

1. difficulty in segregating assets;
2. presence of consolidated financial statements;
3. profitability of consolidation at a single location;

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4. co-mingling of assets and business functions;
5. unity of interests in ownership;
6. existence of intercorporate loan guarantees; and
7. transfer of assets without observance of corporate formalities.

[59] In this case, I find that factors 1, 4, 5, 6 (evidence of intercorporate loan guarantees were before me on the RFI receivership application) and 7 are present, and that a consideration of these factors leads to a conclusion that consolidation is appropriate. Even though consolidation by its very nature will benefit some creditors and prejudice others, I am satisfied that in this case it would be neither fair nor reasonable to accept the position of Effigi, which would provide Effigi, or Effigi and all other H/O creditors with preferential treatment over the other suppliers and creditors of Cotton Ginny and CG Inc. I also note that the required majority of the creditors of H/O voted in favour of the Amended Plan.

[60] I have concluded that, in the circumstances of this case, it is both fair and reasonable to consolidate the claims of creditors of CG Inc. and H/O as proposed in the Amended Plan.

[61] With respect to B.C.'s motion seeking payment of the pre-February 21, 2008 SST, which became due after February 21, 2008, Cotton Ginny submits that the issue to be determined is whether it is appropriate for Cotton Ginny to pay this claim in the context of a procedure which prohibits the Applicants from paying other pre-February 21, 2008 claims on the basis of what appears to be a "hole" in the model initial CCAA order.

[62] In my oral reasons of July 2, 2008, I made it clear that I was in agreement with the Province's counsel that the SST amounts that came due on February 25, 2008 and March 25, 2008 had to be considered Post-Filing Sales Tax and in accordance with paragraph 7(b) of the Initial Order had to be paid. Even though, as Mr. Shea argued, there may be a "hole" in the model Initial Order, the fact remains that this provision of the Initial Order was not varied or appealed and a plain interpretation of this provision accords with the position put forth by B.C.

[63] Since I delivered my oral reasons, the Monitor has filed a Certificate confirming that payment of the Post-Filing Sales Tax claim has been made to B.C.

[64] With respect to B.C.'s classification motion, Cotton Ginny submits that the issue to be determined is whether, given the value of Cotton Ginny's assets and the relative priority of B.C.'s security interest, B.C.'s claim should be included in the class of Affected Creditors. B.C. seeks to have its claim against CG Inc. and H/O either placed in a separate claim for the purposes of the Amended Plan; or treated as an unaffected claim. It seems to me that portions of the argument put forward by B.C., under the heading of "The Bare Trustee Agreement", are really a challenge to the proposed consolidation plan. I have already determined that consolidation is appropriate in this case.

[65] B.C. has put forth evidence that establishes that the Province was operating under the belief that H/O was the operating entity in B.C. I accept this evidence, but it does not alter the fact that a number of creditors were uncertain as to whether they were dealing with CG Inc. or H/O, or whether they were dealing with "Cotton Ginny". The fact that B.C. thought they were dealing with H/O does not, in this case, entitle them to be placed in a separate class.

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[66] On the issue of being treated as an unaffected claim, B.C. relies on the *Atlantic Yarns* case for the proposition that it is not proper for Cotton Ginny or the Monitor to ascribe a liquidation or zero security valuation for its claim.

[67] In *Atlantic Yarns*, Glennie J. was of the view that the secured creditor was attempting to manoeuvre for a better voting position among the Companies' secured creditors in order to negotiate a better deal. It seems to me that in many respects that is what B.C. is trying to do. In this case, the secured claim of B.C. is subordinate in priority to the charges created in the CCAA process, as well as the security of Black Saxon. The Monitor has reported that the liquidation value of its security is zero. To give effect to the argument of B.C. would result in a situation where the claim of B.C. would be unaffected based on the claim being treated as "secured" -- notwithstanding that the security is worth zero. Such an outcome would not be fair and reasonable to the Applicants and to all of the creditors. In my view, the treatment ascribed to the claim of B.C. is fair and reasonable and is consistent with the object and intent of the CCAA.

[68] In the result, I am satisfied that the secured claim of the Province of B.C. is appropriately classified as an Affected Claim.

Disposition

[69] The Certificate in respect of the Post-Filing Sales Tax Claim of B.C. having been filed, I am satisfied that

- (a) there has been strict compliance by Cotton Ginny with all statutory requirements and adherence to previous orders of the court; and
- (b) Nothing has been done or has been purported to be done in the Amended Plan that is not authorized by the CCAA.

[70] The remaining issue is whether the Amended Plan is fair and reasonable to the Affected Creditors. Notwithstanding the very limited anticipated return to the Affected Creditors, the Amended Plan was approved by the requisite majority of creditors on a consolidated basis. In addition, on a company by company basis, the required majority voted in favour of the Amended Plan.

[71] The voting results create the inference that the Affected Creditors find the Amended Plan to be acceptable.

[72] It is also noted that the alternative is likely to be liquidation of Cotton Ginny with a nil return to Affected Creditors.

[73] In addition, the sanctioning of the Plan enables Cotton Ginny to remain in operation and provide continued employment to its workforce and also to provide ongoing business to its continuing suppliers.

[74] It is important to recognize that the parties opposed to Cotton Ginny, namely Effigi and the Province of B.C., do have justifiable positions. However, for the reasons set forth above, the motion by Effigi and the motion of B.C. to be treated as an unaffected creditor have been rejected.

[75] The fact that Affected Creditors are being asked to accept a significant compromise does not make the Amended Plan unfair or unreasonable, and the fact that dissenting Affected Creditors are, pursuant to the CCAA, bound by the vote of the majority of the Affected Creditors does not result in

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a "confiscation" of rights absent a finding of bad faith. (See *Re Canadian Airlines Corp.*, (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.).

[76] In this case, no findings of bad faith had been made. I am satisfied that the Amended Plan is fair and reasonable.

[77] The Amended Plan is sanctioned. The Stay Period is extended to December 31, 2008 to permit the Amended Plan to be implemented.

[78] The Effigi Motion is dismissed but in recognition that the position taken by Effigi in the garnishment proceedings and in its motion was, in my view, justified, costs are payable by Cotton Ginny to Effigi. Costs for the proceedings resulting in the garnishment should be based on s. 70(2) of the BIA. If the parties cannot agree on quantum, brief written submissions (3 pages maximum) can be made within 15 days. Costs in respect of the Effigi motion in these proceedings are payable in the agreed upon amount of \$2,000.

[79] The motion of B.C. in respect of Post-Filing Sales Tax claim is granted, with costs.

[80] The motion to declare B.C.'s secured claim as an Unaffected Claim is dismissed, but in recognition that, in my view, the actions of B.C. were justified, costs are payable by Cotton Ginny to B.C. If the parties cannot agree on quantum, brief written submissions (3 pages maximum) can be filed within 15 days.



Morawetz J.

Released: July 16, 2008

Oral Reasons: July 2, 2008