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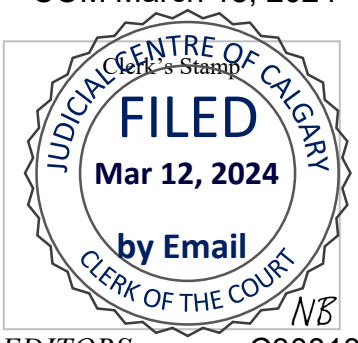

C30813

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF CANADIAN OVERSEAS PETROLEUM LIMITED AND THOSE ENTITIES LISTED IN SCHEDULE "A"

DOCUMENT: **BENCH BRIEF OF THE APPLICANTS**

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APPLICATION BEFORE THE HONOURABLE JUSTICE SIDNELL MARCH 8, 2023 AT 2 PM ON THE COMMERCIAL LIST

PART I - INTRODUCTION

1. This Bench Brief is filed in support of an application by Canadian Overseas Petroleum Limited, ("**COPL**"), together with the other applicants listed in Schedule "A" (collectively, the "**Applicants**" and together with the Non-Filing Affiliates (as defined below), the "**COPL Group**"), seeking an initial order (the "**Initial Order**") and related relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). COPL is a publicly traded international oil and gas exploration, development and production company headquartered in Calgary, Alberta, and the ultimate parent and directing mind of the integrated COPL Group.

2. The COPL Group's headquarters are in Alberta, from which the operations of the group are directed and controlled. The main oil producing assets and reserves of the COPL Group are located in the State of Wyoming, USA (the "**Wyoming Assets**"), and are operated by COPL America Inc., an applicant in these proceedings ("**COPL America**"). Owing to an over-leveraged balance sheet, unfortunate market conditions and a series of operational and weather-related challenges, oil production from the Wyoming Assets has been significantly curtailed, leading to decreased sales, increased capital expenditure and higher production costs. These issues, combined with an inflationary and high-interest market and certain hedging losses, which until recently needed to be cash settled monthly, significantly strained the COPL Group's liquidity.

3. Efforts to reduce costs and restructure the business outside of a proceeding were ultimately unsuccessful, and the COPL Group faces a looming liquidity crisis. On December 20, 2023, COPL America received a Notice of Default from its Lender under the Senior Credit Facility (each as defined below), and payments under the Senior Credit Facility will become due on March 9, 2024. The COPL Group is unable to meet this obligation, as available cash reserves are expected to be

fully depleted by no later than the middle of March and additional funding will be required to continue operations beyond that date.

4. After considering all reasonably available options and indications of potential value from third-party sources, the COPL Group, with the assistance of their financial and legal advisors, have determined that the best path to stabilize its business, maximize stakeholder value, and preserve the COPL Group as a going-concern is to commence these CCAA proceedings. The Lender under the Secured Credit Facility has committed to provide DIP financing to the Applicants, and the Applicants intend to use these CCAA proceedings to effect a restructuring of the COPL Group through a proposed SISP, which is intended be supported by transactions contemplated under a stalking horse purchase agreement.

5. The Applicants therefore seek a stay of proceedings (the "**Stay**") for the permitted initial ten-day period (the "**Initial Stay Period**") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. This relief includes the appointment of KSV Restructuring Inc. as monitor in these proceedings (the "**Proposed Monitor**"), and the approval of the DIP Term Sheet and related DIP Lender Charge (each as defined below). The Applicants additionally seek the extension of the Stay to the Non-Filing Affiliates in order to prevent any potential enforcement actions against the Non-Filing Affiliates which could prejudice the value of the COPL Group as a whole.

6. At the Comeback Hearing, the Applicants intend to seek certain additional relief, including approval of the Restructuring Support Agreement (as defined below) between the COPL Group and the Lender, pursuant to which the Lender has agreed to support these CCAA proceedings, and approval of the SISP.

PART II - FACTS

7. The facts are more fully set out in the Affidavit of Peter Kravitz.[1]

A. The COPL Group

8. COPL, the parent of the COPL Group, is incorporated pursuant to the laws of Canada. COPL's head office is located in Calgary. COPL is the holding company for the following ten wholly-owned direct and indirect subsidiaries, each of whom is an Applicant:[2]

(a) COPL Technical Services Limited ("**COPL Technical**"), incorporated pursuant to the laws of Alberta, which performs geological, geophysical, engineering, accounting and administration functions for the COPL Group;

(b) Canadian Overseas Petroleum (UK) Limited ("**COPL UK**"), registered under the laws of England and Wales, which performs certain technical and project-related functions for the COPL Group;

(c) Canadian Overseas Petroleum (Bermuda) Limited ("**COPL Bermuda**"), registered under the laws of Bermuda;

(d) Canadian Overseas Petroleum (Bermuda Holdings) Limited ("**COPL Bermuda Holdings**"), registered under the laws of Bermuda;

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1 Affidavit of Peter Kravitz affirmed March 7, 2024 [Kravitz Affidavit]. Capitalized terms not otherwise defined have the same meaning as in the Kravitz Affidavit. All references to monetary amounts are in U.S. dollars unless noted otherwise.

2 Kravitz Affidavit at paras. 20-22. A corporate chart depicting the structure of the COPL Group can be found at para. 23 of the Kravitz Affidavit. The Applicants are listed in Schedule "A" to the Kravitz Affidavit.

(e) Canadian Overseas Petroleum (Ontario) Limited ("**COPL Ontario**"), registered under the laws of Ontario for the purposes of providing COPL with a vehicle with which it may act on potential acquisition opportunities in Canada;

(f) COPL America Holding Inc. ("**COPL America Holding**"), registered under the laws of the State of Delaware;

(g) COPL America Inc. (as defined above, "**COPL America**"), registered under the laws of the State of Delaware, which, together with COPL America Holding, was incorporated for the purpose of oil and gas operations in the United States in connection with the Atomic Acquisition (as defined below);

(h) Atomic Oil and Gas LLC ("**Atomic**"), registered under the laws of the State of Colorado, which is the titled interest holder for the COPL Group's working interest share of the Wyoming Assets;

(i) South Western Production Corp. ("**SWP**"), registered under the laws of the State of Colorado, which is an operating company designated by Atomic and its agent, and the non-operating working interest partners, to operate the Wyoming Assets on behalf of Atomic and the non-operating working interest partners; and

(j) Pipeco LLC ("**Pipeco**"), registered under the laws of the State of Wyoming, which together with Atomic and SWP, was acquired by COPL, through its wholly-owned subsidiary COPL America, in the Atomic Acquisition.

