

Electronic Service Protocol Brings Unwelcome Substantive Change for Canadian Restructurings in the Guise of Procedural Recommendation

By Robert Thornton and Greg Azeff¹
January 10, 2005

An influential committee comprised of senior insolvency practitioners and one of Canada's top jurists has tackled the thorny issue of setting standards regarding electronic service and communications in large Canadian restructurings. However, if the committee's guidelines are followed, it would effect a substantive change in the law rendering restructurings more complicated and costly. Practitioners before the Commercial List, Canada's most active restructuring court, are faced with a difficult choice.

Introduction

Most large Canadian corporate restructurings are conducted under the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA"). In large CCAA proceedings, such as the recent Air Canada and ongoing Stelco restructurings, the service list can grow to include hundreds of parties, each of which must be served with all court materials filed in the proceedings. Many of the largest Canadian restructuring proceedings have been commenced in Ontario under the supervision of the judges of the Commercial List, a subset of the Ontario Superior Court of Justice that specializes in commercial matters. In order to streamline the process and more effectively manage cases, the Ontario courts have encouraged the use of digital media including online filing and electronic service of documents.

In order to standardize and encourage practices that have been evolving in the Commercial List court, the Commercial List Users Committee (the "CLUC") developed and circulated an e-filing and e-service protocol (the "Protocol"). The CLUC is comprised of senior practitioners who regularly appear in the Commercial List courts, members of the academic community and at least one highly-respected Commercial List judge. The CLUC's recommendations (though not binding) are very influential on court practices. By way of example, Commercial List judges often ask for blacklined versions of draft orders showing variations between the order being sought and the standard version of such order as blessed by the CLUC. Deviations must be explained and, as a practical matter, the CLUC's recommendations are ignored at the peril of counsel.

The adoption by the CLUC of standard terms for the use of electronic filing and service of documents is a welcome development. However, the inclusion in the Protocol of certain substantive changes to the law is troubling.

The Protocol

The CLUC recommends the Protocol for use in all large, multi-party or otherwise complex cases, and in particular in CCAA proceedings. Due to the front-end cost of designing and

¹ Both of the firm ThorntonGroutFinniganLLP

implementing a web site for use in a particular proceeding, it is expected that an electronic filing and service system will only be justified in large proceedings.

For the most part, the Protocol contains the type of procedural rules that have found their way into regular practice in Ontario in any event and includes three principal components:

1. directions regarding the procedure to establish web hosting arrangements for the proceeding;
2. directions to the web host / court officer outlining the details of the website filing system to be established and maintained by the web host; and
3. directions to counsel to all parties using the system (and other parties with notice of the initial order) to follow the specified procedures concerning electronic service and filing of all documents in the case.

The Protocol sets out requirements for the electronic service of court materials such as motion records, affidavits and legal briefs (facta). In addition, the Protocol prescribes standards for the maintenance of a website providing access to all documents in the proceeding as well as other information to stakeholders. The CLUC is of the view that enhanced availability of information about insolvent estates enhances the quality of decision making by parties and creditors and improves the efficiency of the capital markets as they pertain to distressed companies. The operating principles for the Protocol provide that the website should be available to the service list, creditors, shareholders, the media and the public.

Improving efficiency and information flow are laudable goals and the Ontario courts are at the cutting edge of the movement towards electronic filing and document service in Canada. Jurisdictions considering implementing similar programs should pay attention to the Ontario experiment and should work to improve on it.

Potential Problems with the Protocol

Formal restructuring proceedings in Canada occur either as proposals under the *Bankruptcy and Insolvency Act* (Canada) (the “BIA”) or as arrangements the CCAA. There are significant differences between proceedings under the two Acts. BIA proposals are not favoured for large corporate restructurings for a number of reasons, including a shorter timeline and less flexibility than is available under the CCAA. Unlike proceedings under the BIA, there is no substantive requirement under the CCAA for either the debtor company or the independent court-appointed monitor to disclose a list of creditors. The courts have, to date, routinely resisted attempts by creditors to obtain creditor lists.

