Court File No. M45666

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BETWEEN:

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. and 2147659 ONTARIO INC.

Moving Parties

MOVING PARTIES' FACTUM

December 11, 2015

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Harvey Chaiton
LSUC No. 21592F
Tel: (416) 218-1129
Fax: (416) 218-1849
harvey@chaitons.com

Stephen Schwartz
LSUC No. 25980A
Tel: (416) 218-1132
Fax: (416) 218-1832
Stephen@chaitons.com

Lawyers for Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147659 Ontario Inc.

TO: **KLEIN & ASSOCIATES PROFESSIONAL CORPORATION**
390 Bay Street, Suite 1101
Toronto, Ontario M5H 2Y2

James Klein
Tel: (416) 366-9494
Fax: (416) 366-9442
jklein@kalaw.ca

Lawyers for
Medi Group Incorporated

AND TO: **TORYS LLP**
Barristers and Solicitors
79 Wellington Street West
Suite 3000
Box 270, TD South Tower
Toronto, Ontario M5K 1N2

Adam Slavens
Tel: (416) 865-7333
Fax: (416) 865-7380
aslavens@torys.com

Lawyers for
Tarion Warranty Corporation

AND TO: **BISCEGLIA & ASSOCIATES**
Professional Corporation
7941 Jane Street, Suite 200
Concord, Ontario L4K 4L6

Emilio Bisceglia
Tel: (905) 695-3100
Fax: (905) 695-5201
ebisceglia@lawtoronto.com

Lawyers for
Argo Lumber Inc. and Newmar Window Manufacturing Inc.

AND TO: **AIRD & BERLIS LLP**
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
P.O. Box 754
Toronto, Ontario M5J 2T9

Ian Aversa
Tel: (416) 865-3085
Fax: (416) 865-1515
iaversa@airdberlis.com

Lawyers for the Monitor

Court File No. M45666

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

B E T W E E N:

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. and 2147659 ONTARIO INC.

Moving Parties

MOVING PARTIES' FACTUM

PART I - OVERVIEW

1. Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147659 Ontario Inc. (collectively, the "**Applicants**") seek leave to appeal from the Order and Endorsement of the Honourable Mr. Justice Wilton-Siegel (the "**Motion Judge**") dated September 25, 2015 (the "**Decision**")[1], dismissing the Applicants' motion for: (i) an order declaring that they have the requisite authority to enter into the Settlement Agreement dated February 17, 2015 (the "**Settlement Agreement**") between the Applicants, Imran Jinnah ("**Jinnah**") and Tarion Warranty Corporation ("**Tarion**") without the approval of the Court; or, in the alternative (ii) an order approving the Settlement Agreement.

2. The Applicants collectively carried on business as builders and vendors of a residential development project in Richmond Hill Ontario referred to herein as the "**Puccini Project**". As required under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the

[1] Tab 2 of the Moving Parties' Motion Record.

"***Warranties Act***"), registrations were filed with Tarion in connection with the Puccini Project and letters of credit were provided as security for deposit and warranty claims by purchasers of the Puccini Project homes.

3. On December 17, 2013, the Applicants commenced this restructuring proceeding. In or around the summer of 2014, the Applicants for the first time learned that their registrations under the *Warranties Act* did not extend to Silver Streams Homes (Puccini) Inc. ("**Puccini**"), which acted as vendor on the Puccini Project. As a consequence of this inadvertence, Tarion is unable to draw on the Letters of Credit. The Applicants, Jinnah and Tarion entered into the Settlement Agreement to rectify this inadvertent error and to allow Tarion to access the Letters of Credit as the parties had intended.

4. The respondents, who represent the majority of the Applicants' lien claimants on the Puccini Project (the "**Lien Claimants**"), objected to the Settlement Agreement.

5. The Decision raises important questions of law of the CCAA court's jurisdiction to rectify pre-filing agreements. The Motion Judge's refusal to approve the Settlement Agreement denies Tarion of the security that it bargained for and exposes Jinnah to quasi-criminal penalties, including incarceration.

6. The objecting Lien Claimants admitted at the Motion that their understanding and expectation was that the letters of credit and the underlying cash collateral were provided in favour of Tarion. As such, any cash collateral held as security for the letters of credit that becomes available to pay the claims of the Lien Claimants would constitute a windfall to the Lien Claimants that was never anticipated or bargained for. In these circumstances, the Motion Judge's decision to

refuse approval of the Settlement Agreement is not fair and reasonable in the circumstances and offends the administration of justice.

