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• MONITORS AS OPPRESSION COMPLAINANTS: ONTARIO COURTS WEIGH IN •

Shawn Irving, Partner, & Waleed Malik, Associate, Osler, Hoskin & Harcourt LLP[1]

The oppression remedy is a powerful tool in Canadian corporate law which gives courts wide discretion to make any order they think fit.[2] However, it is not automatically available to everyone. Outside certain groups like shareholders and directors, an aspiring complainant must convince a court that it is a "proper person" to make an oppression application.[3]

Can a monitor in a CCAA[4] proceeding — typically a non-partisan, court-appointed officer — advance an oppression claim? Two Ontario courts grappled with that question recently. Both agreed that, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant in an oppression action with leave of the court, but came to opposite conclusions on the facts before them on whether the monitor should so act.

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In *Essar Global*,[5] an appeal from a decision of Newbould J. in Essar Steel Algoma Inc.'s ("Algoma") CCAA proceedings, Pepall J.A. found the monitor was an appropriate complainant because the oppression claim had *prima facie* merit, removed a substantial obstacle for a successful restructuring, and was made on behalf of an unorganized group of creditors. On the other hand, in *Urbancorp*,[6] the CCAA supervising judge found the monitor was not an appropriate complainant because the claim lacked merit, the monitor was stepping into an inter-creditor dispute rather than pursuing a restructuring objective, and there was no explanation why the monitor (as opposed to a creditor) had to bring the claim.

These decisions provide important lessons for monitors and other stakeholders evaluating if a monitor-led oppression claim is a viable option in future CCAA proceedings.

A. *ERNST & YOUNG INC. V. ESSAR GLOBAL FUND LTD.*, [2017] O.J. NO. 6723, 2017 ONCA 1014

(a) Background

At first instance, the monitor in the Algoma CCAA proceedings was granted leave to commence an oppression action under the CBCA against Algoma's parent, Essar Global Fund Limited ("Essar Global"),

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General Editor
Adam M. Slavens, B.A., LL.B.
Firm: Torys LLP

Please address all editorial inquiries to:

LexisNexis Canada Inc.
Tel. (905) 479-2665
Fax (905) 479-2826
E-mail: nir@lexisnexis.ca
Web site: www.lexisnexis.ca

and other entities owned by Essar Global (the "Essar Group"). The monitor alleged that the Essar Group had exercised *de facto* control over Algoma and consistently preferred the interests of the Essar Group to those of Algoma and its stakeholders. More specifically, the action arose in the context of a recapitalization of Algoma and a transaction (the "Port Transaction") between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

Essar Global challenged the monitor's standing as a complainant under the oppression remedy provisions of the CBCA. Newbould J. rejected that argument. He acknowledged that normally a monitor should be neutral and not take sides. However, there are exceptions to that rule and a monitor must carry out any function in relation to the debtor that the court may direct. In addition, in *Olympia & York*,[7] the Ontario Court of Appeal, noting the need for flexibility in deciding if someone is a proper complainant in order to achieve the remedial purpose of the oppression remedy, held that a trustee in bankruptcy acting on behalf of creditors could be a complainant. Newbould J. saw no reason why the principle of collective action should not be followed in a CCAA proceeding and concluded that the monitor had brought the oppression action as an adjunct to its role in facilitating a restructuring. Therefore, it was a proper complainant.

Newbould J. then went through the two-step process for deciding an oppression claim: (i) does the evidence support the reasonable expectations asserted by the complainant; and (ii) were those reasonable expectations violated by conduct that was oppressive, unfairly prejudicial, or unfairly disregarded a relevant interest?[8]

At the first step, Newbould J. found that Algoma's stakeholders such as trade creditors, pensioners, retirees, and employees had a reasonable expectation that Algoma would not give up long-term control of a critical asset like the Port to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

At the second step, Newbould J. found that the stakeholders' reasonable expectations were violated in two principal ways:

- First, the Port Transaction itself was oppressive: it was necessary only because Essar Global failed to provide an equity contribution it promised during Algoma's recapitalization; it resulted in Algoma giving up control of the Port, a critical asset for its business; and it provided disproportionate benefits to the Essar Group.
- Second, a change of control provision in a Cargo Handling Agreement executed as part of the Port Transaction was also oppressive. It gave Portco, and thus Essar Global, effective control over who could acquire the Algoma business as the agreement was necessary to maintain access to the Port. This had become a material impediment to Algoma's restructuring and had been used by Essar Global to dissuade competing bidders.