The new CLUC Protocol reverses this important practice point and suggests that companies seeking to restructure under the CCAA should voluntarily post on a website a list of all creditors together with contact particulars and details of each claim.

Why does this matter? Isn't it a good thing to have informed stakeholders? Doesn't this simply facilitate creditor organization which will ease restructurings?

The fact of the matter is, for good or ill, the law of the land is such that there is no obligation to produce a list of creditors in CCAA restructurings. As all practitioners know, information is power in a restructuring. A list of names, contact particulars and details of claims is important information in any restructuring. There is no statute, regulation or practice direction which compels the delivery of such information into the hands of creditors in a CCAA restructuring. It is our view that the substantive law of Ontario should not be changed by a handful of well-intentioned practitioners and others on the CLUC. Changes to the delicately balanced playing field of restructurings should be left to those with legislative authority or, at least, the judges overseeing the proceedings. Judges can decide on a case-by-case basis when and how such information should be shared after full argument. Through caselaw, principled guidelines can be established to guide practitioners and the law of the land can evolve in its natural and proper course. The CLUC provides many useful services. Substantive legislative amendment is not one of them.

Secondly, regardless of the source of the proposed amendment, such change is not necessary. Creditors lists are a fact of life in Chapter 11 restructurings and under the BIA. CCAA restructurings have been successfully concluded for years without them. In practice, those claimants with significant interests at stake become involved in the proceeding at its earliest stages in any event. The law requires all creditors to be notified of the proceedings immediately after the initial order is made. Creditors with similar interests have had no trouble organizing themselves into groups often with common representation. In appropriate cases, and decided on a case-by-case basis, creditor committees can be recognized by the debtor and the court with varying degrees of formality, including funding, requirements for admission and restrictions on trading, all determined in the dynamic crucible of the particular restructuring proceeding. One or more creditor committees arise in those cases where the parties conclude, or the court is convinced, that they will play a constructive role. In short, there is no problem in creditor organization under the regime currently in place. Under the new CLUC protocol, creditor committees would be more likely to arise instantaneously at the beginning of a proceeding rather than evolving as part of the restructuring process. In our experience, such creditor committees would generate more chaos, not less, and would result in more contested motions, more delay, more cost and more complexity to the proceeding when the opposite should be the goal. Canadian CCAA restructurings have an enviable track record for speed and efficiency as compared with the Chapter 11 restructurings in the United States. The new CLUC Protocol brings us one step closer to the American experience and should be resisted.

The Difficult Choice for Practitioners

Counsel advising debtor clients seeking to restructure under the CCAA in Ontario face a difficult choice today. They can choose to comply with the CLUC Protocol by posting a creditor list on a website, which will have the consequences noted above, or they may choose to omit this aspect of the Protocol and potentially incur the wrath of the supervising judge at an early stage in the proceeding. Neither option holds much appeal.

In our view, the list should not be published on the grounds that there is no legal requirement to do so. The CLUC Protocol is not binding and does not have force of law. Whether the Commercial List judges will allow debtor companies to stray from the Protocol in this regard remains to be seen, but if they do not, the efficiency gains hoped to be achieved by the electronic

service and notice provided for in the Protocol will evaporate in the face of early creditor organization and resistance to the restructuring process.

Conclusion

While some of the concerns set out above may be specific to Canada, the underlying principles upon which such concerns are founded are of broader moment. Many jurisdictions have in place consultative bodies to provide practical advice and direction regarding the administration of the courts. Such bodies are useful in developing programs to improve the efficiency of the court systems, but must not be permitted to usurp the authority of the legislatures and courts on substantive legal issues. Substantive amendments should not be allowed to “slip under the radar” in the guise of a procedural amendment when, in fact, they can have a substantial impact on the conduct of a restructuring proceeding.