PART II - SUMMARY OF FACTS

The Parties

The Applicants

7. The Applicants are affiliated Ontario corporations owned by Jinnah. On December 17, 2013 (the "**Filing Date**"), the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**") pursuant to an order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Commercial Court**").[2] No judge of the Commercial Court is seized of this proceeding.

8. At the time of the commencement of the CCAA proceeding, the Applicants collectively carried on business as developers and builders and were in the process of completing the Puccini Project, a four phase residential development project in Richmond Hill, Ontario. Title to the lands that comprised phases I through III of the Puccini Project are registered in the names of 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc. (collectively, the "**Numbered Companies**").[3]

9. Silver Streams Homes Inc. ("**Homes**") is a residential homebuilder in the Greater Toronto Area. At the commencement of the Puccini Project, Homes acted as the vendor under the

[2] Affidavit of Imran Jinnah sworn March 25, 2015 (the "**Jinnah Affidavit**"), Tab 5 of the Moving Parties' Motion Record at para. 10.
[3] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at paras. 2 and 8.

agreements of purchase and sale. Puccini was later incorporated for the purpose of selling homes in the Puccini Project and replaced Homes as the vendor.[4]

Tarion

10. Tarion is a quasi-governmental, not-for-profit corporation established in 1976 to protect the rights of new home purchasers and regulate new home builders and vendors in Ontario. Tarion administers the *Warranties Act*, which sets out the warranty protection for new home purchasers in the Province of Ontario.[5]

The Lien Claimants

11. The Lien Claimants represent the majority of trades who provided construction services on the Puccini Project and registered liens against the lands that comprise phases II and III of the Puccini Project.

Tarion Registrations and Letters of Credit

12. Homes was registered as a builder and vendor with Tarion under the *Warranties Act* since May 2004, in connection with other construction projects that pre-date the Puccini Project. In May 2010, the Numbered Companies became registered as vendors under the *Warranties Act*.[6]

13. In connection with their registrations under the *Warranties Act*, Homes and the Numbered Companies provided security in favour of Tarion in the aggregate amount of $920,000 by way of letters of credit (the "**Letters of Credit**") issued by Bank of Montreal ("**BMO**"). The Letters of

[4] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.9.
[5] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.16.
[6] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.17.

Credit were provided to Tarion to secure the Applicants' obligations to Tarion for deposit claims and warranty claims by purchasers of homes in Phases I, II and III of the Puccini Project.[7]

14. The Letters of Credit were financed pursuant to a Term Sheet dated August 25, 2008, as amended, among Symphony Series Co-Tenancy Corp. ("**Symphony**") as Borrower and BMO as lender. The BMO facilities were amended over time. Pursuant to these amendments, the Numbered Companies replaced Symphony as Borrowers under these facilities.[8]

15. The Numbered Companies are the named "Applicants" under the Letters of Credit with Tarion named as the "Beneficiary". The only condition Tarion must satisfy before it can draw on the Letters of Credit is the requirement to deliver to BMO a written demand for payment indicating that "the monies being drawn under this Letter of Credit are being drawn in respect of obligations owed or which will be owed by the Registrant to the Beneficiary". The Letters of Credit identified Homes as the Registrant. Through inadvertence, the identity of the "Registrant" was not updated when Puccini replaced Homes as vendor under the agreements of purchase and sale.[9]

16. At all relevant times the Applicants believed that the Puccini Project was properly registered with Tarion under the *Warranties Act* and that the registrations in respect of the Puccini Project extended to all of them. This understanding was communicated to the court and all of the Applicants' stakeholders in the CCAA proceeding in affidavits sworn by Jinnah and filed in the CCAA proceeding. The Lien Claimants acknowledged in their materials that they understood that Puccini was a registrant under the *Warranties Act* and the Letters of Credit were posted in favour

[7] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.11; Reply Affidavit of Imran Jinnah sworn April 13, 2015 (the "**Jinnah Reply Affidavit**"), Tab 8 of the Moving Parties' Motion Record at paras. 6 and 7.
[8] Jinnah Reply Affidavit, Tab 8 of the Moving Parties' Motion Record at paras. 6-8.
[9] Exhibit C to the Affidavit of Daniela Gaglio sworn June 12, 2015 (the "**Gaglio Affidavit**), Tab 9 of the Moving Parties' Motion Record.