B. Business of the Applicants

9. COPL is a publicly traded international oil and gas exploration, development and production company. Operational and financial control of the COPL Group is based out of the head office in Calgary and substantially all geological and other technical services are provided from that office. The COPL Group's exploration and development efforts are primarily based in the United States.[3]

10. As of the date of this submission, the COPL Group has 23 full-time employees (the "**FTEs**"), one part time employee (the "**PTE**"), and two independent contractors. Of these employees, 8 FTEs are located in Calgary, AB, 8 FTEs are located in the United Kingdom, and 8 FTEs and 1 PTE are located in the United States.[4]

(a) The Wyoming Assets

11. The COPL Group's main oil producing assets and reserves are in the State of Wyoming, where the COPL Group is the operator, and majority working interest owner, of three oil producing units.[5]

12. Operational and working interest control over these units was acquired through two significant acquisitions in 2021 and 2022. In March 2021, COPL America acquired all of the membership interests in Atomic Oil and Gas LLC (as defined above, "**Atomic,**" and the acquisition, the "**Atomic Acquisition**"). In July 2022, COPL America completed the acquisition of substantially all of the assets of Cuda Oil and Gas Inc. (as defined above, "**Cuda**," and the aquisition, the "**Cuda Acquisition,**" and together with the Atomic Acquisition, the

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3 Kravitz Affidavit at paras. 24-26.
4 Kravitz Affidavit at para. 40.
5 Kravitz Affidavit at para. 27.

"**Acquisitions**"). As a result of the Acquisitions, the COPL Group acquired 85-100% working interest across three oil producing units located in the Powder River Basin in Converse County, Wyoming. For each unit, the interests are as follows: (i) an 85.52% working interest in the Barron Flats (Deep) Unit ("**BFDU**"); (ii) a 100% working interest in the Cole Creek Unit ("**CCU**"); and (iii) an 85.7% working interest in the Barron Flats (Shannon) Unit ("**BFSU,**" and collectively the "**Wyoming Assets**"). The COPL Group also has an interest in other non-utilized lands complimentary to the Wyoming Assets.[6]

(b) Nigeria Operations

13. In October 2014, COPL formed ShoreCan, a joint venture company with Shoreline Energy International Limited ("**Shoreline**"). COPL and Shoreline each hold a 50% interest in ShoreCan, which itself holds 80% of the shares of Essar Exploration and Production Limited, Nigeria ("**Essar Nigeria**" and, together with ShoreCan, the "**Non-Filing Affiliates**"), which is registered under the laws of Nigeria. Essar Nigeria's sole asset is a disputed claim to a 100% interest and operatorship of an oil prospecting license located offshore in the central area of the Niger Delta ("**OPL 226**"). Essar Exploration and Production Limited (Mauritius) ("**Essar Mauritius**") holds the remaining 20% of the equity of Essar Nigeria.[7]

14. In August 2020, ShoreCan and Essar Mauritius entered into certain definitive agreements with respect to Essar Nigeria, including a sale and purchase agreement, which among other things, set out their respective obligations under the shareholder agreement with respect to Essar Nigeria. The completion date of the definitive agreements has been extended several times. There have

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6 Kravitz Affidavit at paras. 28-30. See Kravitz Affidavit at para. 32 for a summary of the COPL Group's oil and gas reserves in Wyoming.

7 Kravitz Affidavit at para. 34.

been no further developments with the joint venture partners since December 2021, and the COPL Group's efforts in Nigeria are currently on hold.[8]

(c) Shared Services

15. All of the entities in the COPL Group, including COPL America and its subsidiaries, rely on COPL for certain administrative and business support services that are integral to the COPL Group's operations. These services include executive, M&A and strategic corporate, investigation of new projects and future development, capital expenditure review and approval, legal, tax, financial accounting, treasury, statutory reporting, Lender reporting, internal controls and tax, among other things (together, the "**Management Services**"). In addition, COPL Technical provides the COPL Group with geological and geophysical services, engineering services and corporate development and land management services which are integral to the COPL Group's operation (together, the "**Technical Services**," and with the Management Services, the "**Shared Services**").[9]

C. Financial Position of the Applicants

(a) Assets, Liabilities, and Stockholder's Equity

16. As of September 30, 2023, COPL had combined total assets with a book value of approximately $114,829,000, and total liabilities of approximately $92,022,000. As of the same date, stockholders' equity in respect of COPL was $22,807,000.[10]

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8 Kravitz Affidavit at paras. 37-38.
9 Kravitz Affidavit at paras. 52-53.
10 Kravitz Affidavit at paras. 65, 70, 74.

(b) Senior Credit Facility

17. COPL America is a borrower under a senior secured loan agreement originally dated March 16, 2021 (the "**Senior Credit Agreement**") and as amended through Amendment No. 11 dated as of October 13, 2023 (as may be amended, restated, supplemented, or otherwise modified from time to time, the "**Senior Credit Facility**") between and among the lender parties thereto (collectively, the "**Lender**") and ABC Funding, LLC as administrative and collateral agent. The Senior Credit Facility is repayable within a four-year term and provides for a base facility of $45 million, with an additional $20 million available to fund future development at the sole discretion of the Lender. The Senior Credit Facility is guaranteed by COPL America Holding, SWP and Pipeco; however, it is not guaranteed by COPL or any of its subsidiaries outside of the US.[11]

(c) Swap Intercreditor Agreement

18. On March 15, 2021, as a condition of the Senior Credit Facility and a means of mitigating exposure to commodity price risk volatility, COPL America entered into a master risk management agreement (as amended, restated, supplemented or otherwise modified from time to time, the "**BP Swap Counterparty Master Agreement**") with BP Energy Company ("**BP**").[12]

19. In connection therewith, COPL America, BP and the Lender entered into an intercreditor agreement originally dated March 16, 2021 and as amended through the second amendment dated as of October 13, 2023 (as amended, restated, supplemented or otherwise modified from time to time, the "**Swap Intercreditor Agreement**"). The Swap Intercreditor Agreement provides, among other things, that obligations under BP Swap Counterparty Master Agreement and the loan obligations under the Senior Credit Facility were to be secured on a first priority, *pari passu* basis

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11 Kravitz Affidavit at paras. 76-77.
12 Kravitz Affidavit at para. 85.

by the Liens on the Collateral granted to the Lender under the Collateral Documents (in each case as such are defined in the Senior Credit Facility).[13]

(d) Swap Loan

20. On October 4, 2023, COPL America and BP terminated all the COPL Group's crude oil and butane hedging contracts and the outstanding obligations under the BP Swap Counterparty Master Agreement, resulting in obligations due and owing to BP in an aggregate amount of $11,873,702.13 as of such date (collectively, the "**BP Specified Swap Obligations**"). The BP Swap Obligations were replaced with a loan in the principal amount of $11,873,702.13 (the "**Swap Loan**") which bears interest at the same rate and calculation methodology as the Senior Credit Facility and has the same maturity date.[14]

21. The Swap Loan remains a "Swap Obligation" under the Swap Intercreditor Agreement and shall be treated as *pari passu* with the Loan Obligations (as defined in the Swap Intercreditor Agreement).[15]

