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Relevant Considerations in Approving Assignments Under the *CCAA*

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Case Commented On: *Dundee Oil and Gas Limited (Re)*, [2018 ONSC 3678]

As part of approving a plan of compromise or arrangement under the *Companies' Creditors Arrangement Act*, [RSC 1985, c. C-36,] s.11.3 (*CCAA*), the Court on an "application by a debtor company and on notice to every party to an agreement and the monitor, … may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment." Section 11.3(3) provides the following guidance to the Court in exercising this power:

> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed assignment;
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.

Dundee Oil and Gas Ltd, operating under the protection of the *CCAA* in proceedings that began under the proposal provisions of the *Bankruptcy and Insolvency Act*, [RSC 1985 c. B-3] (*BIA*) (and as to which see *Dundee Oil and Gas Ltd (Re)*, [2018 ONSC 1070]) had applied for Court approval of an Asset Purchase Agreement and for approval of the assignment to the purchaser of various contracts related to the oil and gas assets. The Court was satisfied with all of the terms of the arrangement but initially concluded that there was inadequate information before the Court to allow it to conclude that the purchaser (the proposed assignee) "would be able to perform the obligations." This concern had been raised by a landowner with respect to remediation obligations associated with Dundee's oil and gas properties. Justice Dunphy raised the following concerns and gave the parties the opportunity to file additional affidavit evidence to address them (at para 8):

> a. The operation of a natural resource extraction business such as an oil and gas business is one that entails a degree of environmental risk that, in the event of insolvency of the lessee/contract holder may visit the remediation or well-capping costs upon the landowner, a factor that makes the capacity and ability of the proposed assignee to manage those responsibilities a matter of concern when assessing the suitability of the proposed assignee; and

b. The affidavit material at the motion provided no solid evidence of the expected financial stability or durability of the purchaser post-closing, a rather critical factor to assess in considering the suitability of a proposed assignee.

Having reviewed the additional material filed it is evident that Justice Dunphy still had concerns with respect to the exercise of the statutory power principally because (at para 24):

> The purchaser Lagasco is largely a shell company for the time being. It will own the business being purchased. The evidence before me indicates that substantially all of the purchase price is to be debt financed – partly through financing secured by the equipment to be purchased and partly through a credit facility. On day one there will be little to no equity in the purchaser and the significant leverage will have to be serviced entirely from cash flow.

Nevertheless, Justice Dunphy concluded that this was an appropriate case to approve the assignments. He gave the following reasons for doing so:

1. The *CCAA* and *BIA* regimes involve balancing competing interests (at para 29).
2. The wording of s.11.3(b) of the *CCAA* does not imply iron-clad guarantees: "It does not give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor" (at para 30).
3. Cash flow associated with the properties was "quite solid" (at para 33).
4. The forecast of reserves had been prepared according to NI 51.01 standards "which means at the very least that they have been prepared to reviewable standards of reasonableness. The forecasts, such as they are, justify the inference that there is a *reasonable basis* to conclude that the cash flow from the acquired assets will sustain operations and the acquisition debt. It will be a while before an equity cushion will be built though" (at para 34, emphasis in original).
5. "…[T]he purchaser has a plan to reduce G&A and operating costs to provide a further margin of safety and a level of institutional experience to make such a plan credible" (at para 35)
6. "…[T]he environmental risk is mitigated somewhat by the fact that Ontario's regulatory model operates on a 'pay as you play' basis requiring the building of reserves to handle capping costs as wells move past their expected lives. Dundee has had no trouble in the past funding capping expenses from operations and these expenses are accounted for in the cash flow forecasts used" (at para 36).
7. Notwithstanding the concerns raised no party had actually objected to the assignments (at para 37).
8. "…[C]ontract counterparties are not expected to *improve* their situation by reason of an assignment" and "The desire to ensure the assignee is a reasonably fit and proper one should not morph into an exercise in patching up contracts previously negotiated by requiring financial covenants and safeguards never before required" (at para 38, emphasis in original).

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