The trial judge granted a number of remedies amending the terms of the Port Transaction, including deleting the change of control provision in the Cargo Handling Agreement.

(b) Court of Appeal Decision

A number of parties, including Essar Global and some members of the Essar Group, appealed the lower court decision. They advanced many arguments, including that the monitor lacked standing to bring an oppression claim. Pepall J.A., on behalf of a unanimous Court of Appeal, rejected that argument. She found that a monitor can bring an oppression claim on behalf of stakeholders and that it was appropriate in the case before her. She also rejected the appellants' other arguments and dismissed the appeal.

(i) A monitor can act as a complainant in exceptional circumstances

Pepall J.A. began her analysis by addressing the role of monitors in CCAA proceedings. Significantly, she noted that the CCAA only sets out the minimum powers of a monitor that may be augmented by the court. Paragraph 23(1)(k) provides that a monitor shall carry out "any other functions in relation to the company that the court may direct" and CCAA courts have provided expanded powers to monitors in a number of cases.

More generally, she noted that a monitor acts as "the eyes and the ears of the court and sometimes … the nose".[9] While a monitor must be impartial and treat all parties reasonably and fairly, it is required to and frequently does take positions on contentious issues. Any position a monitor takes will end up favouring certain stakeholders over others depending on the context and may force the monitor to enter into the fray.

Pepall J.A. then turned to the statutes at issue. Section 238 of the CBCA gives the court a broad discretion to decide if a potential complainant was a "proper person" to make an oppression application. This could include a monitor.

Nothing in the CCAA suggests that a monitor is incapable in all circumstances of being an appropriate complainant. As noted, paragraph 23(1)(*k*) explicitly provides that a monitor shall carry out "any other functions in relation to the company that the court may direct". Further, paragraph 23(1)(*c*) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs, a responsibility that will frequently place it at odds with the shareholders and other stakeholders. Finally, the broad language of s. 11 of the CCAA, which permits a supervising court to "make any order it considers appropriate in the circumstances," provides authority for an order permitting a monitor to act as a complainant as well.

Pepall J.A. reiterated that generally monitors play a neutral role and that it will be a "rare occasion" that a monitor will be authorized to act as an oppression complainant. She identified three non-exhaustive and non-dispositive factors that a CCAA supervising judge should consider when deciding if a monitor should be authorized to do so:

- Is there a *prima facie* case that merits an oppression action or application?

- Does the proposed action or application have a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring?
- Is there any other stakeholder better placed to be a complainant?

(ii) The monitor was an appropriate complainant

Pepall J.A. found that in the circumstances before her, the CCAA supervising judge was justified in authorizing the monitor to act as a complainant.

A *prima facie* case had been established. The monitor had reviewed and reported to the court on related party transactions, including the Port Transaction.

The oppression action removed a significant obstacle to Algoma's restructuring. As noted above, the change of control provision in the Cargo Handling Agreement gave Essar Global an indirect veto over who could acquire Algoma's business and had been used to dissuade competing bidders. The oppression action eliminated this veto.

The monitor was able to efficiently advance the oppression claim. It represented a conglomeration of stakeholders, including Algoma's pensioners, retirees, employees and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

Pepall J.A. also observed that as the presiding judge in the CCAA proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties, including the monitor, to ensure that no unfairness or unwarranted partiality occurred.

B. *URBANCORP CUMBERLAND 2 GP INC. (RE)*, [2017] O.J. NO. 6648, 2017 ONSC 7649

(a) Background

In the Urbancorp CCAA proceedings, the monitor moved for advice and directions on whether certain payments in kind made by two debtor companies were oppressive.

