

Restructuring under the CCAA: Should A Debtor Always Be Allowed to Proceed?

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Cases Considered:

[*Budget Waste Inc., Re*](#), 2009 ABQB 752.

LoVecchio J.'s decision in *Budget Waste Inc., Re* ("*Budget Waste*") is a great example of the questions courts need to keep in mind as they are deciding on issues that arise in the context of restructuring proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA").

Budget Waste

Budget Waste Inc. ("BWI") operates a waste disposal business and employs a fleet of vehicles, the majority of which are leased from various lessors. BWI filed for and obtained protection under the CCAA on March 4, 2009. By the terms of the Initial Order, BWI undertook to effectively pay in full all post-petition trade creditors for post Initial Order services or have any unpaid amounts for post Initial Order services protected by a security interest.

The issue in *Budget Waste* was the priority of unpaid post Initial Order lease payments for vehicles leased but no longer used by BWI.

Between March 4, 2009 and the decision date, BWI and the Monitor appointed under the CCAA reviewed the company's operations. During that review, it became apparent to BWI that a number of its vehicle leases were uneconomic and related to redundant or unusable vehicles. As a result of this determination, BWI ceased using a number of the leased vehicles in its operations and, in the latter part of May 2009, segregated and isolated these vehicles in a storage facility.

BWI had not made any payments on the majority of the leases since March 4, 2009 and a number of the leases were in arrears at the time of the Initial Order. By Notice of Motion dated November 11, 2009 and heard on November 26, 2009, BWI sought permission from the Court to terminate certain of the leases and a declaration as to the priority, if any, of the unpaid lease payments which had accrued since the Initial Order.

The Court had to determine whether unpaid lease payments which accrued after the Initial Order had a different priority than unpaid lease payments which accrued prior to the Initial Order.

BWI argued that the lessors knew that BWI was not making payments on the leases that BWI was seeking to terminate and the lessors had failed to take action by asking the court to lift the stay so they could reclaim their vehicles. Accordingly, all unpaid leases should be treated as unsecured claims. The lessors argued that all accrued and unpaid lease payments since the date of the Initial Order should be treated as post-petition creditor claims and as such be entitled to full payment or otherwise protected. They reasoned that they should not bear financial responsibility for any unpaid lease payments because the unused vehicles were still in BWI's care and control until their leases were finally terminated by the Court. They maintained that their failure to apply to the Court to lift the stay following a CCAA order so as to permit them to reclaim their vehicles should not change their entitlements, since it is the company under CCAA protection that is in control of the process and knows which of its assets and equipment it is using.

The Court upheld the status of the post-petition creditors. It based its decision on who was in control of the process, which it found to be BWI. It was determined that BWI could have moved to terminate the contracts for the unused vehicles earlier but it refrained from doing so for several months. And the lessors should not have to bear the costs associated with BWI's indecision. It is for that reason that the burden of making a court application in these situations is on the company under CCAA protection. As LoVecchio J. maintained, “[t]he ‘price’ for the stay should be an obligation on the company to act” (at para. 33).

Application to *Budget Waste*

While LoVecchio J. did not directly articulate an overarching theory, it seems he was very much thinking about underlying policy concerns when he made his decision, and considering the purpose of restructuring proceedings. While there are certainly communitarian concerns in restructuring proceedings and we cannot deny the benefit a successful restructuring brings to the surrounding community and all the other stakeholders, at the commencement of the proceedings, we necessarily need to adopt a narrow focus. The focus at that time needs to be entirely on the debtor's ability to attempt to restructure and to repay its creditors, and not necessarily on the interests of the surrounding community.

When LoVecchio J. put the financial responsibility for the post-petition leases on the debtor company, removing that money from the pool of funds and placing an ongoing financial burden on it, his decision potentially affected the debtor company's ability to ultimately formulate a restructuring plan. He was urged by BWI to follow *Re Winnipeg Motor Express Inc.*, 2009 MBQB 204 (*Re Winnipeg*). There, the equipment lessors were entitled to some of their unpaid lease payments but damages were cut and they were only granted two and a half months of arrears. LoVecchio J. did not similarly choose a reasonable period of time to cut off the protected amounts owing to the lessors in *Budget Waste*, maintaining that the difference between this case and *Re Winnipeg* is the timing of the CCAA process. In *Re Winnipeg*, the company's plan of

arrangement was being approved, whereas in this case, BWI is merely developing its plan. It should be noted that at the time LoVecchio J. issued his decision, the plan of arrangement for BWI had been put to him and the money put aside for the leases had, in fact, not adversely affected the unsecured creditors. However, since there is a limited pool of resources, as money is put aside for post-petition leases or any creditor not falling within the pool of unsecured creditors, generally speaking, it usually means less money available for the unsecured creditors.

The attention to timing indicates that importance has been placed on the debtor company's ability to manage itself, to function within the confines of the proceedings and to start to formulate a plan. Companies face financial difficulties and end up in restructuring proceedings for any number of reasons. BWI could have landed in financial trouble for any number of reasons, including a downturn in the market, a temporary glitch in the industry or as a result of poor management. If management was the reason for BWI's financial trouble, be it entirely or in part, and added to that, once in restructuring proceedings, BWI's management did not terminate the leases when it determined it did not need the vehicles, then considerable flags arise immediately as to management's business decision-making capabilities. And if the flags are already present when BWI is merely developing its plan, its ability to go forward in the restructuring proceedings is already in question.

Although the principal purpose of commercial restructuring law is to seek to avoid liquidation, the confines we create need to be realistic. If management cannot make these determinations at the outset, how can the company be expected to formulate a plan, get its creditors on board, pull itself out of financial distress, once more come to operate as a financially viable entity, and refrain from ending up in the same financial predicament in several months? Always deciding in favour of the debtor company, with the goal of pushing the debtor company through at any cost, has significant potential to be harmful to the creditors. LoVecchio J. suggested that BWI propose the compromise of the post-petition payments as a term of the plan of arrangement, again showing the potential for greater concession later on in the process, once the debtor has shown progress in the restructuring proceedings.

Conclusion

The question as to whether a debtor company should be allowed to restructure under the CCAA is not extensively discussed in Canadian jurisprudence. But the issues that arise throughout the proceedings necessarily lead the courts to consider these questions.