CITATION: Essar Steel Algoma Inc. et al Re, 2017 ONSC 3031
COURT FILE NO.: CV-15-11169-00CL
DATE: 20170517

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR STEEL ALGOMA INC. USA

BEFORE: Newbould J.

COUNSEL: *Steven L. Graff, Ian Aversa and Jeremy Nemers*, for the City of Sault Ste. Marie

Ashley Taylor and Sanja Sopic, for the Applicants

Clifton Prophet and Nicholas Kluge, for the Monitor

L. Joseph Latham, for the Ad Hoc Committee of Essar Algoma Noteholders

John MacDonald, for the Term and DIP Lenders

Max Starnino, for USW and its Local 2724

Karen Ensslen, for the Retirees

D. Magisano, for ICICI Bank Canada

Danish Afroz, for Avenue Capital Group

HEARD: May 10, 2017

ENDORSEMENT

[1] The City of Sault Ste. Marie (the "City") moves for an order requiring the immediate payment of all of Algoma's post-filing property tax obligations currently outstanding and all future post-filing property tax obligations.

[2] On or about April 16, 2014, the applicants ceased paying property taxes to the City. However, they did pay interest on late property tax payment instalments prior to the filing date. The outstanding property tax for the period prior to the filing date, excluding interest and penalties, is approximately $13.9 million.

[3] The Initial Order provided that the applicants were to pay post-filing realty taxes in the ordinary course. However, since the filing date, the applicants have not made any property tax or interest payments. As of April 30, 2017, the outstanding post-filing property taxes, before interest and penalties, is approximately $10.8 million.

[4] On April 26, 2016 the City brought a motion requiring Algoma to pay all post-filing property taxes since the Initial Order. Algoma brought a motion for an order relieving it from the obligation to pay post-filing taxes during this CCAA process. The City's motion was dismissed and the motion of Algoma was granted. At that time the cash flow forecasts made clear that the financial position of Algoma was precarious. Also, other obligations of Algoma were not being paid, including special pension payments and payments to Portco.

[5] Argument was made on whether the City has met the tests of rule 59.06 which permits a party to move to vary a court order if there are new facts arising or discovered after the order was made. I frankly do not think the rule could fetter the discretion of a judge given by section 11 of the CCAA to make any order that is appropriate in the circumstances. I recognize however that an order previously made in a CCAA proceeding should not lightly be overturned without a proper basis for doing so, such as changed circumstances, a situation that is very normal in a CCAA proceeding that stretches out, as this proceeding has.

[6] The City points to improving steel prices. Algoma points to the volatility of steel prices and the reduction of 5% in the three weeks before the motion was argued. A $10 per tonne variance in the price of steel has an annual impact of approximately $20 million to $25 million on Algoma's

cash position. That said, the CRU index price has risen from $540 in May, 2016 to $660 in April of this year. The cash flow of Algoma has improved because of this price increase and because of the monetization of the annual winter raw material build-up that occurred over the winter that was financed by the increase of $35 million in the DIP loan and which has had to be paid down by weekly cash sweeps of all amounts over unrestricted cash of $25 million.

[7] The stay period for this CCAA proceeding was extended recently to June 30, 2017. The DIP loan expired on April 30, 2017. The cash flow forecast at the time of the extension indicated that between the weeks ending May 19 and June 30, there would be approximately $22 million in excess of the $25 million cushion that Algoma has required. The cash flow assumed that this $22 million would be used to pay down the DIP loan by way of the weekly cash sweeps.

[8] The City says that as the DIP loan matured on April, 30, 2017, there is no right in the DIP lenders to a cash sweep and that the $22 million should be used to pay creditors for post-filing arrears, including the arrears owed to the City for post-filing taxes. It says that the contest is between the City and the DIP lenders and although the entire DIP loan of some $163 million is now due and owing by Algoma, and secured by the DIP charge, it would be wrong to use a CCAA stay to determine disputes between parties other than the debtor company as the CCAA does not provide jurisdiction to grant remedies between creditors. Reliance is placed on *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 241 at paras. 32-33 (C.A.) and *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 at paras 32-33. It is argued that the rights of the DIP lenders under its charge to be repaid in full under its security should be stayed and overlooked and instead the available funds should be used to pay the City's post-filing taxes.

