CITATION: Victorian Order of Nurses for Canada (Re), 2016 ONSC 5540
COURT FILE NO.: CV-15-11192-00CL
DATE: 20160906

SUPERIOR COURT OF JUSTICE – ONTARIO

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

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C-43 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA - EASTERN REGION, AND VICTORIAN ORDER OF NURSES FOR CANADA - WESTERN REGION

BEFORE: Penny J.

COUNSEL: *Evan Cobb* for the Applicants

Clifton Prophet and Frank Lamie for the Ontario Nurses Association

Darrell Brown for the United Nurses of Alberta

Jessica Spence and Deborah McPhail for the Superintendent of Financial Services

James Harnum for OPSEU et al.

Mark Laugesen for Collins Barrow Toronto Limited (Monitor)

Kenneth Kraft for the Board of Directors of the Applicants

Sam Rappos for IBM

HEARD: November 25, 2015

ENDORSEMENT

The Motion

[1] This is a motion by the Ontario Nurses Association seeking an order under s. 11 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as am., directing VON Canada to restructure its pension plan. The requested order would initiate a process by which all of the assets and liabilities of the pension plan attributable to VON Ontario's present and former employees would be transferred out of the VON Canada pension plan into a new pension plan for employees of VON Ontario.

[2] The motion is opposed by the applicants and essentially all of the other participants in the hearing of this matter.

Background

[3] The Victorian Order of Nurses for Canada and the other entities in the VON group have, for over 100 years, provided home and community care services which address the healthcare needs of Canadians in various locations across the country on a not-for-profit basis.

[4] The VON group delivered its programs through four regional entities:

(1) VON – Eastern Region

(2) VON – Western Region

(3) VON – Ontario and

(4) VON – Nova Scotia.

VON Canada does not itself provide direct patient service but functions as the "head office" infrastructure supporting the operations of the regional entities.

[5] The VON group suffered liquidity problems. Liabilities consistently exceeded assets by a significant margin; net losses from 2012 to 2015 totalled over $13 million. Cash flows from operations from 2012 to 2015 were similarly negative in the amount of over $8 million. In particular, it was determined that VON East and VON West were not financially viable.

[6] As a result of these circumstances, VON Canada, VON East and VON West sought protection from their creditors under the CCAA. It is important to note, for the proper analysis of the issue before the Court, that VON Ontario is not an applicant in these proceedings. There is no evidence VON Ontario is insolvent and there is no intention to effect any restructuring with respect to VON Ontario.

[7] The goal of the contemplated restructuring under the CCAA is to modify the scope of the VON group's operations and focus on its core business and regions. This involves winding down the non-viable operations of VON East and VON West and restructuring and downsizing the management services provided by VON Canada in order to have a more efficient and cost-effective operating structure.

[8] VON Canada has a multi-jurisdictional pension plan with members drawn from all five corporate entities. The evidence is that the pension plan has a sufficiency of assets over liabilities on a going concern basis but a solvency deficit on a wind-up basis. The wind-up deficit is about $20 million, or 6% of the value of all pension plan assets.

[9] The present problem arises because VON East and VON West are not financially viable. VON East and VON West have been shut down and all of their employees have been terminated. As a result of this shut down, neither VON East nor VON West, nor their former employees, are continuing to contribute to the pension plan.

[10] The concern is that unless steps are taken to segregate the VON East and VON West members, VON Ontario (and possibly VON Nova Scotia and VON Canada) could, in the future, be required to subsidize VON East's and VON West members' participation in the pension plan going forward, particularly with respect to VON East and West's share of any pension plan deficits.

Origins of the Present Motion

[11] Before the ONA brought its present motion, the applicants moved for an order authorizing a pension plan restructuring which would have involved a partial windup of the pension plan. The objective was, through partial windup, to segregate all of the assets and liabilities of VON East and VON West from the pension plan. This proposal met with significant opposition. The United Nurses of Alberta, which represents some affected pension plan members who are former employees of VON West, opposed the partial wind-up of the pension plan (as it does the transfer of VON Ontario assets out of the pension plan now proposed by the ONA). Among other things, there is a significant potential dispute about whether the employers of the participating members (that is, all five VON entities) are jointly and severally liable to fund deficits in the pension plan.

[12] In addition, the Superintendent of Financial Institutions took the position that the court has no jurisdiction to order a partial windup regarding pension plan members in British Columbia, Alberta and Prince Edward Island. The Superintendent further took the position that while there may be jurisdiction to order a partial windup regarding members in Saskatchewan, Manitoba, New Brunswick and Newfoundland, full funding of the pension plan would be a requirement for a partial windup in all of these jurisdictions except Saskatchewan.

