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The Final Skirmish in the *Trillium* Class Action: Class Counsel's Charge With Respect to Fees and Disbursements Trumps GM's Prior Perfected Security Interest

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One of the few Ontario class actions to proceed through trial to judgment and subsequent appeals, the *Trillium Motor World Ltd.* ("Trillium") *v. General Motors of Canada Company* ("GM") *and Cassels Brock & Blackwell LLP* ("CBB") case concerning the wind-down of GM dealerships during the 2009 financial crisis has spanned nearly a decade. The final skirmish in this case involved a priority dispute between class counsel and GM in which GM sought to claim approximately $3 million in costs awards that CBB had been ordered to pay to Trillium (the representative plaintiff) at trial and on CBB's unsuccessful appeal ("Costs Award'). In this decision, the trial judge, Justice McEwen, found that class counsel's interest in the Costs Award had priority over GM's interest as secured creditor of Trillium and directed that the Costs Award be applied to class counsel's fees and disbursements as per the court's prior approval of class counsel's retainer agreement.

Background

In a motion originally returnable in July 2018, class counsel sought court approval of their retainer agreement and payment of their fees and disbursements under section 32(2) of the *Class Proceedings Act, 1992*[1] ("CPA"). The retainer agreement provided for the assignment to class counsel (as part of class counsel's contingent fee) of costs awards made in favour of Trillium in the action, subject to the approval of the court. Section 32(3) of the CPA states that amounts owing under an enforceable agreement (i.e. an agreement respecting fees and disbursements between class counsel and the representative plaintiff that is approved by the court under section 32(2) of the CPA) "…are a first charge on any settlement funds or monetary award."

Prior to the return of class counsel's fee and retainer approval motion, GM brought an application for orders: (i) adjudging Trillium bankrupt; (ii) that the Costs Award be deemed the property of Trillium; and (iii) declaring that GM as secured creditor of Trillium had a first-ranking security interest over the Costs Award, and specifically ranked in priority to class counsel. Having succeeded in defending the case at trial and on appeal, GM had received substantial costs awards of its own and, as such, was an unsecured creditor of Trillium. GM was not, however, a secured creditor of Trillium until it took steps to acquire, at or around the same time it brought its application in July 2018, a $2.7 million secured debt that the Business Development Bank of Canada ("BDC") held with respect to Trillium. As a result of GM's acquisition of the secured debt, Trillium owed $2.7 million to GM on a secured basis. Having become a secured creditor, GM then sought to put Trillium into bankruptcy and to collect on the Costs Award in priority to class counsel.

Class counsel's retainer and fee approval motion was ultimately heard together with GM's application in September 2018. GM's position was supported by submissions from FTI Consulting Canada Inc. ("FTI") who GM had proposed be appointed as Trillium's trustee in bankruptcy. In an Endorsement dated December 5, 2018, [2] Justice McEwen approved class counsel's retainer agreement

and the assignment of the Costs Award from Trillium to class counsel, without prejudice to GM's outstanding application which was to be the subject of a subsequent decision.

Decisions on Other Issues Raised on the Application

Before determining the priority contest between GM (as secured creditor) and class counsel (as party to the court-approved retainer agreement and beneficiary of the CPA first charge), Justice McEwen first addressed four other issues.

First,[3] the court adjudged Trillium bankrupt. Given that Trillium had ceased to meet its liabilities generally as they became due, an act of bankruptcy had occurred under section 42(1)(j) of the *Bankruptcy and Insolvency Act*[4] ("BIA").

Second,[5] Justice McEwen declined to appoint FTI as Trillium's trustee in bankruptcy in view of FTI's demonstrated partiality in favour of GM. Citing the rule of trustee impartiality in section 39 of the *Bankruptcy and Insolvency General Rules*[6], Justice McEwen held that:[7]

[…] FTI positioned itself on the side of GM as more an advocate than an administrator. FTI displayed further partiality in favour of GM when it suggested at the hearing that the choice of Trillium as a representative plaintiff was an improper tactic intended to frustrate possible creditors. I am of the view that in the circumstances it would be inappropriate to appoint FTI as Trillium's trustee in bankruptcy as FTI has aligned itself with GM. There is, at least, the appearance of a lack of independence on the part of FTI prior to any potential appointment.

Third,[8] Justice McEwen noted that GM had initially raised, and the parties had briefed, a constitutional paramountcy issue between the CPA and the BIA. However, GM ultimately conceded, in its reply material and at the hearing of the application itself, that there was no issue of paramountcy in this case. Justice McEwen confirmed, in brief reasons, that he would not have found an operative conflict between the CPA and the BIA in any event.

Fourth,[9] the court rejected class counsel's submission that the Costs Award did not belong to the representative plaintiff itself and, therefore, could not form part of Trillium's estate. While class counsel pointed to the potential unfairness inherent in permitting a representative plaintiff (and not the class as a whole) to enjoy a windfall in the form of a large costs award, Justice McEwen held that such unfairness did not arise on the facts of this case where the approved contingency fee retainer agreement expressly assigned the Costs Award to class counsel.[10]

The Determination of the Priority Contest [11]

Justice McEwen framed the principal issue on GM's application as a contest between the security granted to GM as secured creditor under the *Personal Property Security Act*[12] ("PPSA"), and the security granted to class counsel under the CPA. As noted by Justice McEwen,[13] there are no cases directly on point.

