ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

CLASS ACT

Volume 3, No. 1 – December 2012 Class Action Law Section

"Thinking Outside the Box - Using the *Companies' Creditors Arrangement Act* to Resolve a Prospective Class Action"

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The *Companies' Creditors Arrangement Act* ("*CCAA*") has long been lauded as a flexible tool that lends itself to creative use. Justice Robert A. Blair, as he then was, in an oft quoted comment stated:

> "[The CCAA] is designed to be a flexible instrument and it is that flexibility which gives the Act its efficacy."[i]

In this article, I will outline the steps that were taken by KPMG LLP ("*KPMG*"), named as a defendant in a prospective securities class action in Quebec initiated on behalf of retail investors of Olympus United Funds Corporation ("Olympus Funds"), to resolve the case by using the *CCAA*.

The Landscape

In early 2000, a group of companies headquartered in Montreal under the umbrella of the Norshield Financial Group ("*Norshield*") gained prominent attention when CINAR, the children's animation company, found itself unwittingly in the financial press arising out of unauthorized, non-board approved, investments in offshore hedge funds associated with Norshield in the Bahamas.

In the ensuing years, Norshield's name remained in the crosshairs of the financial press which escalated in May, 2005 when the Ontario Securities Commission ("*OSC*") applied under section 129 of the *Securities Act*, R.S.O., c. S.5 for an Order appointing RSM Richter Inc. ("*Richter*") as Court Appointed Monitor of a number of Norshield companies, including Olympus Funds. The impetus behind the motion was that Norshield had failed to meet increasingly frequent redemption requests from retail investors of, *inter alia*, Olympus Funds looking to pull their money out. At the time of the OSC's application, some 1900 retail investors had outstanding redemption requests of $159 million.

Within a few weeks, Richter's mandate would be converted to that of Court appointed Receiver of all of the Norshield entities. The Monitorship gave way to the Receivership.

Richter subsequently took steps to participate as a Court Appointed liquidator or custodian in the other jurisdictions, mainly Caribbean, where proceedings had been commenced in relation to other offshore Norshield entities[ii].

Putative Class Actions in Quebec

Three years after Richter's initial appointment as Monitor and its subsequent appointment as Receiver, two prospective class actions were commenced in Quebec in early May, 2008 on behalf of the retail investors of Olympus Funds. One of the actions was against KPMG, the former auditor of Olympus Funds ("*KPMG Action*"). The other action was against Royal Bank of Canada et al. ("*RBC*"), who it was alleged was liable as a result of its association with the underlying securities into which the initial investments of the retail investors in Olympus Funds allegedly flowed ("*RBC Action*"). The two actions were commenced days apart from each other by the same class action lawyer.

Much like the practice in Ontario, putative class actions in Quebec are not necessarily brought forward in a timely manner to the authorization stage. The KPMG and RBC Actions would languish. This provided KPMG with an opportunity to resolve the prospective class action against it with Richter, in its capacity as Receiver of Olympus Funds, by using the CCAA and following the precedent in *Metcalfe & Mansfield Alternative Investments II Corp*., more commonly known as the asset backed commercial paper or *ABCP* case, to obtain bar orders and third party releases.[iii]

Opportunity Knocks: Conversion of the Receivership of Olympus Funds into a CCAA proceeding

While the prospective KPMG Action remained in procedural limbo, KPMG and Richter worked together to fashion a settlement designed to resolve any and all claims against KPMG including the claims advanced in the KPMG Action and, in addition, to protect KPMG, from any claims over by third parties.

The settlement strategy was for Richter, in its capacity as Receiver of, *inter alia*, Olympus Funds, to convert the receivership of Olympus Funds into a CCAA proceeding, to prepare a CCAA Plan providing for the payment by KPMG of a settlement amount for the benefit of the retail investors of Olympus Funds - who were the putative class in the KPMG Action - in consideration of receiving (i) deemed releases by the retail investors and Richter in it's capacity as Receiver of Olympus Funds, (ii) a broad bar order and third party release precluding any person from pursuing KPMG and (iii) a dismissal of the putative KPMG Action.

The advantage of using the CCAA as a vehicle to resolve a class action - an opportunity presented by the existing receivership of the fund the prospective class members had invested in, is that KPMG could control the process and move forward with a view to securing "peace for all time from all mankind". A *CCAA Plan*, once accepted by the statutory majority of creditors under s. 6 of the *CCAA* and sanctioned by Order of the Court, is binding on all creditors. In this respect, following the *CCAA* approach, there is no prospect of persons opting out of an authorized or certified class. Any creditor who

votes against the *CCAA Plan* or elects not to vote at all is nonetheless bound by a *CCAA Plan* once the *CCAA Plan* sanctioned by the Court. This aspect of the *CCAA* regime many moons ago spawned the expressions "cram down" or "cramming down" - there is no opting out under class actions legislation or mechanism to be bought out at fair market value under corporations' legislation.

Another advantage the *CCAA* approach offered is that the plaintiff's class counsel did not have any role to play in the *CCAA* process. The Ontario Court supervising the Receivership had previously appointed a partner of Stikeman Elliot in the Receivership proceedings to act as Representative Counsel for the retail investors which ensured that the interests of the retail investors as stakeholders in the *CCAA* process were treated fairly[iv].

