IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Chemtura Canada Co. (Re), 2008 NSSC 14

Date: 2008-01-21
Docket: SH 283921
Registry: Halifax

In the Matter of:

The Amalgamation of Chemtura Canada Co./Cie
and Anderol Canada Corp.

Applicant

- and -

In the Matter of:

The *Companies Act* of Nova Scotia, being Chapter 81 of the **Revised Statutes of Nova Scotia**, 1989, *as amended*

Judge: The Honourable Justice John D. Murphy

Heard: *{In Chambers}* October 18, 2007, in Halifax, Nova Scotia

Counsel: Robert G. MacKeigan,Q.C., for the applicant

By the Court:

[1] Chemtura Canada Co./Cie (the "Applicant") is an unlimited liability Nova Scotia company which was formed August 1, 2007 when this Court approved the amalgamation of Anderol Canada Inc. ("Anderol") and Chemtura Canada Co./Cie ("Chemtura"). The Applicant now seeks an order permanently sealing affidavits

providing financial information about Anderol and Chemtura, which were filed in support of the Application for Amalgamation Approval.

BACKGROUND

[2] The *Nova Scotia Companies Act*, R.S.N.S. 1989, c. 81, s.134, requires that an agreement to amalgamate two or more companies be approved by court order, and also provides in s.134(7):

> Unless the court otherwise directs, notice of the time and place of the application for the approving order shall be given to the creditors of an amalgamating company in such manner as the court may direct.

The intent of s.134(7) of the Act is to give creditors an opportunity to make representations opposing the application for approval if the amalgamation would impair their ability to collect a debt.

[3] There are often practical difficulties associated with notifying each creditor when companies want to amalgamate, and in many cases to do so would serve no purpose, as there is often no reasonable likelihood a creditor's position would be worsened by amalgamation; indeed, sometimes the prospect of collection from the new entity may be better than from the original debtor. Amalgamating companies routinely request the Court to dispense with the requirement that creditors be notified, on the basis they will not be adversely affected by amalgamation. Although the *Companies' Act* does not prescribe evidence which the Court should consider before waiving notice, applicants usually support requests by providing financial statements to establish that creditors will not be put at risk by the transaction. If creditors' positions will be materially worsened (for example when creditors of a company with substantial retained earnings might have to seek recovery from an amalgamated company in a deficit position), the Court may decline to approve the amalgamation, or prescribe terms to protect arm's length creditors, such as requiring a guarantee or postponement of inter-company debt. The Court's vigilance to protect creditor's interests and the impracticality of giving notice have made providing financial statements an effective requirement for amalgamation in Nova Scotia.

[4] The frequency of amalgamation applications has increased significantly during the past 15 years, as business interests in the United States use the unlimited liability

company provisions of the *Companies Act* to structure their affairs in a tax-efficient manner. Many U.S. corporations are "continued" to this jurisdiction, and then amalgamated, sometimes with a shell company incorporated in Nova Scotia, to create an unlimited liability company which provides tax benefit under U.S. law.

[5] In support of requests that the Court waive notice to creditors, most applicants for amalgamation approval present their financial information by exhibit to a separate affidavit from a corporate officer. They also asked that the order approving the amalgamation direct that the affidavit providing financial data be sealed, on the basis that it could be harmful to the applicants if the information were accessible to competitors. Until July 2007, the Court routinely sealed the documentation.

[6] Nova Scotian and Canadian jurisprudence recognizes the "open court principle" and the right of freedom of expression guaranteed by the **Canadian Charter of Rights and Freedoms**, and transparency of court proceedings has become an established policy and fundamental value. In this environment, court and media representatives in this province formed a joint committee which developed Guidelines for Media and Public Access to the Courts of Nova Scotia (the "Guidelines"), including implementation of a system whereby the Court notifies the media prior to considering applications for publication bans.

[7] Effective July 1, 2007, this Court changed its practice of routinely sealing "financial" affidavits from companies seeking amalgamation approval. The Court advised the legal profession in the following terms that judges will no longer apply a presumption that financial information will be sealed when amalgamation orders are issued:

> A request to seal documentation will be treated as an application for a publication ban, and judges will exercise discretion in individual cases. Applicants will be required to justify obtaining a sealing order in the context of the "open courts" principle, and will bear the burden to establish, with reference to tests set out in jurisprudence, that:
>
> (a) the order is necessary to prevent a serious risk to the proper administration of justice, or to the public interest in the confidentiality of an important commercial interest, because reasonable alternative measures will not prevent the risk; and

> (b) the salutary effects of the publication ban outweigh its deleterious effects on the rights and interests of the parties and the public, including the public interest in open and accessible court proceedings.
>
> Applicants seeking an order to seal financial information will be expected to notify the media. The Notice form, email communication facility, and the *Guidelines for Media and Public Access to the Courts of Nova Scotia* are available on the Courts of Nova Scotia website at www.courts.ns.ca.