(e) Subordinated Credit Facility Agreement

22. COPL America is also a borrower pursuant to a subordinated credit facility agreement (as may be amended, the "**Subordinated Intercompany Credit Facility Agreement**") between COPL and COPL America, whereby COPL has agreed to provide an unsecured and unguaranteed credit facility (the "**Interco Credit Facility**") under which COPL America may borrow amounts up to $53 million. Until the Obligations (as defined therein) under the Senior Credit Facility have been fully satisfied, the indebtedness under Interco Credit Facility is wholly subordinate and junior

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13 Kravitz Affidavit at paras. 86-87.
14 Kravitz Affidavit at paras. 88-90.
15 Kravitz Affidavit at para. 92.

in payment to the Obligations, and COPL America is not permitted to make, and COPL is not permitted to accept or retain, any payments under the Subordinated Interco Credit Agreement.[16]

(i) Convertible Bonds

23. COPL has additionally issued two series of unsecured convertible bonds. $12.6 million principal amount of senior convertible bonds due July 26, 2024 (the "**2024 Bonds**") and U.S. $12.6 million principal amount of Bonds due July 26, 2025 (the "**2025 Bonds**" and together with the 2024 Bonds, including all subsequently issued bonds consolidated therewith to form a single series, collectively, the "**Bonds**") were issued pursuant to bond instruments dated July 26, 2022.[17]

24. The bond instrument governing the 2024 Bonds was subsequently supplemented on March 24, 2023, October 10, 2023 and January 14, 2024 and the bond instrument governing the 2025 Bonds was subsequently supplemented on December 30, 2022, March 24, 2023, October 10, 2023 and January 15, 2024, in each case to reflect, among other things, an increase to the outstanding principal amount of Bonds, a reduction in the conversion price per share, and to extend the maturity date of the Bonds. The 2024 Bonds now have a maturity date of January 26, 2028 and the 2025 Bonds now have a maturity date of January 26, 2029.[18]

25. The Bonds are held in majority by one large institutional shareholder, being a UK-based fund (the "**Lead Bondholder**"), with the remainder held by other investors (all investors collectively, the "**Bondholders**").[19]

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16 Kravitz Affidavit at paras. 95-98.
17 Kravitz Affidavit at para. 99.
18 Kravitz Affidavit at paras. 100-101.
19 Kravitz Affidavit at para. 103. Commercial terms of the Bonds are summarized in the Kravitz Affidavit.

D. Events Leading up to the CCAA Filing

(a) Operational and Market-Related Challenges

26. Following the Acquisitions, the COPL Group sought to optimize and increase oil production from the Wyoming Assets. However, a series of market forces and operational and weather-related challenges significantly curtailed oil production in the Wyoming Assets, including: (i) difficulties related to COPL's "miscible flood program" in the BFSU, which led to unsafe working conditions and forced COPL to undertake a series of temporary mitigation measures which significantly curtailed oil production; (ii) escalating cost of injectants used in the miscible flood program; and (iii) severe weather conditions in 2022 and 2023. These challenges led to decreased production and sales, increased capital expenditure, and higher production costs.[20] Further, global instability led to more volatile crude oil prices and higher interest rates, which significantly increased borrowing costs under the Secured Credit Facility.[21]

27. This challenging business environment was exacerbated by losses which COPL America experienced on hedging contracts entered into with BP, which until recently needed to be cash settled monthly. On October 4 and 13, 2023, the COPL Group's hedging contracts were terminated and the outstanding obligations replaced with the Swap Loan.[22]

28. The COPL Group's financial performance has correspondingly struggled. The COPL Group has failed to deliver free cash flow in any single quarter over the past 18 months and COPL America has laboured to service its debt.[23] In addition, since August 2022, COPL America has

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20 Kravitz Affidavit at paras. 118-122.
21 Kravitz Affidavit at para. 123.
22 Kravitz Affidavit at paras. 124-127.
23 Kravitz Affidavit at para. 117.

been prohibited under the terms of the Senior Credit Facility from disbursing funds to COPL to fund G&A expenses and Shared Services. This has led to the need for repeated small equity and convertible debt "rescue" financings by COPL.[24]

(b) Default under the Senior Credit Facility and Third-Party Technical Review

29. In response to these challenges, the COPL Group undertook a number of cost reduction initiatives, including by reducing G&A costs, covering the hedging losses with the Swap Loan and temporarily ceasing the acquisition of injectant (the cost of which has significantly increased in recent months).[25]

30. Notwithstanding these cost reduction initiatives, on December 20, 2023, COPL America received a Notice of Default (the "**Default Notice**") from the Lender under the Senior Credit Facility. On December 29, 2023, COPL America entered into a Forbearance Agreement with the Lender in which the Lender agreed not to enforce its rights under the Senior Credit Facility until February 29, 2024, which was later extended until March 9, 2024. [26]

31. On January 16, 2024, the COPL Group obtained $2.5 million in emergency equity financing from the Lead Investor, in order to allow the COPL Group to remain listed while it obtained an independent technical review its assets, with a view to obtaining further financing. On February 19, 2024, the results of the third-party technical review were received. The review demonstrated the immediate need for short and long-term expenditures and material risks related to the field at the Wyoming Assets.[27]

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24 Kravitz Affidavit at para. 130.
25 See Kravitz Affidavit at para. 133 for examples of these initiatives.
26 Kravitz Affidavit at paras. 134-135, 138, 110.
27 Kravitz Affidavit at paras. 138-139, 142.

E. The Urgent Need for Relief Under the CCAA

32. The challenges outlined above have led to a situation in which the COPL Group will be unable to meet its obligations going forward. The COPL Group expects that its cash reserves will be entirely depleted by the early-middle of March, and that it will require additional funding to be able to continue operations beyond such date.[28]

33. As part of its efforts to restructure for the benefit of stakeholders, the COPL Group began exploring DIP financing options with its key stakeholders and other third parties. At the same time, COPL America commenced discussions with the Lender regarding the terms on which they would support a restructuring of the Applicants. Discussion with the Lender bore fruit, and on March 7, 2024, the COPL Group and the Lender executed a support agreement (the "**Restructuring Support Agreement**"), which outlined the terms and steps of the Lender's support. The Restructuring Support Agreement appends a term sheet (the "**Restructuring Term Sheet**"), and authorizes the Applicants to negotiate and enter into a stalking horse purchase agreement substantially in accordance with the terms set out in the Restructuring Term Sheet by no later than March 22, 2024. The stalking horse purchase agreement is intended to support the proposed SISP, and may ultimately serve as the basis for the restructuring of COPL.[29]

34. The Applicants anticipate seeking approval of the Restructuring Support Agreement at the Comeback Hearing, along with approval of the SISP. The proposed restructuring contained in the Restructuring Term Sheet represents the best path to stabilize the COPL Group's business, maximize stakeholder value, and preserve the COPL Group as a going-concern.[30] The Applicants

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28 Kravitz Affidavit at paras. 144-145.

