

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF
SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC.,
2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC.
AND 2147650 ONTARIO INC.

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STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO
INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.**

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FACTUM

OVERVIEW

1. The Applicants/Moving Parties under the guise of seeking authority of a settlement agreement with the Tarion Warranty Corporation ("Tarion"), are seeking to take an aggregate amount of \$1.24 million out of the administration of the debtor companies and transfer it to various third parties such that it would be outside the ability of the Creditors/Respondents in these proceedings to seek an equitable distribution of such monies.
2. The effect of the settlement agreement is significant. After Silver Streams Homes (Puccini) Inc. ("Puccini") built about 95 homes, registered as an HST declarant, processed millions of dollars in HST sales, entered into tens of contracts with the subtrades, transferred approximately 95 homes to their purchasers, it now seeks, in one swift step, to transfer, *nunc pro tunc*, approximately 95 Agreements of Purchase and Sale entered into by Puccini to another insolvent company, Silver Streams Homes Inc. ("Silver Stream").

3. There is no equitable or reasonable basis for the transfer of the Agreements of Purchase and Sale, other than to remove \$1.24 million which is now part of the Estate.
4. More importantly, the Moving Parties have admitted that the limitation period, with respect to any Tarion claims, has essentially expired for all but 10 homes.
5. Furthermore, in the evidence before the Court, there are total claims of \$127,000 with Tarion representing homes not built by any of the Applicant/Moving Party corporations, but, rather, by yet another company related to the principal of the Applicants; namely, 2148991 Ontario Inc.

Transcript of the Examination of Jack Greenberg held on May 22, 2015 ("Greenberg Transcript") pg. 34 - 35, Q. 126 - 128

6. 2148991 Ontario Inc. (the "Phase 4 Company") is not part of the CCAA Proceedings and ought not to benefit from the \$1.24 million. Rather, the \$1.24 million ought to be transferred to the CCAA Estate and administered in accordance with the priorities set forth by the Court.
7. There is no basis or reasonable position to believe that Tarion itself will be out-of-pocket in any fashion whatsoever. The principal of the Applicants and The Phase 4 Company, Imran Jinnah, has indicated that he provided a personal guarantee to Tarion. The Settlement Agreement is an attempt to use assets under the CCAA Estate to satisfy Mr. Jinnah's guarantees to Tarion.

BACKGROUND

8. The affairs of the Moving Party/Applicant corporations were carefully crafted by its lawyer, Jack Greenberg who was examined in respect of this motion on May 22, 2015.

9. Greenberg also represents a multitude of private lenders which have competing claims in the within CCAA insolvency proceeding.
10. Jack Greenberg admitted that he drafted the format of the Agreement of Purchase and Sale with respect to each of the 95 houses in issue. He specifically indicated that he was instructed to, and did specifically, identify the Puccini company as the vendor.

Greenberg Transcript, pg. 7 - 9, Q. 18-29

11. Jack Greenberg also confirmed that he provided a multitude of the mortgage commitments which are now subject to the competing claims in the CCAA proceedings. Each one of the private lenders' mortgages contained a condition which required that the builder provide evidence that it was properly registered with Tarion and that applicable security had been placed with Tarion as required.

Greenberg Transcript, pg. 11 - 14, Q. 39 - 55

12. As noted by the Applicants, the letters of credit and cash collateral were provided respectively by the Bank of Montreal and RBC. In none of the cases were the funds generated by any collateral which was owned by Silver Streams Homes Inc., the entity to which the 95 Agreements of Purchase and Sale are sought to be transferred.

13. Mr. Greenberg, counsel for the Applicants, admitted that ultimately, the manner in which the commitment letter worked was after the mortgages were paid off, the sales of the homes would turn into cash collaterals for the letters of credit.

Greenberg Transcript, pg. 29 - 30, Q. 105 - 107

14. Mr. Greenberg has closed almost 85 of the 95 home closings. The two year limitation is up for all of the homes other than the last ten or so homes.

Greenberg Transcript, pg. 35 - 36, Q. 131 - 136

15. Imran Jinnah confirmed that as the sale of the homes proceeded, the proceeds went to cash collateral for the lien claimants.

Jinnah Transcript Pg. 38 - 41, Q. 139 - 148

16. Mr. Greenberg also confirmed that the Tarion deposit claims were in relation to The Phase 4 Company, which is not part of the CCAA proceeding.

Greenberg Transcript, pg. 45 - 46, Q. 185 - 191 & Pg. 49 - 55, Q. 209 - 241

17. The lien claimants take the position that given the fact that none of the Tarion claims relate to any of the companies under CCAA protection, the Settlement Agreement is inappropriate and the court has no jurisdiction to approve it.

18. The claimants relate to The Phase 4 Company. The Phase 4 Company is not part of the proceedings before the court and there is no evidence as to what the status of the claims are in relation to this company.

19. As evidence of the fact that Tarion obviously has sufficient security without the \$1.24 million, Mr. Jinnah has indicated that Tarion has not made any demand for payment under Mr. Jinnah's personal guarantee for the \$127,000 paid out on behalf of claims for The Phase 3 Company.