of Tarion as security for their obligations to Tarion under the *Warranties Act.* No Lien Claimant expected to have access to the cash collateral posted as security for the Letters of Credit.[10]

CCAA Proceeding

17. As at the Filing Date, there were 10 remaining homes to be built in Phases II and III of the Puccini Project that were in various stages of completion (the "**Puccini Homes**"). The objective of the Applicants' CCAA proceeding was to complete and sell the Puccini Homes and to distribute the net sale proceeds to the Applicants' creditors subject to Court approval.[11]

18. Puccini acted as vendor under the agreements of purchase and sale. It was clear from the commencement of the CCAA proceeding that the Applicants would not be able to satisfy their obligations to Tarion under the *Warranties Act* for the homes sold in the Puccini Project before and during the CCAA proceeding. It was expected that Tarion would look to the Letters of Credit to satisfy the Applicants' obligations under these agreements of purchase and sale.

19. The CCAA proceeding is being administered on consolidated basis. Nine out of the ten Puccini Homes have now been sold and the net sale proceeds have been deposited and comingled in the Monitor's trust account. The only parties with an economic interest in the net sale proceeds are a syndicate of mortgagees who collectively hold mortgages on all of the Puccini Homes and the lien claimants with perfected liens registered against the Puccini Project. The determination of priorities between the mortgagees and the lien claimants has been referred to arbitration within the CCAA proceeding.[12]

---

[10] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.15; Decision at para. 58. Tab 2 of the Moving Parties' Motion Record.
[11] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.12.
[12] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.14.

Notice of Deficiency in Registration

20. The Applicants did not learn that Puccini was not registered as a vendor under the *Warranties Act* until the summer of 2014. On September 3, 2014, a summons was issued to Puccini pursuant to section 24 of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (the "***Offences Act***") under the *Warranties Act* (the "**POA Charge**"), which, among other things, charged Puccini with acting as a vendor of a new home without being properly registered under the *Warranties Act*. The summons also charged Jinnah in his capacity as the director and officer of Puccini with knowingly concurring with Puccini's breach.[13] Pursuant to section 22 of the *Warranties Act*, Jinnah, if convicted, may face a fine of up to $25,000 and/or imprisonment for a term of not more than one year.

Settlement Agreement

21. Upon learning that Puccini was not a registered vendor under the *Warranties Act*, Jinnah and Tarion entered into discussions, which ultimately resulted in the Settlement Agreement.[14]

22. The Settlement Agreement incorporates an Assignment Agreement pursuant to which, the Applicants agreed that Puccini will assign to Homes all of its rights, title, interest and obligations under the purchased agreements entered into by Puccini in its capacity as vendor.[15] The purpose of the Assignment Agreement was to restore the parties to the Settlement Agreement to the position they intended and would have been in had Puccini been registered as a vendor with Tarion and named "Registrant" in the Letters of Credit once it took over acting as vendor for Homes.

---

[13] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.25; Exhibit E to the Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record.

[14] Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record at para.29.

[15] Exhibit F to the Jinnah Affidavit, Tab 5 of the Moving Parties' Motion Record.

Objections to the Settlement Agreement

23. On February 26, 2015, the Applicants advised the service list in the CCAA proceeding of the Settlement Agreement.

24. The Lien Claimants objected to the execution of the Settlement Agreement. The Lien Claimants argued that Tarion, the Applicants and Jinnah should not be permitted to change their contractual arrangements to the detriment of the trades who have filed liens.

25. The mortgagees did not object to the Settlement Agreement.

PART III - THE MOTION AND DECISION

26. The Motion was heard by the Motion Judge on June 25, 2015. The following three issues were considered by the Motion Judge at the Motion:

(a) Do the Applicants have the power to enter into the Settlement Agreement without the approval of the court?

(b) Does the court have the authority to approve the Settlement Agreement?

(c) Should the court approve the Settlement Agreement?

27. On September 25, 2015, the Motion Judge released the Decision and held that:

(a) The execution of the Settlement Agreement engages paragraph 9(c) of the Initial Order which prohibits the Applicants from granting credit or incurring liabilities, except in the ordinary course of business or until further order of the court[16];

[16] The Decision, Tab 2 of the Moving Parties' Motion Record at paras. 39-43.