The respondents (collectively, "Cooltech") had been contractors on several Urbancorp projects. In July and August 2015, two of the CCAA debtors, Edge on Triangle Park Inc. and Edge Residential Inc. (collectively, "Edge"), transferred condominium units, parking spots, and storage lockers at or near fair market value to Cooltech to pay off debts owed by other Urbancorp entities and by Urbancorp's owner personally. In return, Edge received intercompany book entries from the affiliates whose loans it paid and other inter-company credits.

The monitor argued that replacing hard assets with impaired loans from insolvent entities prejudiced creditors' recovery and, therefore, was oppressive. It sought a monetary award against Cooltech. The monitor had not sought leave to commence an oppression claim before bringing its motion.

(b) CCAA Supervising Judge's Decision

Myers J. dismissed the motion for two reasons. First, he held that the monitor needed leave of the court before bringing a motion that was, in effect, an oppression claim. Second, on the facts of the case, it was not appropriate to permit the monitor to act as an oppression claimant.

(i) The monitor should have obtained leave to bring an oppression claim

Although the motion was styled as a motion for advice and directions, the monitor was not truly seeking advice and directions. It had sued Cooltech for monetary relief and was seeking a judgment holding Cooltech liable under the oppression remedy.

Myers J. referred to the trial decision in *Essar Global*[10] and noted that the CCAA supervising judge had made an order permitting the monitor to act as an oppression complainant before the monitor commenced its oppression action. In *Urbancorp*, on the other hand, the monitor had merely referred to the possibility of bringing proceedings in the interests of creditors in a report. This was not enough and the monitor needed a court order permitting it to advance

an oppression claim on behalf of the CCAA debtors. Unless empowered to sue, the monitor was a neutral with duties to all interested parties.

(ii) The monitor was not an appropriate complainant

In any event, Myers J. held that it was not appropriate for the monitor to act as a complainant in the oppression claim. Although *Urbancorp* was released a day before the Court of Appeal's decision in *Essar Global*, Myers J. referred to the factors identified by Pepall J.A. — restructuring purpose, the ability of other stakeholders to bring a claim, and *prima facie* merit — but came to the opposite conclusion on the facts before him.

First, there was no restructuring purpose served by an oppression claim. Rather, the monitor was simply pitting the current creditors against a group of creditors who were paid a year before the CCAA proceedings commenced.

Second, the monitor had not provided any explanation why it, rather than a creditor, needed to bring a claim. There was no evidence about the existing creditor body. There may have been tens of thousands of powerless or involuntary creditors who needed representation, or there may have been someone who was able to bring proceedings.

Finally, there was no evidence establishing the reasonable expectations of stakeholders that would have been violated by the payments in issue. Myers J. noted that he knew nothing about the creditors in existence when the payments were made, what their expectations may have been, or if those expectations were reasonable. Therefore, there was nothing to show that the proposed claim had merit.

In conclusion, Myers J. emphasized the limitations of a monitor's role:

> It is not the Monitor's role to "try one on" to see if it can increase recovery for the current creditor body. Creditors are free to spend their money and face the consequences. The Monitor, by contrast, acts with the *imprimatur* of the Court. It is far more constrained in its activities and ought typically to consider seeking court approval before undertaking litigation on behalf of particular interests.[11]

C. CONCLUSION

The decisions in *Essar Global* and *Urbancorp* are the first reported decisions addressing when a monitor may bring an oppression claim, and they provide important lessons for future CCAA proceedings. Three are highlighted below.

First, a monitor must be expressly empowered to bring proceedings *before* advancing an oppression claim. As demonstrated by *Urbancorp*, a court will not permit a monitor to circumvent this requirement by disguising an oppression claim as something else.

Second, *Essar Global* provides the factors — *prima facie* merit, restructuring purpose, and the ability of other stakeholders to bring a claim — that will guide courts and stakeholders in future cases where a monitor intends to bring an oppression claim. In addition, *Urbancorp* shows that a monitor or other stakeholders seeking leave must provide evidence satisfying each factor.