[13] After considering the responses to the applicants' pension motion, and in particular the responses of the Financial Services Commission of Ontario on behalf of itself and other provincial pension regulators with jurisdiction in this case, VON Canada's board decided to withdraw VON Canada's motion and abandon its proposed restructuring of the pension plan.

[14] VON Canada set out in its factum three reasons why it decided to withdraw its pension plan restructuring motion:

(1) A goal of VON Canada's pension motion was to insulate VON Ontario, VON Nova Scotia and VON Canada from any liability for the portions of the windup deficit attributable to VON East and VON West. It was clear from the responses to VON Canada's pension motion that certain of the provincial regulators strongly opposed any request by VON Canada for an order declaring that there is no joint and several liability of VON Ontario, VON Nova Scotia and VON Canada for the entire windup deficit in the pension plan. VON Canada believed that this issue would become the subject of extensive litigation.

(2) These CCAA proceedings have been ongoing for approximately nine months. The VON pension motion was intended to allow for an expedited procedure to approve the restructuring of the pension plan, provide VON Canada with information necessary to determine the claims of creditors that might arise from the proposed VON pension motion and allow VON Canada to move forward with a plan of

compromise and arrangement and complete these proceedings after the administrative steps necessary to complete the pension plan restructuring had been put in motion. The degree and type of opposition to the VON pension motion suggested that even if VON Canada was successful on its motion, the matter would not proceed on an expedited basis and would significantly delay the restructuring process in a manner that would be prejudicial to VON Canada and the continuing operations of its remaining operating entities.

(3) VON Canada's current financial resources are not sufficient to fund an extended CCAA process involving contentious pension issues which will require adjudication by the courts, including likely appeals. Further, any use of finances and resources to fund litigation would reduce recoveries available to creditors.

[15] In summary, VON Canada initiated its pension restructuring proposal because it was considered to be the optimal approach to the pension matters if VON Canada's proposed resolution could be implemented quickly, in a cost-effective manner with minimal opposition, and with minimal disruption and claims against the continuing VON entities. When it became clear this would not be possible, VON Canada withdrew its motion.

The ONA Proposal

[16] The ONA represents 292 active employees of VON Ontario, 112 of which are active members of the pension plan. The pension plan has approximately 5,900 members overall and approximately 2,900 active members. Approximately 3,300 of the pension plan members are current or former employees of VON Ontario.

[17] The ONA seeks an order: a) requiring VON Canada to take steps under s. 81 of *the Pension Benefits Act (Ontario)*, R.S.O. 1990, c. P.8, to restructure the pension plan by transferring out of the VON pension plan to a new pension plan, all assets and liabilities associated with the employees of VON Canada, VON Ontario and VON Nova Scotia; and b) declaring that VON Ontario is not jointly and severally liable to fund any solvency deficiency or funding shortfall that has or may arise as a result of VON East, VON West, VON Canada or VON Nova Scotia failing to meet their contribution obligations under the VON Canada pension plan.

[18] The ONA is concerned, as a result of the shutdown of VON East and VON West and the uncertainty surrounding whether VON Canada will be able to implement a compromise or arrangement with its creditors, about the possibility that the pension entitlements of ONA members who are members of the VON Canada pension plan (by virtue of past or current employment with VON Ontario) may be adversely affected by the outcome of these CCAA proceedings.

[19] The ONA argues that its proposal does not suffer from the technical limitations of the partial windup proposal previously made by VON Canada. In particular, under the applicable statutes, an administrator of a defined benefit pension plan may transfer assets to a successor plan subject to certain conditions being met. In Ontario, the only requirement with respect to the transfer of assets and liabilities is that the administrator must obtain the consent of the Superintendent prior to transfer. The Superintendent must approve the transfer if the following criteria are satisfied:

(a) the administrators of the two pension plans have agreed upon the manner of determining the amount of assets to be transferred;

(b) if the pension benefits under the successor plan are not the same as the pension benefits under the original plan, the commuted value of the benefits provided for the transferred members under the successor plan must be not less than the commuted value of the benefits provided under the original plan; and

(c) if the original pension plan as a surplus as of the effective date of the transfer, the amount of assets to be transferred must include a portion of the surplus determined in accordance with the regulations.

[20] The ONA maintains that these requirements are manifestly met or could be met by virtue of the order of the court.

[21] The ONA argues that multiple participating employers under the VON Canada pension plan are not jointly and severally liable for pension liabilities. This is based on an interpretation of the language of both the legislation and the pension plan itself. The applicable sections of the PBA define an employer to mean the "organization from which the member receives remuneration to which the pension plan is related". The VON entities were each separate legal entities. Each VON entity employed its own employees. Thus, the "organization from which the member received remuneration to which the pension plan relate" was, in the case of every VON employee, only the specific VON entity by which the employee was actually employed.