[8] Since the Court has implemented its new policy, and now treats sealing financial information as a publication ban, most companies seeking amalgamation approval do not request sealing of affidavits providing financial statements. In some cases, such as where a shell company is incorporated in Nova Scotia for the sole purpose of being a party to amalgamation and an affidavit indicates it has no assets (other than a nominal subscription price received for its shares) and no liabilities, there may be no possibility of prejudice to any creditors of an operating company which is the other party to the amalgamation. In those situations where the creditors of the amalgamated company will continue to be creditors of a company with the assets currently on one amalgamating party's balance sheet, with no new liabilities, the Court may not require the filing of any financial information, particularly if the new entity will be an unlimited company whose shareholders will be accessible by creditors. However, the usual practice since July 2007 is that applicants provide financial data, and it is accessible to the public in the court file.

[9] Chemtura and Anderol were both operating companies with creditors. When they sought approval of their Amalgamation Agreement, they requested the Court to waive notice to creditors, and also sought an order directing that affidavits which provided their financial information be sealed. This Court's Order issued August 1, 2007 approved the Amalgamation Agreement and directed that neither Chemtura nor Anderol be required to give notice to their creditors. Anderol and Chemtura's request that financial information be sealed was not granted; however, the Amalgamation Order provided for temporary sealing of the affidavits pending disposition of a supplementary application for a permanent sealing order to be brought within 60 days of the approval of the amalgamation. The present motion was brought within the 60-day period, and the temporary sealing continues pending this decision.

[10] The Applicant complied with court policy and followed the procedure in the Guidelines to notify the media that it was seeking a publication ban. No media representative sought to intervene. (Although it is not a factor which influenced

disposition of this Application, in my view a more informative notice to media would have been preferable. The information provided identified the Applicant as Chemtura Canada Co./Cie and the particulars of the Application as "applying for a publication ban in connection with an Amalgamation Order issued on the 1st day of August, 2007." While technically correct, it would have been better to identify the companies which originally sought to amalgamate, instead of only the new entity. I also recommend that the notice specify that the publication ban relates to financial information concerning the amalgamated companies. The notice given, while technically compliant in the circumstances, does not indicate the involvement of Anderol, or reveal the type of information sought to be withheld from publication, matters of possible interest to those receiving the notice.)

ISSUE

[11] Should the Court permanently seal the affidavits with financial statements provided by Chemtura and Anderol in support of their Application to amalgamate?

DECISION

[12] The documentation should not be sealed in this case.

ANALYSIS

[13] The Applicant made comprehensive written and oral submissions reviewing development of the law surrounding the granting of publication bans and confidentiality orders. The importance of courts conducting activities in public has long been recognized in our judicial system. In **Ambard v. Attorney General for Trinidad and Tobago**, [1936] A.C. 322 Lord Atkin, when delivering judgment on behalf of the Privy Council, noted at p.335:

> Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

The Supreme Court of Canada has addressed the balance between the "open court principle" and the need to protect confidential information to prevent a serious risk to the proper administration of justice. In **Dagenais v. Canadian Broadcasting Corporation**, [1994] 3 S.C.R. 835, the Court established a test for the ordering of a publication ban, which it refined in **Canadian Broadcasting Corporation v.**

New Brunswick (Attorney General), [1996] 3 S.C.R. 480, **R. v. Mentuck**, [2001] 3 S.C.R. 442 and **Sierra Club of Canada v. Canada (Minister of Finance)**, [2002] 2 S.C.R. 522, and reviewed in **Toronto Star Newspapers v. Ontario**, [2005] 2 S.C.R. 188. In **Sierra Club**, the Supreme Court considered the confidentiality of commercial information in the context of judicial proceedings, and restated as follows at para.53 the test which was originally set out in **Dagenais**:

> A confidentiality order...should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[For ease of reference, this test will sometimes be referred to as the "DMS Test."]