Third, the norm for monitors is to be neutral and non-partisan and compelling circumstances will be needed to justify a departure. Both levels of court in *Essar Global* emphasized the fact that the oppression claim removed an impediment to the restructuring of Algoma. On the other hand, the fact that the monitor in *Urbancorp* attempted to bring a claim on behalf of all current creditors was not enough. While rare, in the right case, an oppression claim will be a powerful tool available to a monitor for advancing the remedial goals of a CCAA proceeding.

[***Shawn Irving*** *is a partner in the litigation department at Osler, Hoskin & Harcourt LLP and has a has a commercial litigation practice, with expertise in securities litigation, class actions, insolvency and restructuring, and banking law.*

Waleed Malik *is an associate in Osler's litigation department and has a general civil and commercial litigation practice.*]

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1 Shawn Irving is a partner in the litigation department at Osler, Hoskin & Harcourt LLP and has a has a commercial litigation practice, with expertise in securities litigation, class actions, insolvency and

restructuring, and banking law. Waleed Malik is an associate in Osler's litigation department and has a general civil and commercial litigation practice.

2 *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 4142, 42 OR (3d) 177 (C.A.) at para. 4.

3 See, for example, *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), s. 238(*d*).

4 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

5 *Ernst & Young Inc. v. Essar Global Fund Ltd.*, [2017] O.J. No. 6723, 2017 ONCA 1014. Osler represented certain lenders in the Algoma CCAA proceedings.

6 *Urbancorp Cumberland 2 GP Inc. (Re)*, [2017] O.J. No. 6648, 2017 ONSC 7649.

7 *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2003] O.J. No. 5242, 68 OR (3d) 544 (C.A.).

8 *BCE Inc. v. 6796508 Canada Inc.*, [2008] S.C.J. No. 37, 2008 SCC 69 at para. 68.

9 *Essar Global* at para. 109.

10 *Ernst & Young Inc. v. Essar Global Fund Ltd.*, [2017] O.J. No. 1377, 2017 ONSC 1366, affd [2017] O.J. No. 6723, 2017 ONCA 1014.

11 *Urbancorp* at para. 26.

• TOO TAXING? CCAA DEBTORS' POST-FILING MUNICIPAL TAX OBLIGATIONS SUSPENDED •

Jeremy Opolsky, Senior Associate, and Melody Burke, Associate, Torys LLP

I. INTRODUCTION

Under the *Companies' Creditors Arrangement Act*,[1] debtors have certain post-filing obligations. Unlike the United States Bankruptcy Code, which specifically details and protects obligations incurred after an insolvency filing, the CCAA provides fewer codified protections for those who the debtor owes post-filing obligations.

This article focuses on one of the newest frontiers in post-filing obligations: municipal tax. Unlike certain federal and provincial tax obligations, there are no specific protections for these taxes in the CCAA. While such taxes are generally paid in the ordinary course during the pendency of CCAA proceedings, recent cases have challenged that assumption.

In two Ontario CCAA decisions, *Re US Steel Canada Inc.*[2] and *Essar Steel Algoma Inc. (Re)*,[3] debtors sought to cease municipal property tax payments in the post-filing stage. Both CCAA courts allowed the debtors' requested relief.

This paper first provides a brief summary of regime surrounding post-filing obligations of CCAA debtors, followed by addressing the decisions in *US Steel* and *Essar Algoma Steel.*

II. POST-FILING OBLIGATIONS

The CCAA provides only skeletal protections for post-filing obligations. These include protections for certain federal and provincial tax obligations and protections for critical suppliers.[4] Importantly for this

article, there is no express statutory protection for the payment of post-filing municipal tax obligations.

The broadest statutory protection for post-filing expense is found in s. 11.01 of the CCAA, which prohibits the forced extension of credit for the provision of post-filing services. It provides:

> **Rights of Suppliers**
>
> **11.01** No order made under section 11 or 11.02 has the effect of:
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

What constitutes the use of goods, services, the use of leased or licensed property or other valuable consideration is itself the subject of a complicated line of jurisprudence. An exploration of these cases is beyond the scope of this short article.