Implementation of the CCAA Plan

The first step taken by Richter was to move on an *ex parte* basis before Justice Campbell of the Ontario Superior Court of Justice, the judge with carriage of supervising the Norshield Receivership, for an Order approving the confidential Minutes of Settlement entered into between the Receiver and KPMG and authorizing the Receiver to execute the Minutes of Settlement[v]. The next step involved moving for the Initial Order converting the Receivership of Olympus Funds into a *CCAA* proceeding[vi]. Thereafter, a motion was brought for a Notice and Meeting Order which established the procedure leading up to the Approval Meeting[vii]. The motion for the Sanction Order approving the *CCAA Plan* followed after the statutory double majority of Retail Investors voted in person or by proxy in favour of the CCAA Plan at the Approval Meeting.[viii]

Following the expiry of the 21 day period under the *CCAA* for seeking leave to appeal of the Sanction Order to the Court of Appeal for Ontario, the Receiver then moved for a judgment in Quebec recognizing the Sanction Order[ix]. The Recognition Judgment was one of the terms of the *CCAA Plan*. Strictly speaking, the Sanction Order granted pursuant to the *CCAA*, a federal statute, is recognized as a matter of law throughout Canada. It was considered appropriate, nonetheless, to include a Recognition Judgment from the Quebec Court as the parties were in somewhat uncharted territory.

Accordingly, a motion was brought before Justice Yves Poirier of the Quebec Superior Court of Justice for the Recognition Judgment. The final step required to implement the settlement set out in the *CCAA Plan* called for an Order dismissing the putative *KPMG Action*. Mechanically, this could only be achieved if the *KPMG Action* had been authorized. Until then, it was simply a prospective class action. It was accordingly determined that rather than proceeding in this fashion as initially contemplated, a motion for leave to desist would be brought by the proposed representative plaintiff, Sheila Calder ("*Calder*"), which would be "with prejudice" to *Calder*.

The motion did not need to be brought on notice to the prospective class members in the *KPMG Action* as they were one and the same as the retail investors/creditors who had received notice of the Approval Meeting, who subsequently attended in person or by proxy, voting in favour of the *CCAA Plan* with all of its terms and conditions. Notice of a motion for leave to desist in Quebec was a discretionary matter. In the circumstances

of the case, the presiding class actions judge Justice Marc de Wever determined that notice was not required.[x]

Conclusion

Not every prospective class action, much less securities class action, will present an opportunity to use the *CCAA*. That said, it is not uncommon for companies who have issued securities resulting in a prospective class action against professionals associated with the offering of the securities or the issuer's financial statements to find themselves bordering on insolvency. Where these factors are present, opportunities exist for other solvent defendants named in a prospective class action to work with a Court Appointed Receiver to bring about a speedy resolution to otherwise protracted class proceedings by following the Olympus Funds precedent.

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[i] *Canadian Red Cross Society*, (1998) O.J. No. 3306 at para 45; see also the comments of Justice R.A. Blair in *Metcalfe & Mansfield Alternative Investments II Corp*., (2008) ONCA 587 at para 61; see also the comments of Justice Farley in *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 at para 13; see also the comments of Justice Doherty in *Elan Corp. v. Comisky*, (1990), 41 O.A.C. 282 at para 77; see also the comments of Justice E.E. Gillese in *Re Indalex Ltd* (2011) ONCA 265 at para 155 and the comments of Justice B.D. Macdonald in *Re Westar Mining Ltd*. (1992), 14 C.B.R. (3D) 88 at para 23.

[ii] Order of Justice Paul G. Chaput of the Quebec Superior Court dated September 16, 2005; Order of Justice William Chandler of the High Court of Justice of the Commonwealth of Barbados dated September 28, 2005; Order of Madam Justice Jeanne Thomson of the Supreme Court of the Commonwealth of the Bahamas dated February 6, 2006; Order of Madam Justice Cheryl Albury of the Supreme Court of the Commonwealth of the Bahamas dated January 23, 2007.

[iii] *Metcalfe & Mansfield Alternative Investments II Corp*., [2008] O.J. No. 2265; upheld on appeal [2008] O.J. 3164.

[iv] The Representative Counsel Order was issued February 7, 2006 by Justice Campbell of the Ontario Superior Court.

[v] The Minutes of Settlement Approval Order was issued on August 22, 2011 by Justice Campbell of the Ontario Superior Court.

[vi] The Initial CCAA Order was issued on September 7, 2011 by Justice Campbell of the Ontario Superior Court.

[vii] The Notice and Meeting Order was issued on November 29, 2011 by Justice Colin Campbell of the Ontario Superior Court. The Approval Meeting was held on February 29, 2012.

[viii] The Sanction Order was issued March 19, 2012 by Justice Campbell of the Ontario Superior Court.

[ix] The Recognition Judgment was issued April 13, 2012 by Justice Yves Poirier of the Quebec Superior Court.

[x] The Judgment Discontinuing the KPMG Action with prejudice was issued on July 26, 2012 by Justice Marc de Wever of the Quebec Superior Court. Justice Marc de Wever issued on the same day a Declaratory Judgment in the RBC Action limiting RBC's liability to its proportionate liability in light of the bar order and third party releases in favour of KPMG contained in the CCAA Plan.