29 Kravitz Affidavit at paras. 145-147. For a full outline of the proposed restructuring of the COPL Group contained in the Restructuring Term Sheet, see Kravitz Affidavit at para. 147.

30 Kravitz Affidavit at para. 14.

therefore require urgent relief under the CCAA to ensure that they can continue as a going concern, maintain employment for their employees, and preserve enterprise value while they pursue the restructuring contemplated under the Restructuring Term Sheet.[31]

PART III - LAW AND ARGUMENT

35. This Bench Brief addresses the following issues:

(a) The Applicants are entitled to seek protection under the CCAA, as the Applicants are insolvent and have obligations exceeding $5 million and the Alberta court has jurisdiction over the Applicants;

(b) The Applicants are entitled to a broad stay of proceedings, which should be extended to the Non-Filing Applicants;

(c) This Court should authorize payment of certain pre-filing claims to suppliers;

(d) This Court should authorize the engagements of the CRO and Financial Advisor;

(e) This Court should authorize the DIP Term Sheet and the DIP Lenders' Charge;

(f) This Court should approve the Administration Charge and Directors' Charge; and

(g) This Court should authorize COPL to act as the foreign representative for the purpose of having these CCAA proceedings recognized and approved in a jurisdiction outside of Canada, and to apply for foreign recognition and approval of these CCAA proceedings in any jurisdiction outside of Canada.

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[31] Kravitz Affidavit at para. 144.

A. The Applicants are Entitled to Seek Protection under the CCAA

(a) The Applicants are Insolvent

36. The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars.[32] The Applicants are all affiliated debtor companies with total claims against them that far exceed $5 million. The Applicants are each a "company" for the purposes of s. 2 of the CCAA, as they are either incorporated in Canada or have assets in Canada. [33]

37. A "debtor company" means, *inter alia*, a company that is insolvent.[34] Whether a company is insolvent for the purposes of this definition is evaluated by reference to the disjunctive definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, and the expanded concept of insolvency adopted by the court in *Stelco*.[35]

38. The Applicants in these proceedings are either currently insolvent under the BIA test for solvency, or facing the kind of imminent liquidity crisis that clearly satisfies the expanded *Stelco* test. As discussed above, the Forbearance Agreement entered into with the Lender in respect of the Senior Credit Facility expires on March 9, 2024 at 12:01 AM, the COPL Group' cash reserves will imminently be fully depleted and the COPL Group will be unable to meet its obligations.[36]

39. Further, when CCAA applicants are part of a significantly intertwined group of affiliated debtor companies, it may not be necessary to find that each and every applicant is insolvent on a

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32 CCAA, sections 2 and 3(1).
33 *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 35 and 36[*Lydian*].
34 CCAA, sections 2 and 3(1).
35 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s. 2(1); *Stelco Inc. (Re)*, 2004 CanLII 24933 at para. 26. This approach to the insolvency criterion has been applied on countless occasions, including *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 26 [*Target*]; *Just Energy Corp. (Re)*, 2021 ONSC 1793 [*Just Energy*] at paras. 48 to 51; *Nordstrom Canada Retail, Inc. (Re)*, 2023 ONSC 1422 at para. 26 [*Nordstrom*].
36 Kravitz Affidavit at para. 144.

stand-alone basis.[37] The Applicants are all affiliated, and the businesses of the Applicants in Canada, the US, and elsewhere are inextricably intertwined. The COPL Group entirely relies on COPL and COPL Technical for provision of the Shared Services and cannot operate or function without the provision of the Shared Services.[38]

(b) The Alberta Court has Jurisdiction Over the Proceeding

40. Subsection 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

41. Each of the Applicants fulfils these requirements. COPL, COPL Ontario, and COPL Technical are each headquartered in Canada, while the remaining Applicants each maintain funds on deposit in Canadian bank accounts or have funds currently being held on retainer in Canada by counsel.[39] A number of courts have held that funds deposited in bank accounts or held on retainer in this manner are sufficient to satisfy the CCAA jurisdiction requirements, and have cautioned that the court must not engage in "a qualitative or quantitative analysis of the Canadian assets."[40]

42. Further, Alberta is the proper forum for the restructuring, as Alberta is the chief place of business for the COPL Group as a whole. COPL Group is a consolidated business, whose operations are functionally and operationally integrated. All other members of the COPL Group

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37 *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 at paras. 28 to 30; see also *Dondeb Inc. (Re)*, 2012 ONSC 6087 at para. 16.

38 Kravitz Affidavit at para. 53.

39 Kravitz Affidavit at paras. 57-58.

40 *Global Light Telecommunications Inc., (Re)*, 2004 BCSC 745 at para. 17; see also *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para. 30. In reference to funds held on retainer by counsel, see *Syncreon Group B.V. (Re)*, 2019 ONSC 5774 at para. 27; *LTL Management LLC (Re)*, 2021 ONSC 8357 at para. 13.

are ultimately entirely owned by, and report to, COPL, and historically, the COPL Group has been directed and controlled by COPL's executive officers, the majority of whom were Canadian residents. All or substantially of the senior management, strategic corporate functions and operational decision-making for the COPL Group is performed by and through COPL's head office in Calgary and/or by Canadian employees of the COPL Group. As discussed in more detail above, these services include, among other things, financial accounting, M&A and corporate strategy, legal and tax services.[41]

43. In addition, Canadian employees of COPL Technical, also based out of Calgary, perform substantially all of the geological and geophysical, engineering, and corporate development and land management services for the COPL Group. Without provision of the Shared Services by COPL and COPL Technical, the remaining members of the COPL Group cannot function or operate independently. [42]

44. Canadian courts have accepted that a multinational enterprise such as the Applicants' business must be restructured as a global unit, even where operating units are located in foreign jurisdictions. For example, in *Ghana Gold*, the Ontario court refused the request of two Ghanian subsidiaries of a CCAA debtor for an order that the CCAA proceeding not apply to their Ghanian property. Central to the Court's reasoning was the finding that the center of main interest for the Applicants was Ontario, and it was critical to the restructuring that the entire group of applicants be included in the CCAA proceedings.[43]

45. As discussed in more detail below, if the proposed Initial Order and related relief is granted, COPL intends to commence a recognition proceeding under chapter 15 of the US Bankruptcy Code

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41 Kravitz Affidavit at paras. 24-25, 174.
42 Kravitz Affidavit at paras. 24, 54, 174.
43 *Ghana Gold Corp (Re)*, 2013 ONSC 3284 at paras. 55 to 56.

in the United Stated Bankruptcy Court for the District of Delaware. This relief will ensure that actions taken in relation to US entities and US property will be overseen by the US courts.

B. The Stay of Proceedings Should be Granted and extended to Non-Filing Affiliates

46. Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the Applicants have acted with due diligence and in good faith.[44] Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."[45] All of the relief requested in this first-day application meets these criteria, and consists of exactly the type of essential "keep the lights on" measures that are contemplated by section 11.001 of the CCAA.