Nonetheless, the gravamen of s. 11.01, consistent with general practice under the CCAA, was summarized by the Ontario Court of Appeal: "while the company is given the opportunity and privilege to carry on during the CCAA restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only".[5] Post-filing obligations are generally paid as they are incurred.

Courts in Ontario have broadly adopted this "pay-as-you-go" framework to post-filing obligations in the form of the model CCAA initial order.[6] Terms in the model order includes the obligation to remit any and all "municipal realty, municipal businesses or other taxes, assessment or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors".[7]

III. *US STEEL CANADA INC.*

U.S. Steel Canada Inc. ("USSC"), an integrated steel manufacturer, filed for CCAA protection in September 2014. In 2015, the debtor's parent company, United States Steel Corporation ("USS"), made two announcements: (a) the parent would divert certain steel production and finishing work scheduled for production at USSC facilities and (b) the parent would refrain from submitting customer bids that contemplated any steel production at USSC facilities. These two decisions by USS combined with a deteriorating steel market placed the debtor in a precarious financial state.

As a consequence, USSC developed and sought prospective court approval of a Business Preservation Plan ("BPP"). The BPP provided for continued operations at a significantly reduced level for 12 to 15 months.

A critical element to the BPP was a series of "cash conservation measures" to ensure sufficient liquidity. The cash conservation measures included the suspension of property tax payments to the City of Hamilton and the County of Haldimand (the "Municipalities"). USSC had paid all municipal realty taxes before that date.

Justice Wilton-Siegel considered and approved the suspension of these tax obligations.

Does the Court have the Authority Under s. 11 to Suspend the Property Tax Payments?

The debtor sought for the CCAA court to stay municipal tax obligations under the court's broader s. 11 discretion.

The Municipalities' principal argument was that s. 11.01 restricted the court's ability to suspend the property tax payments. The Municipalities contended that approving the suspension of payments would force the Municipalities to either (a) provide post-filing services or (b) require the Municipalities to advance further credit to USSC.[8]

Justice Wilton-Siegel disagreed. He held that s. 11.01 does not prevent the Court from suspending the property tax payments because property taxes could not be characterized as services under s. 11.01(*a*):

> I do not think that municipal realty taxes are properly characterized as a payment for the

> provision of post-filing services as the concept of "services" is understood for the purposes of section 11.01. Rather, municipal realty taxes are a levy imposed on property owners to fund the operations of a municipality exercising its authority and obligations as a local governmental body.[9]

Justice Wilton-Siegel relied on the Alberta Court of Appeal's decision in *Smoky River Coal Ltd. (Re)*[10]. While *Smoky River* was not decided within the context of s. 11.01, the decision explores why municipal property taxes cannot be characterized as "services". A municipality cannot deny the benefit of municipal operations to the debtor and, therefore, the municipality could not be said to be selling its services: "[P]roperty taxes are not the purchase price for the services provided by [the municipality]; instead they are the means of generating the revenue to provide those services."[11]

Second, Wilton-Siegel J. also found that the phrase "further advance of money or credit" in s. 11.01(*b*) "assumes a pre-existing credit relationship which is maintained on an involuntary basis after the commencement of CCAA proceedings". This did not describe the creditor-debtor relationship between the Municipalities and USSC.[12]

Should the Court Exercise Its Discretion Under s. 11 to Suspend the Payments?

After determining that s. 11.01 did not prevent the suspension of payments, Wilton-Siegel J. considered whether he should exercise his discretion under s. 11 to grant the debtor's requested order.

