

**CITATION:** MF Global Canada Co. (Re), 2011 ONSC 7100  
**COURT FILE NO.:** 31-OR-207854-T  
**Date:** 20111130

**SUPERIOR COURT OF JUSTICE  
ONTARIO  
(In Bankruptcy and Insolvency)**

IN THE MATTER OF THE BANKRUPTCY OF **MF GLOBAL CANADA CO.**,  
OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

**HEARD:** November 14 and 24, 2011

**BEFORE:** C. Campbell J.

**COUNSEL:** *Craig J. Hill* for KPMG Inc., Trustee in Bankruptcy of MF Global Canada Inc.  
*Fred Myers, Brian Empey* for Canadian Investor Protection Fund  
*E.A. Sellers, Tracy Sandler* for RBC Dominion Securities  
*Derrick Tay* for CDCC  
*Harry Underwood* for Friedberg Mercantile  
*Ashley Taylor*, proposed Representative Counsel to the Customers  
*Jeff Carhart* for XL Foods Inc.

**ENDORSEMENT**

[1] Three motions were brought by the MF Global Trustee; two were heard on November 14, 2011 and one on November 24, 2011. The first was for the appointment of Customer Representative Counsel in the bankruptcy of MF Global Canada Co., which was unopposed and which will permit assistance to the Court in respect of the interest of customers of the bankrupt.

[2] The second and third motions sought orders permitting transfer of customer accounts to Royal Bank of Canada Dominion Securities (RBCDS) pursuant to and as contemplated in the Account Transfer and Support Agreement between RBCDS and the Trustee, and repayment of certain amounts that were characterized as a liquidity advance.

[3] The second motion became moot in the intervening time between submissions on the second and third motions, since there was no need to order a liquidity advance, but the basis for which the Order was made is relevant for context.

[4] The third motion, heard on November 24, also sought confirmation of an agreement between the Trustee and the Canadian Investor Protection Fund ("CIPF") by which payments to which CIPF might otherwise be obligated assuming final confirmation of claims, would be estimated and any over-estimated payment would be reimbursed ahead of the "general fund" as referred to below.

[5] The proposed Orders represent the culmination of intense activity on the part of the Trustee and others to permit customers of the bankrupt to have access to their accounts for liquidation and trading purposes. All of those who were involved have performed diligently and effectively to this end and are to be congratulated for their efforts.

[6] The contested area of the relief sought arises from the position of the CIPF, which urges that it be entitled to be repaid from assets in the customer pool of funds following the allocation made pursuant to paragraphs 262(1)(a) and (b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA.") The section reads in part:

**262.** (1) Cash and securities in the customer pool fund shall be allocated in the following priority:

- (a) for costs of administration referred to in paragraph 136(1)(b), to the extent that sufficient funds are not available in the general fund to pay such costs;
- (b) to customers, other than deferred customers, in proportion to their net equity;
- and
- (c) to the general fund.

[7] More explicitly, CIPF asserted in the second motion that should it make liquidity advances or payments to the Trustee to facilitate transfer of customer accounts for which it is obligated to protect that recovery, CIPF should be permitted over and above any amount that it is obligated to reimburse customers any additional liquidity amounts advanced before any further allocation pursuant to section 262(1)(c).

[8] Mr. Taylor on behalf of the customers submits that the scheme of distribution as set out in s. 262 should be strictly construed and so read would not permit any payment out except to customers, which would include both insured and uninsured customers. In that event, CIPF would only be able to recover advances from the general fund referred in 262(1)(c).

[9] Despite the able argument of Mr. Taylor, I was not persuaded that the liquidity charge that was sought here violates s. 262. The scheme of part XII. of the BIA is to permit, among other things, the transfer to and access by customers of their accounts when a security firm is in bankruptcy.

[10] What was sought in the liquidity advance was not in my view a priority to another creditor to the disadvantage of a customer, but rather the cost of administration of advances in respect of estimated obligations for transfer to the customer pool.

[11] I remain of the view that the liquidity Order sought represents an agreement among CIPF, the Trustee and other parties, and it would not in my view be in the interests of any of the customers to see the agreement by which their accounts would be transferred expeditiously put in jeopardy. This would be the case if the agreement between CIPF and the Trustee were rejected.

[12] I concluded that it was in the interests of both the insured and uninsured customers that the transfers take place in an expedited fashion as soon as possible and so approved the Order in the form signed.


[13] The third motion was in effect a variation of the second. Instead of waiting to pay out its obligations in the finalization of a proof of claim process to those customers to which it would be obligated, CIPF agreed to pre-pay its estimated obligation to facilitate early payments to all customers, not just those to whom CIPF would be responsible and to permit the Trustee to minimize the time and cost that would otherwise be incurred in a full claims process.

[14] The scheme of Part XII of the BIA does not explicitly deal with this situation. While some analogy may be made to a Debtor In Possession (DIP) financing, that analogy does not adequately reflect this situation. The pre-payment by CIPF of estimated obligations is voluntary. It did not have to be paid and CIPF is not being reimbursed as would a lender entitled to interest.

[15] The effect of the Agreement with the Trustee is such that CIPF will make a payment of an estimated amount that it otherwise has no obligation but for the Agreement to make at this time. In return for pre-payment of an estimated amount, it seeks to recover any over-payment of the obligated amount ahead of uninsured customers or the general fund.

[16] In my view, the estimated amount does not give rise to a potential priority to CIPF but rather significantly saves the time and cost of administration that would otherwise be incurred if a full claims process were required.

[17] For the above reasons, the relief sought on behalf of uninsured customers is denied and the administration sought by the Trustee is approved in terms of the Order signed.

  
C. CAMPBELL J.

Released: *Nov. 30, 2011*