47. The Applicants further seek that the benefit of the stay be extended to the Non-Filing Affiliates: ShoreCan and Essar Nigeria. The authority of the court to extend a stay to non-filing affiliates is derived from the broad jurisdiction allotted to the court under ss. 11 and 11.01(2) of the CCAA and is commonly granted as part of CCAA proceedings,[46] including to foreign non-applicant affiliates.[47] In *JTI-Macdonald Corp*, this Court outlined the factors determining when it is appropriate to extend a CCAA stay over non-filing affiliates, including where the business of the non-filing affiliate is significantly intertwined with that of the debtors, and extending the stay would help maintain stability during the CCAA process.[48]

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44 CCAA, s.11.02(3)(a)-(b).
45 CCAA, s. 11.001.
46 *Chalice Brands Ltd. (Re)*, 2023 ONSC 3174 at para. 35 [*Chalice Brands*].
47 See, i.e., *Chalice Brands*, at paras. 35, 42; *Lydian*, at para. 39; *Tamerlane Ventures Inc (Re)*, 2013 ONSC 5461 at paras. 20-21; *Target*, at paras. 49-50; *Nordstrom*, at paras. 36-37, 42.
48 Re *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 at para 15 [*JTI-Macdonald*].

48. The Applicant submits that the *JTI-Macdonald Corp* factors support the extension of the stay to the Non-Filing Affiliates. The business and operations of the Non-Filing Affiliates are functionally and operationally integrated with those of the Applicants, and the extension of the stay is necessary to prevent any default or cross-defaults from being declared in agreements of the Non-Filing Affiliates that may arise as a result of the insolvency of the Applicants, and to prevent any realization and enforcement attempts from being made in Nigeria or elsewhere. Such enforcement action could lead to the immediate loss of value of the COPL Group and their stakeholders.[49]

C. Authority to Make Pre-Filing Payments to Critical Suppliers

49. The Applicants seek authorization to make payments of pre-filing amounts to critical suppliers, subject to the terms of the DIP Term Sheet and the Definitive Documents, and with the consent of the Monitor.

50. An inability to pay critical suppliers could jeopardize the Applicants' orderly restructuring. In particular, COPL America, through SWP, is party to a Natural Gas Liquids Purchase Agreement (as amended, "**Tallgrass Agreements**") with Tallgrass Midstream, LLC ("**Tallgrass**") whereby SWP has agreed to purchase all production of mixed natural gas liquids from a Tallgrass facility. It is vital to the preservation of the business of the COPL Group that it can continue its relationship with Tallgrass without disruption, and it is intended that Tallgrass be paid pre-filing amounts should such payments be authorized.[50]

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[49] Kravitz Affidavit at para. 151.
[50] Kravitz Affidavit at paras. 49-51.

51. The Court has exercised its jurisdiction on multiple occasions to grant similar relief.[51] The court in *Index Energy Mills Road Corporation* outlined the factors that courts have considered in determining whether to grant such authorization, all of which are satisfied here, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.[52]

D. Appointment of the CRO and Financial Advisor Should be Approved

52. The Applicants seek the appointment of Peter Kravitz as the CRO, and Province as Financial Advisor, pursuant to the terms and conditions set out in their respective Engagement Letters. Further, the Applicants seek the approval of a charge to fund the CRO (the "**CRO Charge**"), up to a maximum of $500,000 until the Comeback Hearing. The CRO Charge is proposed to be secured by the Property (as defined in the Initial Order), and to rank *pari passu* with the Administration Charge (as defined below) and in priority to all other charges.[53]

53. This Court has the jurisdiction to approve engagement the CRO and Financial Advisor, and to grant the CRO Charge pursuant to s. 11.52 of the CCAA.[54] Courts frequently appoint a chief restructuring officer and financial advisor in order to provide expertise which will assist the debtors in achieving the objectives of the CCAA, to assist the debtor's management in dealing

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51 See, for example, *Target*, at para. 62 to 65; *Nordstrom*, at paras. 50-53; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753 at paras. 72-74.

52 *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para. 31.

53 Kravitz Affidavit at para. 158.

54 See, i.e., *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215 at para. 33 [*Payless ShoeSource*]; *Walter Energy Canada Holdings, Inc., (Re)*, 2016 BCSC 107 at paras. 39-43 [*Walter Energy*].

with a crisis situation, and to allow management to focus on the debtor's continued operation.[55] Orders appointing a chief restructuring officer commonly include a charge securing the chief restructuring officer's expenses.[56]

54. The proposed CRO, Peter Kravitz, has extensive restructuring advisory experience, and in the course of his duties has become familiar with the COPL Group's affairs. Mr. Kravitz is therefore uniquely well positioned to guide the COPL group through the restructuring process and into the SISP.[57] The proposed Financial Advisor, Province, has been engaged by COPL Group since December 19, 2023, and has since that time has, among other things, assisted the COPL Group in developing and considering various business plans and restructuring alternatives.[58]

55. The proposed Monitor supports the appointment of Mr. Kravitz as CRO, and the retention of Province as Financial Advisor.[59]

E. The Interim Financing and DIP Lender's Charge Should be Approved

56. In the lead-up to these CCAA proceedings, the CRO contracted a number of parties in relation to potential debtor-in-possession financing, including BP. Following this process, only certain entities comprising the Lender was prepared to advance DIP funding, and each of the Applicants, as borrowers, have entered into a term sheet dated March 7, 2024 (the "**DIP Term Sheet**") with Summit Partners Credit Fund II, L.P., Summit Investors Credit III, LLC, and Summit Investors Credit III (UK), L.P., (together, the "**DIP Lender**"), pursuant to which the DIP Lender

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55 See, i.e., *Pascan Aviation inc., (Re)*, 2015 QCCS 4227 at paras. 57-58; *Walter Energy*, at para. 35; *JTI-Macdonald*, at para. 26.
56 *Payless ShoeSource*, at para. 33; *Walter Energy*, at paras. 39-43.
57 Kravitz Affidavit at paras. 156-157.
58 Kravitz Affidavit at para. 160.
59 Kravitz Affidavit at paras. 159(b), 160.

has agreed to fund a senior secured, super priority loan (the "**DIP Loan**") in a maximum principal amount of $11 million.[60]

57. Pursuant to s. 11.2 of the CCAA, the Applicants seek an interim financing charge to secure the DIP Loan (the "**DIP Lender's Charge**"). The DIP Lender's Charge is proposed to be secured by the Property, and to rank behind the Administration Charge, the CRO Charge, and the Director's Charge (as defined below).[61]

58. Section 11.2(4) of the CCAA lists the factors to be considered by the court in deciding whether to approve interim financing and grant an interim financing charge.[62] When an application for interim financing is made at the same time as an initial application, the applicant must additionally satisfy the court that the terms of the loan are "limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period [i.e. the initial stay period]."[63] This additional requirement does not preclude interim financing and a related charge from being approved during the initial stay period, and a number of CCAA courts have granted interim financing at the time of the initial order.[64]