(b) The Court has the authority and jurisdiction to approve the Settlement Agreement[17]; and

(c) The Court should refrain from exercising its discretion to approve the Settlement Agreement.

28. The Applicants respectfully submit that the Motion Judge made a number of palpable errors of law and fact in arriving at the Decision. In particular:

(a) The Motion Judge erred in preferring the interests of the Lien Claimants, who admittedly were looking for a windfall, over the interests of the Applicants, Jinnah and Tarion thereby exposing Jinnah to quasi-criminal sanctions and causing Tarion to lose the security that it had bargained for;

(b) The Motion Judge's conclusion that the lien claimants would be detrimentally impacted by the Settlement Agreement was not supported by the evidence before the court;

(c) The Motion Judge erred in finding that rectification should only granted if it furthered the purpose of the CCAA proceeding; and

(d) The Motion Judge erred in his conclusion that the CCAA proceeding was not being administered on consolidated basis.

PART IV - LIST OF ISSUES

29. An appeal of the Decision requires leave of this Court. The issue before this Court is whether leave should be granted.

[17] The Decision, Tab 2 of the Moving Parties' Motion Record at para. 47

PART V - ANALYSIS AND ARGUMENT

Test for Leave

30. The decision to grant leave to appeal a decision of the motion judge in a CCAA proceeding is discretionary. In determining if the exercise of its discretion is appropriate, this Court should consider:

(a) Whether the point on appeal is of significance to the practice;

(b) Whether the point on appeal is of significance to the action;

(c) Whether the appeal is *prima facie* meritorious or frivolous; and

(d) Whether the appeal will unduly hinder the progress of the action. [18]

31. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.* ("***Pine Tree***"), Blair J.A. reviewed the variously articulated tests to be applied for granting leave to appeal in insolvency and restructuring proceedings and concluded that:

> "Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,
>
> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address,
>
> b) is *prima facie* meritorious, and

[18] CCAA, ss. 13 and 14 (Schedule "B"); *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 2002 CarswellOnt 1038 (C.A.) at para. 16, Tab 1 of the Moving Parties BOA; *Re Stelco Inc.*, (2005) 75 O.R. (3d) 5 (C.A.) at para. 24, Tab 2 Moving Parties' BOA.

c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.[19]

32. Justice Blair also indicated that the test he was proposing was similar to the test for determining whether leave to appeal should be granted in restructuring cases under the *Companies' Creditors Arrangement Act*. Justice Blair reasoned that:

> "There is something to be said for having similar tests for leave to appeal in both CCAA and BIA proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings."[20]

33. With respect to the issue of whether the point raised is of significance to the action itself, Justice Blair noted that:

> "I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this Court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case."[21]

---

[19] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 ["***Pine Tree***"] at para. 29, Tab 3 of the Moving Parties' BOA. The need for similar tests for leave in both CCAA and BIA proceedings articulated by Justice Blair is consistent with the recommendations of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, Tab 4 of the Moving Parties' BOA (*"**Century Services**"*), where the Court encouraged harmonization of the two insolvency statutes (*Century Services* at para. 24).

[20] *Ibid., Pine Tree* at para. 33.

[21] *Ibid., Pine Tree* at para. 30.

The Motion Judge's Decision Was Not Supported by the Evidence Before the Court

34. The Motion Judge's decision to refuse approval of the Settlement Agreement was premised on his assumption that the Lien Claimants would be prejudiced by the approval of the Settlement Agreement.

35. There was no evidence before the Motion Judge as to who, as between the mortgagees and the Lien Claimants, would be entitled to the cash collateral securing the Letters of Credit. This issue was not raised by the Lien Claimants and was not argued before the Motion Judge.

The Appeal is of Importance to the Insolvency Practice

36. The Motion Judge accepted that the purpose and effect of the Settlement Agreement was rectification by the Applicants and Tarion of the arrangements between them.[22] However, the Motion Judge found that it would be unfair to allow for such rectification in a liquidating CCAA that may not otherwise not be permissible in a bankruptcy proceeding.[23]

37. The Applicants are not aware of any authority prohibiting rectification of an agreement involving a debtor in a CCAA proceeding and none was cited by the Lien Claimants or the Motion Judge. The issue of the circumstances in which rectification of an agreement in a CCAA proceeding will be permitted or prohibited is a novel issue to be considered by this Court and one that is of importance to the insolvency practice.

