

Court File No. BK-17-01-04509

THE QUEEN'S BENCH
Winnipeg Centre
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY AND
INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF
5274398 MANITOBA LTD.

NOTICE OF MOTION
(Appeal re Disallowance Claim)

HEARING DATE: January 11, 2019

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NOTICE OF APPEAL FROM DISALLOWANCE OF CLAIM
(Section 135(4) and Rule 97)

Court File No. BK-17-01-04509

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE PROPOSAL OF
5274398 MANITOBA LTD. O/A CROSS COUNTRY MANUFACTURING
OF THE CITY OF MORDEN IN THE PROVINCE OF MANITOBA

NOTICE OF MOTION

Cervus Contractors Equipment LP (“**Cervus**”) will make a motion to the Court on Friday, January 11, 2019, at 10:00 A.M., or as soon after that time as the motion can be heard, at the Court House at 408 York Avenue, Winnipeg, Manitoba, by way of appeal from the disallowance by the trustee of its claim in the in the estate of 5274398 Manitoba Ltd. (“**Cross Country**”) dated September 10, 2018.

1. **THE MOTION IS FOR:**

- (a) An order:
 - (i) extending the time for filing and service of this Notice of Appeal, if necessary;
 - (ii) declaring that Cervus’ Proof of Claim filed in the Cross Country estate is a valid claim;

- (iii) in the alternative, adjourning this appeal *sine die* to permit a court of competent jurisdiction to determine:
 - (A) the quantification of damages alleged to have been suffered by Bellhop Express Corp. (“**Bellhop**”);
 - (B) the issue of Cervus’ potential liability to Bellhop; and
 - (C) if Cervus is found to be liable to Bellhop, Cervus’ claim for contribution and indemnity from Cross Country for any such liability;
- (iv) that no distribution to creditors may be made pursuant to the proposal of Cross Country until such time as the issues of liability and damages as per 1(iii) above have been determined;
- (v) in the alternative, valuing the damages alleged to have been suffered by Bellhop, in accordance with its Proof of Claim filed, for the purposes of determining a reserve amount to be held back from the distribution, if any, otherwise available to the creditors of the estate of Cross Country pending the resolution of all remaining issues relating to the Bellhop and Cervus Proofs of Claim and issues of liability addressed herein;
- (vi) Such further or other order as to this Honourable Court may seem just.

2. **THE GROUNDS FOR THE MOTION ARE:**

Relevant parties

- (a) Cervus is a dealer of, *inter alia*, transportation trucks and related equipment;
- (b) Bellhop is an Ontario Corporation;
- (c) Cross Country is a Manitoba Corporation with offices in Morden, Manitoba. Cross Country manufactures, *inter alia*, transportation truck trailers;
- (d) El Cargo Fabrication Inc. (“**El Cargo**”) is a federally incorporated company which manufactures, *inter alia*, mechanized tarp systems for use on transportation truck trailers;

The Bellhop Claim

- (e) Bellhop has sued Cross Country, Cervus and El Cargo in Ontario (the “**Bellhop Claim**”) for damages alleged to have been suffered by Bellhop in connection with, *inter alia*, the purchase and subsequent use of a transportation truck trailer (the “**Trailer**”) with a mechanized tarp system. The Trailer was purchased through a Cervus dealership, was manufactured by Cross Country and contained an El Cargo-manufactured mechanized tarp system;
- (f) Bellhop claims, *inter alia*, that the Trailer was defective and caused Bellhop to suffer damages in lost profit and repairs required to the Trailer. Bellhop seeks damages of “not less than” \$3,500,000 against each of the Defendants to the Bellhop Claim, including Cervus and Cross Country. For reasons unknown, Bellhop appears to have discontinued its claim against El Cargo;

- (g) Cervus has defended the Bellhop Claim and cross claimed against, *inter alia*, Cross Country for contribution and indemnity in connection with any damages for which it may be found liable to Bellhop in connection with the Bellhop Claim;

Proposal in Bankruptcy of Cross Country

- (h) Cross Country filed a Notice of Intention to make a Proposal on August 11, 2017;
- (i) Cross Country ultimately filed its proposal on January 19, 2018. The proposal of Cross Country was accepted by the creditors of Cross Country (subject to the effect of the Bellhop Proof of Claim, addressed below) and has received court approval. The proposal contemplates payment of \$1,200,000 to unsecured creditors;

Bellhop Proof of Claim

- (j) Bellhop has filed a Proof of Claim in the Estate of Cross Country in the amount of \$3,270,684. Bellhop was the only creditor to vote against approval of the proposal. If Bellhop's Claim were admitted in the full amount claimed and its vote counted for the purposes of voting on the proposal, the proposal would not meet the statutory requirements for approval by creditors;
- (k) Cervus understands that the Proof of Claim of Bellhop has been disallowed. It is not known at this time whether Bellhop intends to appeal the disallowance;

Cervus' Proof of Claim

- (l) Cervus has filed a Proof of Claim in the Estate of Cross Country. Cervus' Proof of Claim contains two elements:
 - (i) a claim for certain amounts which Cervus inadvertently paid to Cross Country in double payment of invoices issues by Cross Country;
 - (ii) a claim for contribution and indemnity for any amounts which Cervus may be found liable in the Bellhop Claim (the "**Indemnity Claim**").

- (m) Cervus did not vote on the approval of Cross Country's proposal;

Appeal of Disallowance

- (n) The Indemnity Claim portion of Cervus' Proof of Claim has been disallowed.

- (o) The stated basis for the disallowance of Cervus' Indemnity Claim is as follows:
 - (i) it is speculative and uncertain whether the litigation will progress;

 - (ii) it is speculative and uncertain whether the litigation will result in any liability on the part of Cervus to Bellhop for which Cervus is entitled to contribution and/or indemnity from Cross Country;

This Appeal

- (p) The assets available for distribution from the estate of Cross Country are not insignificant. The determination of liabilities in connection with the Bellhop Claim could, given the amounts claimed by Bellhop and the corresponding Indemnity Claim of Cervus, significantly alter the scheme of distribution;

- (q) Cervus states that uncertainty as to the outcome of litigation between Bellhop, Cervus and Cross Country in connection with the Bellhop Claim and Indemnity Claim is an insufficient reason to disallow Cervus' Proof of Claim outright. Given the size of the Bellhop Claim and the related Indemnity Claim, the issues of the quantum of damages, if any, suffered by Bellhop, liability of Cross Country and/or Cervus for such damages and liability of Cross Country pursuant to the Indemnity Claim must be determined prior to the distribution of any proposal funds to creditors of Cross Country;
- (r) Cervus states that the damages claimed by Bellhop in the Bellhop Claim and Bellhop Proof of Claim are excessive and not substantiated by the evidence filed on behalf of Bellhop in support of same;
- (s) It may be appropriate, for the purposes of this proposal proceeding, for a determination to be made as to the quantum of damages, if any, established by Bellhop. In the absence of a determination by this court valuing the maximum potential claim of Bellhop, Cervus is of the view that no distribution to creditors can proceed until such time as the issues of liability and damages pursuant to the Bellhop Claim and Indemnity Claim have been resolved;
- (t) Such further and other grounds and to this court may seem just.

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:
- (a) The affidavit of Josset Johnson;
 - (b) Such further and other material as counsel may advise and this Honourable Court may permit.

October 10, 2018

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Cross Country Manufacturing

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OF THE CITY OF MORDEN IN THE PROVINCE OF MANITOBA

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