The Municipalities argued the critical importance of taxation to society. If a taxpayer fails to meet its tax-paying obligations, then the municipality will not have the money, to which it is legally entitled and on which it has counted, available to support the education, recreation, housing, social support and other programs which it is required to provide.[13] The Municipalities emphasized that during any suspension, they would be required to cover part of the taxes that would otherwise be payable by USSC, such as provincial education taxes, even though they would not be in receipt of those funds required to cover the obligation.[14]

Justice Wilton-Siegel rejected this argument. He relied on the Municipalities' statutory lien under the *Municipal Act* for unpaid taxes as means to recover unpaid taxes.[15] This motion was not a compromise of their claims but merely a suspension of their payment: there was no evidence that their security for the payment of the taxes would be eliminated.[16] On the other hand, the debtor required a suspension of the property tax payments to facilitate the BPP, which was vital to the possibility of a successful restructuring.[17]

Ultimately, Wilton-Siegel J. held that the suspension of payment was in fact in the Municipalities own interest — despite the fact that they were vociferously opposing it. While the reduction in the municipalities cash flows may result to a short term need to raise realty taxes, the failure for USSC to restructure would have "permanent consequences" for the Municipalities.[18] The balance weighed in favour of ordering the suspension of payments.

IV. *ESSAR STEEL ALGOMA INC.*[19]

In *Essar Steel Algoma*, the City of Sault Ste. Marie (the "City") brought a motion for an order requiring the CCAA debtor, Essar Steel Algoma Inc. ("ESAI"), to pay post-filing municipal property tax obligations. Without seeking Court approval, ESAI had stopped paying these taxes. In response to the City's motion, ESAI sought retroactive and prospective suspension of the tax obligations.

Unlike *US Steel*, where the debtors sought to suspend municipal property tax payments during the prospective 12 to 15 month preservation plan period, ESAI never made any post-filing payments to the City nor had any timeline for the resumption of payments. The City emphasized that ESAI's property tax payments formed a large part of the City's tax base and that the continued accumulation of arrears would create significant difficulties for the City.[20]

Justice Newbould dismissed the City's motion and allowed ESA's motion. Section 11.01 did not play any role in the decision. While the City sought

to distinguish *US Steel*,[21] it argued the motion on different grounds.

In this motion, the City emphasized the importance of initial order and the debtors' obligations to pay municipal taxes from that order. The City argued that the debtor could not deviate from the order at will. Relying on the recent decision of Morawetz J. in *Target*, the City argued that the debtors could not ignore post-filing obligations when counter-parties, like the City, had relied on debtors' Court-ordered obligations to fund these taxes. This would in effect, change the rules mid-stream to benefit the debtors and its DIP lenders and retroactively suspend payments that were already supposed to have been paid under the initial order.[22]

In response, ESAI pointed to the constraints on its cash flow given the liquidity requirements in its DIP facility. It needed to preserve sufficient cash level through its sales process to implement a restructuring plan. The post-filing tax obligations would put any such plan at risk.[23]

Justice Newbould balanced the prejudice to the debtor and the City and exercised his discretion under s. 11 to suspend the payments. Justice Newbould relied upon many of the same factors as in *US Steel*. ESAI faced a serious liquidity crisis with a sale process in the balance.[24] On the other hand, while Newbould J. recognized the City's needs,[25] he also pointed to its lien under the *Municipal Act*, its commercially high rate of interest for unpaid taxes and that the survival of the debtor would ultimately be in the City's longterm benefit.[26] The Monitor's approval of the non-payment and its concern about the debtor's dwindling cash cushion bolstered Newbould J.'s conclusion.[27]

The City renewed its motion approximately one year later. Justice Newbould recognized that the "lack of payment of taxes is causing great difficulty to the City" but refused to order the post-filing back taxes to be paid. Instead, as supported by the Monitor and the DIP lenders, the debtors were ordered to pay approximately half of the monthly tax obligation.[28] The City sought leave to appeal but then abandoned the appeal in favour of a settled resolution.

V. CONCLUSION

US Steel and *Essar Steel* may begin a trend of debtors seeking during the pendency of the CCAA proceedings to suspend municipal tax obligations. It will be important to see how this trend evolves. Will debtors seek relief only in the narrow circumstances outlined in *US Steel*, seeking prospective relief for a fixed period of time, or will they take the broader approach in *Essar Steel Algoma*, seeking retroactive relief and a prospective protection for an unlimited period of time? Even if a municipality reviews the initial order and is satisfied that the payment of its tax obligations is respected, this may not be sufficient to prevent retroactive amendment later in the CCAA proceedings. The courts' treatment of s. 11.01 to-date has shown that there is little statutory protection against such changes.

