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CREDITORS SUSPECTED OF WISHING TO ELIMINATE A COMPETITOR: THE COURT REFUSES TO ANNUL THEIR VOTES AGAINST A PLAN OF ARRANGEMENT

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ON MAY 14, 2012, THE HONOURABLE NORMAND GOSSELIN, J.S.C., RULED ON AN AMENDED MOTION SEEKING THE SANCTION OF A PLAN OF ARRANGEMENT CONCERNING A DEBTOR, NORGATE MÉTAL INC. ("NORGATE").[1] THE JUDGMENT IS SPECIAL IN THAT NORGATE ASKED THE COURT TO ANNUL SOME OF THE VOTES THAT HAD BEEN CAST AGAINST THE PLAN OF ARRANGEMENT. NORGATE SUBMITTED THAT THE ONLY REASON WHY THE CREDITORS WHO CAST THOSE VOTES HAD VOTED AGAINST THE PLAN WAS THAT THEY WISHED TO ELIMINATE A COMPETITOR FROM THEIR INDUSTRY.

THE CONTEXT

Norgate operates in the construction industry and filed for protection under the *Companies' Creditors Arrangement Act* (the "CCAA") in November 2011. In February 2012, Norgate filed its plan of arrangement and the meeting of the creditors was called for March 22, 2012. The plan of arrangement provided for division of the unsecured creditors into two classes, that is the protected creditors and the unprotected creditors. The protected creditors were likely to be paid 100% of the amount of their claims while the unprotected creditors could only hope to recover about 7%.

THE MEETING OF CREDITORS

At the beginning of the meeting on March 22, 2012, certain protected creditors expressed their intention to vote against the arrangement, even though the plan had been amended to preserve their rights against the surety companies and clients. Faced with this prospect, the monitor adjourned the meeting to a later date. Indeed, Norgate found itself in a situation where the plan of arrangement was at risk of being defeated by some creditors likely to be paid 100% of their proven claims. In addition, the plan had been approved by a large majority of the unprotected creditors.

Norgate filed a re-amended plan of arrangement that grouped the protected and unprotected creditors together in one class. However, when the creditors' meeting resumed on April 13, 2012, a minority of the creditors, who nevertheless held about 48% of the total value of the claims, voted against Norgate's plan of arrangement, which caused it to be defeated because section 6 of the CCAA requires approval by a majority in number representing two thirds in value of the creditors. It was in that context that Norgate requested that the votes of the 12 creditors be annulled and, consequently, that its plan of arrangement be sanctioned.

In support of its motion, Norgate claimed that nine creditors holding provable claims totalling more than $1.2 million had asked the monitor to replace their votes in favour of the plan of arrangement (that they had cast in writing before March 22nd) by votes against it. In particular, one creditor had changed his vote two minutes before the beginning of the meeting. In addition,

[1] 2012 QCCS 2163.

Norgate claimed that the communications that it had had with certain creditors had given it valid reasons to believe that certain competitors had incited the other creditors to vote against the plan, either by offering them money, or by intimating to them that they would do business with them.

INAPPROPRIATE EXERCISE OF VOTING RIGHTS?

Justice Gosselin began his analysis by examining the *Laserworks*[2] and *Triage TRIM Ltée*[3] cases supporting the principle that the provisions of the *Bankruptcy and Insolvency Act* cannot be used to impede a plan of arrangement in order to eliminate a competitor. The Court agreed that these same principles apply by virtue of the CCAA and that a competitor who intervenes in the process for the sole purpose of eliminating the debtor is using the law for improper purposes. On the other hand, in those two cases, the competitors had bought the claims with the specific aim of exercising the voting rights attached to them. The Court was of the opinion that those two cases had to be distinguished insofar as, in the Norgate case, the competitors did not intervene directly in the vote by buying certain claims to subsequently exercise the voting rights attached to them.

Justice Gosselin concluded that Norgate failed in its attempt to prove by presumptions of fact that the creditors' U-turn was attributable to the intervention of two competitors who wished to cause the plan of arrangement to fail. Only two witnesses stated that they had received calls from a competitor of Norgate, which did not enable the Court to conclude that there had been similar interventions with respect to the other creditors. Justice Gosselin was of the opinion that even if one could suspect an intervention on the part of a competitor, the evidence did not allow one to establish the probability of such an intervention regarding the nine creditors concerned. Also, Norgate did not succeed in proving that the intervention had a decisive effect on those creditors' votes.

[2] *In Re Laserworks Computer Services Inc. and 3004876 Nova Scotia Limited*, [1998] N.S.J. no. 60 and 6 C.B.R. (4th) 69.

[3] *In Re Triage TRIM Ltée and Benoit Girard Métal Inc.*, J.E. 2003-1361 (C.S.).

CONCLUSION

This decision is a good illustration of the difference between theory and practice. Norgate was convinced that the sudden and unexplained change in the voting by the creditors to whom it had promised payment in full could only be motivated by harmful intentions toward it. However, proving something like that to the court is sometimes a whole other matter!

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