59. These factors favour the requested relief. Given the nature of the Applicants' business, unforeseen liquidity demands may need to be satisfied during this period to ensure the Applicants' ability to operate as a going concern. The Applicants' cash flow projections demonstrate that interim financing is needed to provide stability and fund operations and restructuring efforts during these CCAA Proceedings, and the DIP Loan is expected to provide the Applicants with sufficient

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60 Kravitz Affidavit at paras. 163-164. See Kravitz Affidavit at para. 166 for a list of certain commercial terms contained in the DIP Term Sheet.
61 Kravitz Affidavit at para. 164.
62 CCAA, s. 11.2(4).
63 CCAA, s 11.2(5).
64 See, i.e., *Just Energy*, at paras. 7, 71; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586, at para. 2.

liquidity to do so while it pursues the restructuring contemplated by the Restructuring Term Sheet.[65] The DIP Lender has indicated that it is not prepared to advance funds without the security of the DIP Lenders' Charge, including the proposed priority thereof.[66]

60. Further, under terms of the proposed order, the Applicants will be limited to an initial draw of $1.5 million. The initial draw is designed to pay specified amounts that are known to be due during the first 10 days of these CCAA proceeding. The balance of funds will only be used if necessary, providing the Applicants with flexibility to address additional liquidity demands made during the first 10 days of these CCAA proceedings.[67]

F. The Administration Charge Should be Granted

61. Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of proposed Monitor, its Canadian and U.S. counsel, Canadian and U.S. counsel to the Applicants, and the Financial Advisor, as security for their respective fees and disbursements (the "**Administration Charge**"), up to a maximum of CAD $1.5 million until the Comeback Hearing. The Administration Charge was developed in consultation with the Proposed Monitor and is proposed to be secured by secured by the Property and to rank *pari passu* with the CRO Charge and in priority to all other charges.[68]

62. The requested Charge satisfies the well-accepted factors originally established by Pepall J. in *Canwest Publishing*. Among other factors, the requested amount is fair and reasonable, and

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65 Kravitz Affidavit at paras. 161, 168.
66 Kravitz Affidavit at para. 167.
67 Kravitz Affidavit at para. 168.
68 Kravitz Affidavit at para. 175.

appropriate to the size and complexity of the businesses being restructured.[69] In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period.

G. The Directors' Charge Should be Granted

63. Pursuant to section 11.51 of the CCAA, the Applicants seek a directors and officers charge (the "**Directors' Charge**") in the amount of CAD $500,000 until the Comeback Hearing. The Director's Charge was sized in consultation with the Proposed Monitor and is proposed to be secured by the Property and to rank behind the Administration Charge and the CRO Charge but ahead of the DIP Lenders' Charge.[70]

64. The COPL Group's present and former directors and officers are among the potential beneficiaries under liability insurance policies that cover an aggregate annual limit of approximately $10 million. This policy will likely not provide sufficient coverage for the potential liability that the director and officers could incur in relation to these CCAA proceedings.[71]

65. In light of the potential liabilities and the insufficiency of available insurance, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. A successful restructuring of the COPL Group will only be possible with the continued participation of its directors, officers, management, and employees. These personnel are essential to the viability of the Applicants' continuing business and the preservation of enterprise value.[72]

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69 See, for example, *Target*, at para. 74, citing *Canwest Publishing Inc. / Publications Canwest Inc. (Re)*, 2010 ONSC 222 at para. 39; *Just Energy*, at para. 112 to 113.
70 Kravitz Affidavit at para. 180.
71 Kravitz Affidavit at para. 179.
72 Kravitz Affidavit at paras. 176, 180.

H. Foreign Recognition

66. Because the COPL Group has operations, assets and valuable business and trade relationships in the U.S., contemporaneously with commencement of these CCAA proceedings, COPL intends to initiate a case under Chapter 15 of Title 11 of the Bankruptcy Code seeking an order to recognize and enforce these CCAA proceedings in the U.S. and protect against any potential adverse action taken by the COPL Group's U.S.-based parties (the "**Chapter 15 Case**").[73]

67. Pursuant to s. 56 of the CCAA, the Applicants therefore seek an order allowing COPL to act as a foreign representative in respect of this proceeding for the purpose of having orders issued in the course of this proceedings recognized in jurisdictions outside of Canada, including in the anticipated Chapter 15 Case. The operations of the COPL Group are functionally and operationally integrated, such that the US business cannot operate independently of the Canadian business, including the provision of the Shared Services by COPL and COPL Technical. As such, authorizing COPL to seek recognition of the orders of this Court in the United States is appropriate and in the best interests of stakeholders.[74]

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[73] Kravitz Affidavit at para. 171.

[74] For examples of authorization to act as a foreign representative being granted under similar circumstances, see *PT Holdco, Inc. (Re)*, 2016 ONSC 495 at paras. 43-47; *Black Press Ltd. et al. (Re)*, (January 15, 2024), Supreme Court of British Columbia, Court File No. S-240259 (Initial Order) at para. 55.

PART IV - NATURE OF THE ORDER SOUGHT

68. For the foregoing reasons, the Applicants respectfully submit that this Court should grant the Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of March, 2024:

Osler, Hoskin & Harcourt LLP
Counsel for the Applicants

TABLE OF AUTHORITIES

23. *Syncreon Group B.V. (Re)*, 2019 ONSC 5774

24. *Tamerlane Ventures Inc. (Re)*, 2013 ONSC 5461

25. *Target Canada Co. (Re)*, 2015 ONSC 303

26. *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

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R.S.C., 1985, c. B-3

An Act respecting bankruptcy and insolvency

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Interpretation

Definitions

2 In this Act,

affidavit includes statutory declaration and solemn affirmation; (*affidavit*)

aircraft objects [Repealed, 2012, c. 31, s. 414]

application, with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; (*Version anglaise seulement*)

assignment means an assignment filed with the official receiver; (*cession*)

bank means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association; (*banque*)

L.R.C., 1985, ch. B-3

Loi concernant la faillite et l'insolvabilité

Titre abrégé

Titre abrégé

1 *Loi sur la faillite et l'insolvabilité*.

L.R. (1985), ch. B-3, art. 1; 1992, ch. 27, art. 2.

