



Recent Developments in Insolvency

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Agenda: 4 Cases

1. *Good Natured Products Inc. (Re)*, 2024 BCSC 2126
2. *Delta 9 Cannabis Inc (Re)*, 2024 ABKB 657
3. *Waygar Capital Inc. v. Quality Rugs of Canada Limited*, 2024 ONSC 2486
4. *Fiera Private Debt Fund v. SaltWire Network Inc.*, 2024 NSSC 79



*Re Good Natured
Products Inc.*
2024 BCSC 2126

Transaction “value” for
the purposes of success
fees



Good Natured Products Inc. (Re), 2024 BCSC 2126

FACTS

- Cap West’s remuneration included a “Transaction Success Fee” that is the greater of:
 - \$1.25 million or
 - 3% of the “Enterprise Value” of any successful transaction
- “Enterprise Value” is “the sum of the fair market value of the cash, securities, and other amounts paid or payable to the company or its shareholders.”
- SISP resulted in a sale with value of approximately \$53 million
 - Purchase price included assumed liabilities and repayment of all CCAA charges, except the Cap West Success Fee Charge
 - Transaction only contemplated payment to Cap West of \$300,000

Good Natured Products Inc. (Re), 2024 BCSC 2126

DECISION

- A purchase price includes the assumption of debt, so the amount owing under the Transaction Success Fee is on the whole purchase price, not just on the price of shares under the RVO
- It would be “morally and commercially repugnant” for Cap West to have successfully done the work (and found the best deal) but be the only party that suffers
- Parties came back with a new RVO that allocated \$850,000 plus tax to Cap West. Cap West was amenable. Justice Fitzpatrick approved

Good Natured Products Inc. (Re), 2024 BCSC 2126

TAKEAWAYS

—Pay professional fees fairly

—“Proceeds” include assumed liabilities

—Courts want to encourage sales agents to act in the debtor’s best interests

*Waygar Capital
Inc. v. Quality
Rugs of
Canada
Limited, 2024
ONSC 2486*

Priority of Trusts vs.
Court-Ordered Charges



Priority of Trusts vs. Court-Ordered Charges

Waygar Capital Inc. v. Quality Rugs of Canada Limited, 2024 ONSC 2486

FACTS

- Quality Sterling Group (QSG) was Canada's largest flooring contracting company. Filed for CCAA in August 2023 and obtained a DIP Loan of \$5 million secured by a court-ordered DIP Charge (among other things)
- QSG's suppliers were owed ~\$11 million and had statutory trust over QSG's accounts receivable under s. 8 of the *Construction Act* (Ontario)
- QSG funded ongoing operations during insolvency using the DIP Loan and accounts receivable. Funds subject to the statutory trust were used up and no longer traceable
- Court granted suppliers a trust and lien claim (TLC) over proven trust and lien claims, which suppliers argued should take priority over the DIP Charge, Financial Advisor Charge, and D&O Charge
- Standard language providing that court-ordered charges had super-priority over "trusts" was omitted from the Initial Order and ARIO. DIP Lender, Financial Advisor, and D&Os argued this was inadvertent; Suppliers argued this was deliberate

Priority of Trusts vs. Court-Ordered Charges

Waygar Capital Inc. v. Quality Rugs of Canada Limited, 2024 ONSC 2486

KEY ISSUES AND FINDINGS

- Statutory trusts under provincial statutes can be rendered inoperative by court ordered charges in a CCAA, allowing the funds held in trust to be subject to a DIP Lending Charge (or other priming charges)
- Omission of the word “trusts” was indeed a mistake
 - The DIP Lender, Financial Advisor, and the D&Os of QSG all brought forward uncontested evidence that they agreed to their roles in exchange for super-priority
 - Suppliers did not challenge the priority of the DIP Lender’s Charge at the time it was granted (only raised these arguments around the omission of the word “trusts” after the fact)
 - Suppliers could not specifically name how they relied upon omission of the word “trusts” the CCAA orders after they were granted, such that they would suffer prejudice if the trusts were not placed above the DIP Lender’s Charge now.