For its part, GM, supported in its submissions by FTI, maintained that the PPSA's "first in time" rules applied to the CPA first charge and subordinated that charge to GM's prior perfected secured interest. This submission hinged on the core assertion that the PPSA applied to the CPA first charge *at all*, and that the "non-application" exception prescribed in section 4(1)(a) of the PPSA did not apply because the CPA first charge is not "a lien given by statute or rule of law" in the relevant sense of section 4(1)(a).

Justice McEwen rejected GM's core assertion and, in so doing, determined the priority contest in class counsel's favour. He stated:[14]

In my view, these arguments fail by virtue of the fact that the charge that is created by s. 32(3) of the *CPA* should be treated as

effectively a solicitor's lien which is an exception in s. 4(1)(a) of the *PPSA*. As a result, the *PPSA* does not apply and s. 20(1)(a)(ii) never takes effect to give the perfected security interest priority over seizure under a charging order.

The critical finding in this analysis is that the CPA first charge is "effectively a solicitor's lien". Justice McEwen drew support for this finding from multiple sources, including *dicta* in an earlier Court of Appeal decision in which that Court, in a different factual context that did not concern a priority contest with the PPSA, defined the CPA first charge as "essentially a solicitor's lien".[15]

Justice McEwen also had regard to a series of Ontario court decisions, outside the class actions context, in which solicitors' charging orders were found to have priority over the claims of other secured creditors, including creditors with perfected PPSA security.[16] Justice McEwen reasoned by analogy to these cases that the CPA first charge is properly characterized as a lien to which the PPSA does not apply.

Finally, Justice McEwen noted[17] that his equating the CPA first charge to a solicitor's lien was consistent with and reflective of the broad, purposeful approach to the interpretation of the CPA most recently articulated by the Court of Appeal in *Jeffery v. London Life Insurance Co.*:[18]

[...] There are residual equitable concerns – namely that solicitors' work should be protected in order to ensure that they continue to represent those who cannot necessarily afford a cash retainer, this ensuring access to justice [...]. At para. 44 of *Jeffery*, [...] the Court of Appeal recently indicated the importance of preserving the *CPA*'s access to justice purpose: "[...] s. 32(3) of the *CPA* should be interpreted generously , with a view to the overarching purposes of the *CPA*.

In the result, and as summarised in paragraph 75 of his Reasons, Justice McEwen found that: (i) the PPSA has no application to the first charge obtained under the CPA; (ii) the language of the CPA establishes a super-priority, and so the CPA first charge should take priority over the perfected interest under the PPSA; and (iii) following the referenced case law, class counsel should rank as a secured creditor with an inchoate interest arising at the moment the costs award becomes available through class counsel's work.

Implications

The decision is a significant one for the class actions bar because it affirms that the rationale underlying the CPA first charge is substantially the same rationale that underlies solicitors' liens at common law, i.e. that the work of class counsel, and the property recovered or preserved for the class' benefit through that work, is to be protected in view of access to justice objectives. Permitting a secured creditor to swoop in after the fact and scoop the proceeds arising from class counsel's efforts would bear on counsel's willingness to take on some cases, thereby impacting access to justice and undermining the purposes at which the CPA first charge is aimed.

[1] S.O. 1992, c. 6.

[2] 2018 ONSC 6818.

[3] Reasons of Justice McEwen, (2019), 144 O.R. (3d) 183 (S.C.J.) ("Reasons") at paras. 21-25.

[4] R.S.C. 1985, c. B-3.

[5] Reasons at paras. 27-32.

[6] C.R.C., c. 368. Reference was also made to the decision of Farley J. in *Confederation Treasury Services Ltd. (Re)*, [1995] O.J. No. 3993, 37 C.B.R. (3d) 237 (Gen. Div.).

[7] Reasons at para. 32.

[8] Reasons at paras. 11-17.

[9] Reasons at paras. 33-40.

[10] In addition, Justice McEwen observed, with reference to section 31(2) of the CPA (which expressly provides that class members other than the representative plaintiff are not liable for costs), that "…where class members have no liability for costs it is fairer to conclude that they have no interest in costs received." (Reasons at para. 37).

[11] Reasons at paras. 41-75.

[12] R.S.O. 1990, c. P. 10.

[13] Reasons at para. 44.

[14] Reasons at para. 50. See also, paras. 63 and 75.

[15] *Hislop v. Canada (Attorney General)* (2009), 95 O.R. (3d) 81 (C.A.), at para. 32.

[16] (1) *Thomas Gold Pettingill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182; (2) *Tots and Teens Sault Ste. Marie Ltd. (Re)*, (1975), 11 O.R. (2d) 103 (Bank. Ct.); (3) *Dalcor Inc. v. Unimac Group Ltd.*, (2017), 136 O.R. (3d) 585 (S.C.J.); (4) *Weenen v. Biadi*, (2018), 141 O.R. (3d) 276 (C.A.).

[17] Reasons at paras. 58 and 71.

[18] 2018 ONCA 716 at para. 44.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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