Définitions et interprétation

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une personne insolvable ou un failli transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actif à court terme Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs. (*current assets*)

actionnaire S'agissant d'une personne morale ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une personne morale autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

bankrupt means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; (*failli*)

bankruptcy means the state of being bankrupt or the fact of becoming bankrupt; (*faillite*)

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a person; (*agent négociateur*)

child [Repealed, 2000, c. 12, s. 8]

claim provable in bankruptcy, ***provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor; (*réclamation prouvable en matière de faillite* ou *réclamation prouvable*)

collective agreement, in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; (*convention collective*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

common-law partnership means the relationship between two persons who are common-law partners of each other; (*union de fait*)

corporation means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; (*personne morale*)

court, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; (*tribunal*)

creditor means a person having a claim provable as a claim under this Act; (*créancier*)

affidavit Sont assimilées à un affidavit une déclaration et une affirmation solennelles. (*affidavit*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une personne. (*bargaining agent*)

banque

a) Les banques et les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*;

b) les membres de l'Association canadienne des paiements créée par la *Loi canadienne sur les paiements*;

c) les sociétés coopératives de crédit locales définies au paragraphe 2(1) de la loi mentionnée à l'alinéa b) et affiliées à une centrale — au sens du même paragraphe — qui est elle-même membre de cette association. (*bank*)

bien Bien de toute nature, qu'il soit situé au Canada ou ailleurs. Sont compris parmi les biens les biens personnels et réels, en droit ou en equity, les sommes d'argent, marchandises, choses non possessoires et terres, ainsi que les obligations, servitudes et toute espèce de domaines, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, sur des biens, ou en provenant ou s'y rattachant. (*property*)

biens [Abrogée, 2004, ch. 25, art. 7]

biens aéronautiques [Abrogée, 2012, ch. 31, art. 414]

cession Cession déposée chez le séquestre officiel. (*assignment*)

conjoint de fait La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

conseiller juridique Toute personne qualifiée, en vertu du droit de la province, pour donner des avis juridiques. (*legal counsel*)

contrat financier admissible Contrat d'une catégorie prescrite. (*eligible financial contract*)

convention collective S'agissant d'une personne insolvable, s'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre elle et l'agent négociateur. (*collective agreement*)

créancier Personne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi. (*creditor*)

current assets means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; (*actif à court terme*)

date of the bankruptcy, in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed; (*date de la faillite*)

date of the initial bankruptcy event, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d), or

(f) proceedings under the *Companies' Creditors Arrangement Act*; (*ouverture de la faillite*)

debtor includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; (*débiteur*)

director in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; (*administrateur*)

créancier garanti Personne titulaire d'une hypothèque, d'un gage, d'une charge ou d'un privilège sur ou contre les biens du débiteur ou une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement. S'entend en outre :

a) de la personne titulaire, selon le *Code civil du Québec* ou les autres lois de la province de Québec, d'un droit de rétention ou d'une priorité constitutive de droit réel sur ou contre les biens du débiteur ou une partie de ses biens;

b) lorsque l'exercice de ses droits est assujetti aux règles prévues pour l'exercice des droits hypothécaires au livre sixième du *Code civil du Québec* intitulé *Des priorités et des hypothèques* :

(i) de la personne qui vend un bien au débiteur, sous condition ou à tempérament,

(ii) de la personne qui achète un bien du débiteur avec faculté de rachat en faveur de celui-ci,

(iii) du fiduciaire d'une fiducie constituée par le débiteur afin de garantir l'exécution d'une obligation. (*secured creditor*)

date de la faillite S'agissant d'une personne, la date :

a) soit de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*date of the bankruptcy*)

débiteur Sont assimilées à un débiteur toute personne insolvable et toute personne qui, à l'époque où elle a commis un acte de faillite, résidait au Canada ou y exerçait des activités. S'entend en outre, lorsque le contexte l'exige, d'un failli. (*debtor*)

disposition [Abrogée, 2005, ch. 47, art. 2]

enfant [Abrogée, 2000, ch. 12, art. 8]

entreprise de service public Vise notamment la personne ou l'organisme qui fournit du combustible, de l'eau ou de l'électricité, un service de télécommunications, d'enlèvement des ordures ou de lutte contre la pollution ou encore des services postaux. (*public utility*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

executing officer includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; (*huissier- exécutant*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account; (*garantie financière*)

General Rules means the General Rules referred to in section 209; (*Règles générales*)

failli Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation juridique d'une telle personne. (*bankrupt*)

faillite L'état de faillite ou le fait de devenir en faillite. (*bankruptcy*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par les Règles générales à la date de l'ouverture de la faillite, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;

c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

huissier-exécutant Shérif, huissier ou autre personne chargée de l'exécution d'un bref ou autre procédure sous l'autorité de la présente loi ou de toute autre loi, ou de toute autre procédure relative aux biens du débiteur. (*sheriff*)

intérêt relatif à des capitaux propres

a) S'agissant d'une personne morale autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

localité En parlant d'un débiteur, le lieu principal où, selon le cas :

a) il a exercé ses activités au cours de l'année précédant l'ouverture de sa faillite;

income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

TAB 2

No. S-240259
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF BLACK PRESS LTD., 311773 B.C. LTD., AND THOSE ENTITIES LISTED IN SCHEDULE "A"

PETITIONERS

O R D E R MADE AFTER APPLICATION

(INITIAL ORDER)

BEFORE THE HONOURABLE JUSTICE STEPHENS	)))	January 15, 2024

THE APPLICATION of the Petitioners coming on for hearing at 800 Smithe Street, Vancouver, British Columbia, on the 15th day of January, 2024 (the "**Order Date**"); AND ON HEARING Vicki Tickle, Shayna Clarke and Jared Enns, counsel for the Petitioners and the non-petitioner affiliates of the Petitioners listed in Schedule "B" hereto (the "**Non-Petitioner Stay Parties**" and collectively with the Petitioners, the "**Black Press Entities**"), and those other counsel listed on Schedule "C" hereto; AND UPON READING the material filed, including the First Affidavit of Christopher Hargreaves made January 12, 2024 (the "**First Hargreaves Affidavit**"), the consent of KSV Restructuring Inc. to act as the Monitor, the Pre-Filing Report of KSV Restructuring Inc. dated January 12, 2024; AND UPON BEING ADVISED that the secured creditors who are likely to be affected by the charges created herein were given notice; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

SERVICE

1. The time for service of this Notice of Application and supporting materials is hereby abridged such that the Notice of Application is properly returnable today.

JURISDICTION

2. The Petitioners are companies to which the CCAA applies.

SUBSEQUENT HEARING DATE

3. The hearing of the Petitioners' application for an extension of the Stay Period (as defined in paragraph 16 of this Order) and for any ancillary relief shall be held at the Courthouse at 800 Smithe Street, Vancouver, British Columbia at 10:00 a.m. on Thursday, the 25th day of January, 2024 or such other date as this Court may order.

PLAN OF ARRANGEMENT

4. The Petitioners shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the **"Plan"**).

POSSESSION OF PROPERTY AND OPERATIONS

5. Subject to this Order and any further Order of this Court, the Petitioners shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (excluding the CIBC Cash Collateral (as defined in the First Hargreaves Affidavit), provided that if and when Canadian Imperial Bank of Commerce releases its security interest in such monies then such monies will automatically and without any further action constitute and be deemed to form part of the Property) (the "**Property**"), and continue to carry on their business (the "**Business**") in the ordinary course and in a manner consistent with the preservation of the Business and the

Property. The Petitioners shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.