Priority of Trusts vs. Court-Ordered Charges

Waygar Capital Inc. v. Quality Rugs of Canada Limited, 2024 ONSC 2486

TAKEAWAYS

- Provincial statutory trusts can be collapsed in insolvency proceedings.
- Suppliers and subcontractors should be proactive in registering and perfecting liens and consider getting more actively involved in the insolvency process to protect themselves. Possible for suppliers to collaborate on providing DIP Financing?
- Court emphasized balancing interests of all stakeholders and that the funds that were subject to the statutory trust were used with a view to maximizing benefits for creditors and stakeholders generally. In framing arguments about preserving trusts, suppliers should explain how a DIP charge would be detrimental to all stakeholders, not just the affected suppliers, and propose a path forward (which may involve contributing funds themselves)

*Re Delta 9
Cannabis Inc.*
2024 ABKB 657

When a plan is capable
of sanction



Delta 9 Cannabis Inc (Re), 2024 ABKB 657

FACTS

- The plan sponsor—Fika—sought a creditors meeting order to approve a plan
- The plan did not give SNDL the right to vote as it was classified as an “Unaffected Claim”
- SNDL argued that the plan did affect its claim as the plan did not contemplate full repayment of SNDL’s indebtedness, contrary to its rights under the court-approved Restructuring Term Sheet

Delta 9 Cannabis Inc (Re), 2024 ABKB 657

DECISION

- The plan had not been proposed in a fair and transparent manner
- Allowing the Fika and Delta 9 to materially change their proposal would run counter to the parties' approach underlying the proceedings
- The plan could not withstand the scrutiny of the test to sanction a plan

Delta 9 Cannabis Inc (Re), 2024 ABKB 657

DECISION

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Delta 9 Cannabis Inc (Re), 2024 ABKB 657

TAKEAWAYS

- Approving a creditors' meeting to vote on a plan is more than just a procedural step
- Any plan must be consistent with previous representations in the proceedings

Refusing a Creditors' Meeting

Delta 9 Cannabis Inc (Re), 2024 ABKB 657

TAKEAWAYS

- A degradation of an out-of-class creditor's potential rights under a proposed plan of arrangement may delay a creditors' meeting until the party's rights are settled.
- Approving a creditors' meeting is more than just a procedural step.

*Fiera Private
Debt Fund v.
SaltWire
Network Inc.,
2024 NSSC 79*

Choosing between
monitors in competing
CCAA filings



Choosing between monitors in competing CCAA filings

Fiera Private Debt Fund v. SaltWire Network Inc., 2024 NSSC 79

FACTS

- SaltWire (debtor) was a local news provider in Nova Scotia
- SaltWire and its main creditor, Fiera, both made urgent CCAA filings with respect to SaltWire simultaneously
- SaltWire and Fiera agreed that SaltWire needed CCAA protection. Key controversy was who would act as the monitor
 - Fiera wanted KSV (who had been acting as their financial advisor for some time), SaltWire wanted Grant Thornton (who was newly engaged)
 - Fiera argued KSV's knowledge of and familiarity with SaltWire's business and operations would be helpful in any restructuring
 - SaltWire argued that KSV's potential for bias and appearance of a conflict should disqualify them, and a new, wholly neutral monitor should be appointed

Choosing between monitors in competing CCAA filings

Fiera Private Debt Fund v. SaltWire Network Inc., 2024 NSSC 79

KEY ISSUES AND FINDINGS

- KSV (creditor's monitor) should be the monitor
- Rationale:
 - KSV proved itself to be neutral and unbiased
 - SaltWire was uncooperative despite contractually agreeing to cooperate in a forbearance agreement (although the contract was not determinative)
 - KSV was already familiar with SaltWire's business from its role as Fiera's financial advisor
 - KSV's projections were more realistic (CCAA, s. 11.2 considerations)
 - KSV's lack of local presence was not determinative (on its own or in combination with other factors)
 - SaltWire should be neither preferred nor prejudiced because they are the debtor

Choosing between monitors in competing CCAA filings

Fiera Private Debt Fund v. SaltWire Network Inc., 2024 NSSC 79

TAKEAWAYS

- A court will look at contextual factors when deciding between competing monitors, but a monitor's specific expertise or knowledge about a debtor's business and operations will likely weigh heavily
- Debtors' applications should not be preferred over creditors' applications by mere virtue of being debtor's applications.
- Court cautioned against parties pre-determining the monitor in the terms of DIP financing – Fiera requiring KSV be appointed raised concerns about KSV's independence – and warned that a creditor's former representative should not be automatically installed as monitor without careful scrutiny and assessment for potential bias
- As we see an increase in creditor-led proceedings, this is a good case to keep in mind.

Thank you.

Contact us to discuss how our team can help you.

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