[22] The ONA relies, in particular, on an earlier decision of the Financial Services Tribunal of Ontario made during a prior restructuring of the VON pension plan in 2009. In that decision, the Tribunal found that VON Canada had not and was not obliged to remunerate employees of other VON entities. As a result, VON Canada was not responsible for any deficiency with respect to pension plan members employed by other VON entities. A "spread the pain approach" was not appropriate and plan members were not entitled to count on the security of all participating employers in respect of pension plan liabilities or deficits.

[23] The ONA says that the purposes of the CCAA will be fulfilled if an order is made insulating the members of the solvent VON employers from any adverse effects of the financial restructuring on the VON pension plan or its ability to remain in a solvent position going forward.

Analysis

[24] I am prepared to accept, for the purposes of this motion, that the ONA, by virtue of representing some members of the VON pension plan has an "interest" in the future administration of that plan. I say this without deciding whether the ONA is an interested person in this proceeding "in respect of a debtor company". VON Ontario is not a debtor company, but it is the only VON entity in which the ONA has any material interest. Based on the ONA's own argument, the only entity responsible for any deficit in the pension plan attributable to VON Ontario, is VON Ontario.

[25] In any event, the nature of the ONA interest, whatever it is, must be put into perspective. VON Ontario is not an applicant. VON Ontario is not even a party to these proceedings. There is

no contemplation of a VON Ontario insolvency or restructuring. VON Ontario is 100% controlled by VON Canada. Indeed, the boards of directors of VON Canada and VON Ontario are identical.

[26] The ONA represents less than 5% of the aggregate membership of the VON pension plan and only about a third of these ONA-affiliated members of the pension plan are active pension plan members.

[27] The contingent nature of the problem the ONA seeks to address must also be acknowledged. The VON pension plan is overfunded on a going concern basis. This is important because, as things currently stand, there is no contemplation of a wind up of the pension plan in whole or in part. Further, the solvency deficit on a wind up basis is only 6%. An increase in discount rate of only half a percent would eliminate the windup deficit. The pension plan is, in fact, reasonably well funded.

[28] Of additional significance is that the order sought by the ONA would only begin, not conclude, a process for restructuring the pension plan. Applications would still have to be made to pension regulators in at least two jurisdictions. While I agree with counsel for the ONA that the ONA proposal, as a matter of law, is not frivolous (in the sense that it is "doomed to fail"), it must be acknowledged that the assent of the regulators to such a proposal is not a foregone conclusion. The necessary applications would, as well, themselves be subject to unknown litigation and other risks and contingencies, given the clear dispute that exists between various parties over whether there is joint and several liability for funding pension plan obligations.

[29] I also pause to note that the first precondition to the Superintendent's consent to a transfer of assets under the PBA is that the administrators of both pension plans must have agreed upon the manner of determining the assets to be transferred. The board of directors of VON Canada and VON Ontario (and VON Nova Scotia) are identical. The VON Canada board is opposed to the ONA proposal. It is, therefore, a reasonable inference that the board of directors of VON Ontario (and VON Nova Scotia) is also opposed to the ONA proposal. Assuming the court has the jurisdiction to order a CCAA applicant to initiate a specified pension plan restructuring procedure, it is a different question whether the court could order the boards of an old and new pension plan administrator to "agree upon the manner of determining the amount of the assets being transferred".

[30] Again, while I am confident that unreasonable resistance by a pension plan administrator to commonsense solutions would not, in the end, be countenanced, court intervention could only occur in the context of a properly framed, and joined, litigious dispute over how the transfers should take place.

[31] All the issues outlined above merely provide context for the essential question: should the proposal of a party with a limited, and undeniably self-interested, stake take precedence over the considered business judgment of the applicant, acting in conjunction with the court-appointed Monitor, creditors and other stakeholders?

[32] The ONA accepts that the discretionary power to make an order under s. 11 of the CCAA must be exercised in a manner that advances the policy objectives of the CCAA by usefully

furthering the CCAA's remedial purpose – avoiding the social and economic losses which result from liquidation of an insolvent company.

[33] I am unable to agree, however, that the ONA proposal advances those policy objectives. In my view, implementation of the ONA proposal is more likely to invite than to avoid liquidation. The ONA proposal is a naked act of self-interest for certain members of the VON pension plan. It has been advanced in the hope of avoiding a future contingency - and it is clearly only a contingency - whereby VON Ontario and or its members might someday have to shoulder some of a solvency deficiency, part of which may be attributable to former employees of the now discontinued VON East and West.