Both the *US Steel* and *Essar Steel Algoma* courts have pointed to the municipalities' liens on the relevant properties. The assumption here is that the municipalities will eventually be paid. But given the length of complex CCAA proceedings, municipalities could find themselves waiting for years for the receipt of tax revenue. This may be the new CCAA reality.

[***Jeremy Opolsky*** *is a Senior Associate in the Torys LLP's Litigation Group in Toronto. Jeremy's practice focuses on all areas of litigation and dispute resolution, including corporate/commercial litigation and litigation related to insolvency and restructuring.*

Melody Burke *will be returning as an associate to Torys LLP's Litigation Group in Toronto. The authors would like to thank Alex Bogach for his assistance. Alex will also be returning as an associate to Torys LLP's Litigation Group in Toronto.*]

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1 R.S.C. 1985, c. C-36 ["CCAA"].

2 2015 ONSC 6331 ["*US Steel*"] (unreported decision, found in Motion Record at pages 20–50).

3 Endorsement of Newbould J. (re Property Taxes), dated June 15, 2016 ["*Essar Steel*"]. See also the City's motion for payment of outstanding post-filing property tax obligations in *Re Essar Steel Algoma Inc.*, [2017] O.J. No. 2645, 2017 ONSC 3031 at para. 4,

leave to appeal refused October 20, 2017 by the Court of Appeal for Ontario (unreported decision).

4 CCAA, ss. 11.09 and s. 11.4.

5 *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967, 2009 ONCA 833 at para. 34.

6 The Model Initial CCAA Order, Ontario Superior Court of Justice, available online at: www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-EN.doc.

7 *Ibid.*, at para. 8(c).

8 *US Steel*, *supra* note 3 at para. 119.

9 *US Steel*, *supra* note 3 at para. 120.

10 [2001] A.J. No. 1006, 2001 ABCA 209 at paras. 28–33 ["*Smoky River*"].

11 *Ibid.*, at para. 31.

12 *US Steel*, *supra* note 3 at para. 120.

13 *TD Bank*, *supra* note 14.

14 Factum and Brief of Authorities of the Responding Party, City of Hamilton dated September 25, 2015 at para. 25.

15 *US Steel*, *supra* note 3 at para. 127.

16 *US Steel*, *supra* note 3 at para. 127.

17 *US Steel*, *supra* note 3 at para. 129.

18 *US Steel*, *supra* note 3 at para. 129.

19 One of the Authors of this article is counsel in *In re Essar Steel Algoma Inc.* to the ultimate parent and affiliates of the Debtor. Any views expressed in this article are the views of the authors alone.

20 Application for leave to appeal refused October 20, 2017 by the Court of Appeal for Ontario (unreported decision) at para. 5.

21 Factum of The Corporation of the City of Sault Ste. Marie at para. 47.

22 Factum of The Corporation of the City of Sault Ste. Marie dated June 6, 2016 at para. 40.

23 ESA's Responding Factum dated June 10, 2016.

24 *Essar Steel*, *supra* note 4 at p. 3.

25 *Essar Steel*, *supra* note 4 at p. 3.

26 *Essar Steel*, *supra* note 4 at p. 4.

27 Neither of the *US Steel* and *Essar Algoma Steel Inc.* decisions address another protection for municipalities — *i.e.*, a municipality's status as a preferred creditor under s. 136(1)(*e*) of the BIA. In the event of a distribution of assets under the BIA, a municipality is entitled to preferred status for all municipal taxes assessed or levied within the two years immediately preceding the bankruptcy not exceeding the value of the debtor's interest in the property.

28 *Re Essar Steel Algoma Inc.*, [2017] O.J. No. 2645, 2017 ONSC 3031.