[14] In **Sierra**, the Court noted that three important elements are subsumed in the first branch of the DMS Test:

> First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question. (para.54)
>
> ...In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of public interest in confidentiality... (para.55)
>
> Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question. (para.57)

[15] The Nova Scotia Court of Appeal summarized the principles developed in **Dagenais**, **Mentuck**, and **Sierra Club** in the following terms in **Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)** 238 N.S.R.(2d) 364, at paras. 14-16 (citations omitted):

> **[14]** The open court principle is a hallmark of a democratic society. Openness is required "both in the proceedings of the dispute, and in the material that is relevant to its resolution."
>
> **[15]** Clearly, the order sought by Shannex conflicts with the "open court principle". It is recognized, however, that the principle must sometimes yield to the need for confidentiality. Courts, therefore, retain the discretion to grant confidentiality orders. This discretion is exercised within the general framework of the **Dagenais/Mentuck** test developed by the Supreme Court of Canada, and summarized in **Sierra Club**..
>
> ...
>
> **[16]** The analytical approach to the exercise of discretion here must respect the principles developed in **Dagenais**, **Mentuck** and **Sierra Club** but is a contextual one tailored to the specific rights and interests engaged in this case.

[16] As the Applicant extensively referenced the DMS Test in its submission, the analysis which follows will consider the issue in that context. Although stated in slightly different language, the burden described in the advice to counsel quoted in para.7 of these reasons is not materially different from the DMS Test.

[17] The Applicant maintains that the circumstances in this case resemble those in **Sierra Club** and **Shannex**, (in which confidentiality orders were granted to protect commercial documents), because the order sought relates to commercially-sensitive financial statements of a privately-held company, which would not normally be of general public interest or available to the public, and which its counsel submits would "likely be of significant interest to the Applicant's competitors."

[18] In my view, there are important distinctions between this case and those upon which the Applicant relies, and a sealing order is not warranted under either branch of the DMS test. The Applicant has not met the requirements to obtain a publication ban as described in the Court's advice to counsel.

[19] In this case, any threat which public availability of financial information poses is specific to the Applicant. At para.55-59 the Supreme Court recognized that exposure of the information in **Sierra** would cause breach of a confidentiality agreement, and characterized the interest broadly. The commercial interest at stake in this case does

not extend to a wider objective, such as preserving contractual obligations of confidentiality.

[20] In **Shannex**, unlike in the present case which arises in the context of amalgamation, confidentiality of the material sought to be sealed was the very issue in dispute. The Court of Appeal in **Shannex** noted that the applicable legislation specifically recognized the importance of preserving confidentiality:

> It is key to the analysis that this request arises under the *FOIPOP Act* where confidentiality is not merely incidental but is the subject matter of the litigation. (para.16)
>
> In recognition of the often sensitive nature of the information which is sought to be protected under the FOIPOP process, the Act requires the courts to respect the private nature of such appeals:...(para.17)
>
> It is relevant, as well, that this is an appeal from a decision to release information under the FOIPOP regime. This is a process which guards the confidentiality of information in dispute. As mentioned above, the Act expressly directs the court to take precautions to avoid the unnecessary disclosure of sensitive information (s.43(2)). (para.33)

[21] The first branch of the DMS Test addresses confidentiality orders "in the context of litigation" - the present Application arises in an *ex parte* motion to reorganize the affairs of corporations which have creditors. Chemtura and Anderol are not before the Court in "the context of litigation", or in response to a request for access to information (as in **Sierra**); rather, they have voluntarily chosen to invoke court process to restructure their affairs. The Applicant submits that requirements for a confidentiality order should be less strict for amalgamation applications than during litigation. With respect, I disagree. Full disclosure and transparency should be the dominant consideration when Courts act without giving notice to interested parties, particularly when legislation, such as s.134 of the *Companies Act,* contemplates notice.

[22] The evidence falls short of establishing that a confidentiality order is "necessary to prevent a serious risk to an important interest", and does not establish that "reasonably alternative measures will not prevent the risk." The only testimony in support of the Application, the affidavit of Noel Blake, a Director of the Applicant, states at paras.10 and 11:

> 10. ...The statements contain additional information with respect to the Canadian operations, inter-company transactions and other commercially sensitive information which may be able to be used to the detriment of Chemtura Corporation by its competitors and customers...
>
> 11. The statements contain information of a commercially sensitive nature which may be detrimental to the operations of the company if disclosed to competitors and others... [emphasis added]

[23] The evidence in support of sealing the documents provides limited information about the Applicant's industry and does not indicate that any competitor or customer is seeking the information. Mr. Blake only speculates that the information "may be able to be" used to the detriment of Chemtura Corporation (the Applicant's parent)" and "may" be detrimental. In my view this evidence falls short of establishing that a sealing order "is necessary to present a serious risk to an important interest."