38. This issue is also important to the administration of justice as a whole. In particular, the Decision exposes Jinnah to quasi-criminal liability under the *Offences Act,* including imprisonment, in circumstances where the mutual intention of the parties was that Tarion have

---

[22] The Decision, Tab 2 of the Moving Parties' Motion Record at paras. 57 and 59.
[23] The Decision, Tab 2 of the Moving Parties' Motion Record at para.67.

access to the letters of credit where the applicants were unable to fulfil their obligations to home purchasers under the *Warranties Act.*

The Appeal is of Importance to the Action

39. The Letters of Credit were posted by the Numbered Companies who are the real estate holding companies for the Puccini lands. The Letters of Credit were posted prior to the commencement of construction on the Puccini Project. No claims process has been conducted by the Applicants to determine the creditors of the Numbered Companies, if any, and there was no evidence before the Court that the Lien Claimants, or any other person, were creditors of the Numbered Companies.

40. If the Applicants' motion for leave to appeal is dismissed, the Applicants will be required to conduct a claims process for the claims of creditors of the Numbered Companies and address any priority disputes with respect to the cash collateral securing the Letters of Credit.

The Appeal is *Prima Facie Meritorious*

The Motion Judge Erred in Finding that the CCAA Proceeding was not administered on consolidated basis

41. The Motion Judge's finding that section 9(c) of the Initial Order was triggered by the Settlement Agreement was premised on his legal conclusion that the Applicants' CCAA proceeding has not been conducted on a consolidated basis. Otherwise, court approval of the Settlement Agreement was not required.[24]

42. The Motion Judge's conclusion that the CCAA proceeding was not carried out on consolidated basis was based on the following findings made by the Motion Judge:

[24] The Decision, Tab 2 of the Moving Parties' Motion Record at paras 39 – 43.

(a) The Applicants did not carry on business in a consolidated manner prior to or following the commencement of the CCAA proceeding;

(b) There was no formal court order for consolidation of the Applicants; and

(c) The construction lien claims are not being addressed on a consolidated basis in these proceedings.

43. There was no evidence before the Motion Judge to support the findings set out above. On the contrary, the evidence was clear that:

(a) The Applicants collectively carried on business as builders and vendors of the Puccini Project;

(b) The Initial Order, and paragraph 9(c) in particular, on their face address the Applicants on consolidated and not individual basis;

(c) Other than a bald self serving allegation made by the Lien Claimants, there was no evidence before the motions judge to support the finding that prior to the commencement of the CCAA proceeding the Applicants did not carry on business on a consolidated basis;

(d) In the claims filed by the Lien Claimants against the Applicants, the Lien Claimants take the position that prior to the commencement of the CCAA proceeding, the Applicants carried on business as one consolidated entity;

(e) The CCAA proceeding has been administered on a consolidated basis and all receipts and disbursements of the Applicants were deposited and commingled in the Monitor's Trust Account;

(f) The only stakeholders with an economic interest in the sale proceeds from the Puccini Homes are the mortgagees and the lien claimants; and

(g) The relative priorities of the construction lien claims and the mortgagees are being addressed on a consolidated basis in an arbitration ordered in the CCAA proceeding.

The Motion Judge Erred in Finding that the Settlement Agreement does not meet the purpose of the CCAA

44. A CCAA supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period if such settlement is: (i) consistent with the spirit and purpose of the CCAA; and (ii) fair and reasonable.[25]

45. The CCAA is a flexible instrument and part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Settlement Agreement balances the interests of all of the Applicants stakeholders, including Tarion, the purchasers of Puccini Homes, Jinnah and the Lien Claimants and restores these parties to the positions that they expected to be in.

The Motion Judge Erred in Finding that the Settlement Agreement was not Fair and Reasonable

46. The findings of fact made by the Motions Judge do not support his conclusion that the Settlement Agreement is not fair and reasonable. In particular, at paragraphs 57 to 59 of the

[25] *Nortel Networks Corp., Re,* 2010 ONSC 1708 (Ont. S.C.J. – Com. List), Tab 5 of the Moving Parties BOA at para. 73.