[9] Unfortunately I do not see this as just a dispute between two creditors. There is an issue of Algoma surviving and having the cash to do so. At the moment there is no DIP loan but that will soon change. Who the DIP lender will be and on what terms is not known.[1] It may be that the new DIP will require further cash sweeps. A fall build-up of steel pellets will be required that can only

[1] A hearing is scheduled for May 23, 2017 to deal with the new DIP to be proposed by Algoma.

be financed by a new DIP loan of some $50 million. It is unknown what the term of the new DIP loan will be and whether it will cover the period of time required for the fall build-up.

[10] As well there is a replacement of a stove attached to a blast furnace that must be carried out that will have cash flow consequences for Algoma. The stoves have not been updated since their original installation on the site over 30 years ago. As a result of the deterioration of one of the four stoves on the site, Algoma will need to replace one stove this year which is expected to take place between July 2017 and November 2017. Algoma's steel production will be reduced by approximately 78,000 tons during this period, which will negatively impact its steel shipments and is expected to lead to a decrease in revenue of $60 million and a loss in profits of $25 million during that timeframe.

[11] I recognize that the lack of payment of taxes is causing great difficulty to the City. The extent of the difficulty may be a matter of debate but in a City like Sault Ste. Marie that has such dependency on Algoma, it is no small matter that the taxes are not being paid.

[12] At the hearing, counsel for the City said that Algoma had reviewed its ability to pay City taxes going forward and determined that it could pay $350,000 per month. Such payments are supported by the Monitor, the current DIP lender and the Ad Hoc Committee of Essar Algoma Noteholders. Counsel for Algoma said that Algoma is confident based on the discussions with potential new DIP lenders that the payment would not be a problem for the lender chosen to be the new DIP lender.

[13] $350,000 per month is approximately half of what the liability of the City is under the current assessment for 2016. Algoma points out that the assessment for that year is under appeal and that the assessment recently received by Algoma for the years 2017 to 2020 is less than 50% of the 2016 assessment under appeal. Algoma, MPAC and the City are scheduled to have a mediation this month to try to resolve the assessments under appeal. Algoma says that there is a very good prospect that the 2016 assessment will be reduced to at least the same level as for 2017 to 2020 and that the proposed payment of $350,000 will cover the amount in 2016 under a revised

assessment[2]. I realize that a taxpayer does not have the legal luxury of not paying municipal taxes while an assessment appeal is underway, but in considering a balancing of the interests of stakeholders, the prospects of a possible reduction of the municipal taxes is a factor that I take into account.

[14] In its 30th Report, the Monitor has expressed the view that Algoma is unable to repay the DIP Facilities at present and will likely require access to additional borrowing to fund the next winter raw materials build this fall. The Monitor states that it is therefore prudent for Algoma to preserve liquidity with a view to mitigating any potential risk associated with future DIP financing and to maintaining the financial stability and flexibility necessary to pursue their restructuring efforts.

[15] In the circumstances, I do not think it is appropriate for the post-filing back taxes to be paid yet by Algoma to the City. There are too many uncertainties to say that the $22 million in the cash flow from May to June 2017 is available for that purpose. The motion by the City is therefore dismissed, but it is done so on the statement of Algoma that it will pay $350 million per month going forward for City taxes. Of course, if circumstances change that would not permit Algoma to pay such taxes, Algoma would need to come back to Court to substantiate a need to reduce or eliminate them.

Newbould J.

[2] What the taxes under a reduced assessment would be is somewhat complicated, but certainly the reduction would be substantial.