Jinnah Transcript, pg. 58 - 59, Q. 212 - 214

20. Mr. Jinnah admits that all of the Agreements of Purchase and Sale were signed using the Puccini company.

Jinnah Transcript, pg. 65, Q. 227 - 229

21. Mr. Jinnah admits that all of the trades' contracts were with Puccini.

Jinnah Transcript, pg. 67 - 68, Q. 231 - 234

22. Mr. Jinnah was not even aware of the contents of the settlement agreement he is seeking to approve. When asked at the cross-examination as to why the settlement

agreement included an assignment and assumption of all of Puccini's rights in the Agreement of Purchase and Sale to Silver Streams Homes Inc., Mr. Jinnah could not respond.

Jinnah Transcript, pg. 71 - 73, Q. 242 - 248

23. Further, Mr. Jinnah admits that Silver Streams Homes Inc., the proposed assignee, is insolvent. Accordingly, one insolvent company, namely Puccini, is trying to assign all of its rights *nunc pro tunc* to 95 Agreements of Purchase and Sale to another insolvent company.

24. Mr. Jinnah admits that Silver Stream Homes Inc. does not plan to conduct any business or fix any defects covered by any of the homes.

Jinnah Transcript, pg. 73 - 74, Q. 249 - 255

25. Mr. Jinnah indicates that if the Settlement Agreement is not approved, he intends to fight the appeal or any charges in court. However, there is no evidence that there will be any detrimental impact on Tarion in the event that the settlement agreement is not approved.

Jinnah Transcript, pg. 82, Q. 274

26. Lastly, the suggestion that Puccini was used for administrative purposes is incorrect.

THE LAW

Rectification vs. Novation

27. The Creditors/Respondents, Argo Lumber Inc. and Newmar Window Manufacturing Inc., repeat and rely upon the submissions outlined in paragraphs 70-83 of the Factum of the Responding Parties, Medi Group Incorporated et al. filed by Klein & Associates.

Relative Prejudice to the Parties

28. The Creditors/Respondents, Argo Lumber Inc. and Newmar Window Manufacturing Inc., repeat and rely upon the submissions outlined in paragraphs 84-86 of the Factum of the Responding Parties, Medi Group Incorporated et al. filed by Klein & Associates.

Jurisdiction of the Court in CCAA Proceedings

29. In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation et al, the Court held as follows:

"A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In Century Services, Deschamps J. stated:

1. 65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., Annual Review of Insolvency Law 2007 (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

67 The initial grant of authority under the CCAA empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (CCAA, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the CCAA. Thus in s. 11 of the CCAA as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have

endorsed the broad reading of CCAA authority developed by the jurisprudence.
(underlining added)

206 This Court has a broad inherent jurisdiction to make orders as required to fill in gaps or lacunae not covered by specific provisions in the CCAA. As a superior court of general jurisdiction, the Superior Court of Justice has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters. See *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al.*, [1972] 2 O.R.280 (C.A.) at para. 9. See also *TCR Holding Corp. v. Ontario*, **2010 ONCA 233** at para. 26, *Beach v. Moffatt* (2005), **75 O.R. (3d) 383** (C.A.) at para. 8, **&&&&J.M. v. W.B. (2004), 71 O.R. (3d) 171 (C.A.)** at para. 43 and *McVan General Contracting Ltd. v. Arthur* (2002), **61 O.R. (3d) 240** (C.A.) at para. 56.

207 In *Century Services Inc. v. Canada (Attorney General)*, **2010 SCC 60** at paras. 57-61, it was recognized by the Supreme Court and stated by Justice Deschamps that the CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted, that the incremental exercise of judicial discretion with respect to the CCAA has been adapted and has evolved to meet contemporary business and social needs and that when large companies encounter difficulty and reorganizations become increasingly complex, CCAA courts have been called upon to innovate accordingly.

208 In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. **[FN19]** The costs have well exceeded \$1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction.

209 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), **74 O.R. (3d) 652** (C.A.) at para. 25, per Blair J.A., **&&&&Indalex Ltd. (Re) (2009), 55 C.B.R. (5&&&&th) 64 (Ont. S.C.)**, at para. 16 per Morawetz J. and my comments in *Nortel Networks Corp. (Re)* (2014), **121 O.R. (3d) 228** at para. 12. A *pro rata* allocation in this case goes partway towards such a result."

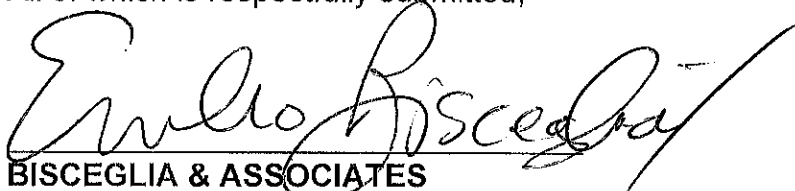
In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended 2015 CarswellONT 70772 ONSC 2987, para.205-209

ORDER REQUESTED

27. The Creditors/Respondents seek an Order:
- a. dismissing the approval of the settlement which allows for the assignment of the Puccini claims to other Silver Stream parties; and
 - b. costs of this motion on a substantial indemnity basis, or in the alternative on a partial indemnity basis.

June 16, 2015

All of which is respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read "Emilio Bisceglia".

BISCEGLIA & ASSOCIATES

Per: Emilio Bisceglia
Lawyers for Argo Lumber Inc.
and Newmar Window Manufacturing

A smaller, stylized handwritten signature in black ink, located below the main signature.

Schedule "A"
List of Authorities

1. *In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended* 2015 CarswellONT 70772 ONSC 2987, para.205-209

	ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) PROCEEDING COMMENCED AT TORONTO
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