[34] When VON Canada withdrew its motion to restructure the pension plan on the basis of a partial windup, it did so because it was concerned that the pension plan restructuring proposal might materially impair its ongoing restructuring opportunities. Among other things, VON Canada simply lacks cash resources to engage in protracted litigation over this issue. The considered judgment of the board of VON Canada (which, as noted, is identical to the board of VON Ontario and VON Nova Scotia) is that the next best option is to maintain the status quo of the pension plan and complete a going concern restructuring of VON Canada.

[35] By such means, VON Canada hopes to preserve the business, preserve the pension plan and avoid a pension plan windup. It is, on the evidence, by no means a forlorn hope. This approach, in my view, is entirely within the policy objectives of the CCAA as articulated by the Supreme Court of Canada in *Century Services v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para 70.

[36] For the same reason the VON Canada board dropped its own pension restructuring proposal, the adoption of ONA's "transfer restructuring" is virtually certain to trigger a lengthy, litigious process, which will prejudice VON Canada's going concern restructuring efforts.

[37] I also agree with VON Canada that the ONA proposal represents an improper attempt to compel VON Canada to implement a material, controversial commercial step in a circumstance where the considered judgment of the VON Canada board is not to take that step.

[38] The business judgment rule recognizes that many decisions made in the course of business affairs, although they turn out to be wrong or unsuccessful, were reasonable and defensible at the time and under the circumstances in which they were made.

[39] Courts are ill-suited to exercise and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision-making, *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, at para. 67.

[40] While the court will not defer to a decision that is found to be wholly unreasonable, it will respect a business decision made (i) independently and without a conflict of interest, (ii) in good faith, (iii) on a reasonably informed basis, (iv) based on information available at the time, and (v) where the decision falls within a reasonable range of options available at the time.

[41] The business judgment rule applies in the context of CCAA proceedings. Courts supervising a debtor company's attempts to affect a going concern restructuring are generally very

hesitant to second-guess the business judgment of the incumbent board and management, *Stelco Inc. (Re)* (2015), 75 O.R. (3d) 5. The discretion afforded by s. 11 of the CCAA does not permit the court simply to direct the commercial steps a debtor company must take and to impose the court's business judgment in replacement for that of the board of the debtor company, *Re Stelco*, supra, para. 44, and see *Crystallex International Corp. (Re)*, [2012] ONSC 2125 at para. 112.

[42] In this case, VON Canada's board, with the assistance of competent professional advisors, carefully considered whether to proceed to restructure the VON pension plan and decided not to do so. There is no suggestion that the board had a conflict of interest or acted negligently or in bad faith. The ONA transfer proposal is, in substance, analogous to the VON Canada partial windup proposal, subject to many of the same litigation risks and pitfalls. The board's decision not to pursue pension plan restructuring, in my view, falls within a range of reasonable alternatives clearly available to the VON Canada board.

[43] I conclude, therefore, that the ONA motion is, in substance, an attempt to invoke the discretion of the court under s. 11 of the CCAA to affect a result which is:

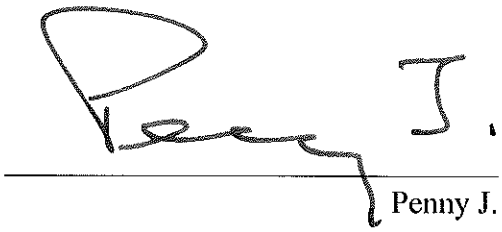
(a) not consistent with the policy objectives of the CCAA, i.e., will not foster going concern restructuring or tend to avoid the economic and social cost of liquidation; and

(b) contrary to the business judgment rule, as the VON Canada board has already given careful consideration to the pension plan restructuring option and rejected it.

[44] I will also add, because the matter was argued, that I am satisfied that the declaration sought by the ONA, which concerns potential future liabilities of VON Ontario for pension plan deficits, is premature. Liability to contribute to a deficit on windup of the pension plan is a question of mixed fact and law. There is no current contemplation of a windup of the pension plan. The facts upon which the ONA declaration would have to rest are, therefore, purely speculative at this time. It is a long standing principle in Ontario that courts should not grant an order on the basis of an assumed set of facts to resolve future matters, *Re 296616 Ontario Ltd. v. Richmond Hill (Town)* (1977), 14 O.R. (2d) 787 at 790. Further, courts should refrain from making declaratory orders where the dispute is hypothetical or abstract and may never arise, *B2B Bank v. Batson*, 2014 ONSC 6105 at para. 13.

Conclusion

[45] For all of the foregoing reasons, the ONA motion for a "transfer restructuring" of the VON pension plan and for a declaration as to future contribution obligations is dismissed.



Penny J.

Date: September 6, 2016