Decision, the Motion Judge held as follows:

> 57. The second prong of the test for approval of the Settlement Agreement is demonstration that it is fair and reasonable in all the circumstances. As mentioned, the applicants say that the Settlement Agreement meets this requirement. They submit that implementation of the Settlement Agreement, in particular implementation of the A/A Agreement, will put the parties to the Agreement in the position that the applicants and Tarion intended them to be in. They also say that implementation will also put the Objecting Parties in the position that they expected to be in at the date of the Initial Order. The applicants argue that maintenance of the arrangements respecting entitlement to the Security, as they existed on the date of the Initial Order, would result in a windfall to the Objecting Parties and the other unsecured creditors of the applicants.
>
> 58. In this regard, Del Fatti himself states in the Del Fatti Affidavit that he accepted as true the statement of Jinnah, in his affidavit sworn December 11 2013 in the application for the Initial Order, that Puccini was registered with Tarion. He further states that he believed any security posted with Tarion was for benefit of Puccini.
>
> 59. I am not satisfied, however, that implementation of the Settlement Agreement would be fair and reasonable in the circumstances, notwithstanding the element of rectification and the expectation of the Trades as acknowledged in the Del Fatti Affidavit [Emphasis Added].

47. Courts in CCAA proceedings have held that it is appropriate to give effect to the mutual intentions of the parties, even if such ruling negatively impacts the estate's stakeholders. In the restructuring proceeding of *PSINet Ltd.* (the "**Debtor**"), PSINet Inc. the Debtor's parent company, brought a motion for permission to effect a registration of its recently discovered general security agreement (the "**GSA**"). Prior to the discovery of the GSA, the debtor operated under the belief that none of its creditors hold general security over its assets. This was communicated to the Debtor's service list which was also advised that the Debtor expects there will be a significant

recovery by its unsecured creditors.[26]

48. The motion was opposed by Royal Bank of Canada who argued that it would have taken a different approach in its participation in the Debtor's CCAA proceeding had it been aware of the GSA. In balancing the interests of all parties, Justice Farley allowed PSINet Inc. to re-register its GSA but required it to pay costs thrown away by the creditors as a result of their reliance on the statements made by the Debtor.[27]

49. Unlike the circumstances in PSINet, the Applicants' creditors were expressly advised that the Letters of Credit were posted for the benefit of Tarion. In these circumstances, it is fair and reasonable for the Court to approve the Settlement Agreement and grant Tarion access to the security that it bargained for.

The Proposed Appeal Will Not Unduly Hinder the Progress of the Action

50. The Appeal will not hinder the progress of the Applicants CCAA proceeding. The only outstanding issues in the CCAA proceeding is the resolution of the arbitration and distribution of funds in accordance with the priorities determined therein.

PART VI - ORDER REQUESTED

51. The Applicants seek an order granting leave to appeal from the Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2015.

Counsel for the Applicants

[26] *PSINet Ltd., Re.* [2002] O.J. No. 271, 2002 CarswellOnt 211 (Ont. S.C.J. – Com. List) ("***PSINet***"), Tab 6 of the Moving Parties BOA at paras. 1 and 14.
[27] *Ibid., PSINet* at paras. 5, 13 and 14.

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Maya Poliak
LSUC No. 54100A
Tel: (416) 218-1161
Fax: (416) 218-1844
maya@chaitons.com

Stephen Schwartz
LSUC No. 25980A
Tel: (416) 218-1132
Fax: (416) 218-1832
Stephen@chaitons.com

Lawyers for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 2002 CarswellOnt 1038 (C.A.)

2. *Re Stelco Inc.,* (2005) 75 O.R. (3d) 5 (C.A.)

3. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282

4. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

5. *Nortel Networks Corp., Re,* 2010 ONSC 1708 (Ont. S.C.J. – Com. List)

6. *PSINet Ltd., Re.* [2002] O.J. No. 271, 2002 CarswellOnt 211 (Ont. S.C.J. – Com. List)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36)

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC. ET AL.

Court File No. M45666

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE MOVING PARTIES

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Harvey Chaiton (21592F)
harvey@chaitons.com
Tel: (416) 218-1129
Stephen Schwartz (25980A)
Stephen@chaitons.com
Tel: (416) 218-1132

Tel: (416) 222-8888
Fax: (416) 222-8402

Lawyers for the Moving Parties