[24] The final element of the first branch of the DMS Test is that the order be necessary "because reasonably alternative measures will not prevent the risk." Materials filed in support of the Application to seal the information do not address alternatives. The evidence on this motion does not indicate whether it would have been feasible to give Anderol and Chemtura's creditors notice of the Approval Application or to protect their interests by other alternatives which might not require production of financial statements, such as providing a guarantee or postponing any obligations to related companies.

[25] The Applicant has not met the first branch of the DMS Test - I am not convinced on the balance of probabilities that a sealing order is necessary to prevent a serious risk to an important commercial interest in the context of litigation because reasonably alternative measures will not prevent the risk.

[26] Under the second branch of the DMS Test, the Court must be satisfied that the beneficial effect of the confidentiality order would outweigh its adverse impact on the open court principle, thus balancing the protection of the Applicant's interest in amalgamating without notice to creditors or public disclosure of financial information against the principle of open and accessible court proceedings. (**Shannex**, para.29) In my view, the open court principle deserves particular emphasis in this case, where the *Companies Act* imposes a requirement to notify creditors. The Amalgamation Approval Order issued August 1, 2007 waived that requirement. The documentation the Applicant wants sealed contains the information advanced in support of the request

to waive the statutory notice. When the Court removes a statutory right to receive notice of a proceeding, the public is *prima facie* entitled to know the basis upon which the Court acts, and material upon which the Court relies to order the waiver should be in the public record. A sealing order should not issue if its effect would be to treat the Applicant's interest in keeping its finances confidential as more important than providing public access to information upon which the Court relied to waive a statutory obligation to notify potentially-interested creditors.

[27] The *Judicature Act*, R.S.N.S. Chapter 240, s.37, allows public exclusion from court proceedings: (1) in the interest of public morals; (2) for the maintenance of order; and (3) for the proper administration of justice. Only the third consideration is relevant. Infringing upon the transparency of court proceedings by sealing evidence upon which the Court relies is not consistent with the administration of justice in this case. The circumstances relevant to the second branch of the DMS Test differ significantly from those in **Shannex**:

(A) The issue in **Shannex** concerned whether there was general public interest in the information. Here, parties likely to be interested in the amalgamation, creditors of the companies involved, are specifically given statutory right to notice. A sealing order in this case would deny open and accessible court proceedings to a group entitled to notice by statute, a more deleterious effect upon the public interest in open and accessible court proceedings than, in the absence of a notice requirement, maintaining confidentiality of information in which no member of the public other than competitors are identified as interested.

(B) Unlike in **Shannex** where evidence indicated the appellant would not have proceeded without assurance the information would be kept confidential, the evidence in this case does not establish that Chemtura and Anderol would not have sought approval to amalgamate unless the Court ordered sealing of their financial information. The Applicant's "risk" to a fair trial (or other access to court) is not at stake.

[28] The Applicant does not satisfy the second branch of the DMS Test. Anderol and Chemtura proceeded with amalgamation despite uncertainty about obtaining a sealing order - the salutary effects of granting a confidentiality order in this case are outweighed by deleterious effects, including the impact on the right to free expression, which in this context includes creditors' interest in having access to documents upon which the Court relied when waiving their statutory right to notice.

[29] The Court has given notice that a publication ban should only be ordered to prevent a serious risk to the proper administration of justice. In this case, where refusal to seal financial information does not deny companies the opportunity to seek amalgamation approval, the proper administration of justice would in my view be compromised if the Court were to deny the access to information upon which it relied when waiving statutory notice. When a court exercises discretion to take away a right or obligation prescribed by statute, it should not cover the trail unless the risk to the administration of justice presented by an applicant for a sealing order is more serious than was evident in this case.

DISPOSITION

[30] The Application will be dismissed.

[31] In order to prevent publication of the financial information pending any appeal of this decision, the order which issues shall provide that the documentation not be opened for 20 days. This will maintain confidentiality during the ten-day appeal period provided by the **Civil Procedure Rules**, and allow the Applicant an additional ten days to seek a stay pending appeal.

J.