Cash Management System

6. The Petitioners shall be entitled to continue to utilize the cash management system currently in place as described in the First Hargreaves Affidavit or, with the prior written consent of the Monitor and the Interim Lender, replace it with another substantially similar central cash management system (the "**Cash Management System**"), and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by any of the Petitioners of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Petitioners, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan (if any) with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. Subject to the terms of the DIP Term Sheet and Definitive Documents (both as hereinafter defined), the Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:

(a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred (collectively "**Wages**");

(b) the fees and disbursements of any Assistants retained or employed by the Petitioners which are related to the Petitioners' restructuring, at their standard rates and charges, including payment of the reasonable fees and disbursements of legal counsel retained by the Petitioners, whenever and wherever incurred, in respect of:

(i) these proceedings or any other similar proceedings in other jurisdictions in which any of the Petitioners or any subsidiaries or affiliated companies of the Petitioners are domiciled;

(ii) any litigation in which any of the Petitioners are named as a party or are otherwise involved, whether commenced before or after the Order Date;

(iii) any related corporate matters; and

(c) with the written consent of the Monitor, amounts owing for goods and services actually supplied to the Petitioners prior to the Order Date, if in the opinion of the Petitioners the supplier is critical to the Business and ongoing operations of the Petitioners, consistent with existing policies and procedures.

8. Except as otherwise provided herein and subject to the terms of the DIP Term Sheet and the Definitive Documents, the Petitioners shall be entitled to pay all expenses reasonably incurred by the Petitioners in carrying on the Business in the ordinary course following the Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably incurred and which are necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services, provided that any capital expenditure exceeding $100,000 shall be approved by the Monitor;

(b) all obligations incurred by the Petitioners after the Order Date, including without limitation, with respect to goods and services actually supplied to the Petitioners following the Order Date (including those under purchase orders outstanding at the Order Date but excluding any interest on the Petitioners' obligations incurred prior to the Order Date); and

(c) fees and disbursements of the kind referred to in paragraph 7(b) which may be incurred after the Order Date.

9. The Petitioners are authorized to remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from Wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, and (iii) income taxes or any such claims which are to be paid pursuant to Section 6(3) of the CCAA;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioners, but only where such Sales Taxes accrue or are collected after the Order Date, or where such Sales Taxes accrued or were collected prior to the Order Date but not required to be remitted until on or after the Order Date; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal property taxes, municipal business taxes or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors.

10. Until such time as a real property lease is disclaimed in accordance with the CCAA, the Petitioners shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease, but excluding, for greater certainty, accelerated rent or penalties, fees or other charges arising as a result of the insolvency of the Petitioners or the making of this Order) based on the terms of existing lease arrangements or as otherwise may be negotiated between the Petitioner and the landlord from time to time ("**Rent**"), for the period commencing from and including the Order Date, twice-monthly in equal payments on the first and fifteenth day of the month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including Order Date shall also be paid.

11. Except as specifically permitted herein, the Petitioners are hereby directed, until further Order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any of the Petitioners to any of their respective creditors as of the Order Date except as authorized by this Order;

(b) to make no payments in respect of any financing leases which create security interests;

(c) to grant no security interests, trust, mortgages, liens, charges or encumbrances upon or in respect of any of their Property, nor become a guarantor or surety, nor otherwise become liable in any manner with respect to any other person or entity except as authorized by this Order;

(d) to not grant credit except in the ordinary course of the Business only to their customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioners to such customers as of the Order Date; and

(e) to not incur liabilities except in the ordinary course of Business.

RESTRUCTURING

12. Subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the DIP Term Sheet and Definitive Documents, the Petitioners shall have the right to:

(a) permanently or temporarily cease, downsize or shut down all or any part of their Business or operations and commence marketing efforts in respect of any of their redundant or non-material assets and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $500,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate; and

(c) pursue all avenues of refinancing for their Business or Property, in whole or part;

all of the foregoing to permit the Petitioners to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. The Petitioners shall provide each of the relevant landlords with notice of the Petitioners' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Petitioners' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors who claim a security interest in the fixtures, such landlord and the Petitioners, or by further Order of this Court upon application by the Petitioners', the landlord or the applicable secured creditors on at least two (2) clear days' notice to the other parties. If the Petitioners disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any dispute concerning such fixtures (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Petitioners' claim to the fixtures in dispute.

14. If a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours on giving the Petitioners and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer, the landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims the landlord may have against the Petitioners, or any other rights the landlord might have, in respect of such lease or leased premises and the landlord shall be entitled to notify the Petitioners of the basis on which it is taking possession and gain possession of and re-lease such leased premises to any third party or parties on such terms as the landlord considers advisable, provided that nothing herein shall relieve the landlord of its obligation to mitigate any damages claimed in connection therewith.

15. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronics Documents Act*, S.C. 2000, c. 5 and Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, and any regulations promulgated under authority of either Act, as applicable (the "**Relevant Enactment**"), the Petitioners, in the course of these proceedings, are permitted

to, and hereby shall, disclose personal information of identifiable individuals in their possession or control to stakeholders, their advisors, prospective investors, financiers, buyers or strategic partners (collectively, "**Third Parties**"), but only to the extent desirable or required to negotiate and complete the Restructuring or to prepare and implement the Plan or transactions for that purpose; provided that the Third Parties to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them in the same manner and to the same extent with respect to the collection, use and disclosure of that information as if they were an organization as defined under the Relevant Enactment, and limiting the use of such information to the extent desirable or required to negotiate or complete the Restructuring or to prepare and implement the Plan or transactions for that purpose, and attorning to the jurisdiction of this Court for the purposes of that agreement: Upon the completion of the use of personal information for the limited purposes set out herein, the Third Parties shall return the personal information to the Petitioners or destroy it. If the Third Parties acquire personal information as part of the Restructuring or the preparation and implementation of the Plan or transactions in furtherance thereof, such Third Parties may, subject to this paragraph and any Relevant Enactment, continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners.

STAY OF PROCEEDINGS, RIGHTS AND REMEDIES

16. Until and including January 25, 2024, or such later date as this Court may order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of any of the Black Press Entities or the Monitor, or affecting the Business, the Property or the Non-Petitioner Stay Parties' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Non-Petitioner Stay Parties' Property**"), shall be commenced or continued except with the prior written consent of the Black Press Entities and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Black Press Entities or affecting the Business, the Property or the Non-Petitioner Stay Parties' Property are hereby stayed and suspended pending further Order of this Court.

17. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any of the Black Press Entities or the Monitor, or affecting the Business, the Property or the Non-Petitioner Stay Parties'

Property, are hereby stayed and suspended except with the prior written consent of the Black Press Entities and the Monitor or leave of this Court.

18. Nothing in this Order, including paragraphs 16 and 17, shall: (i) empower the Black Press Entities to carry on any business which the Black Press Entities are not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a mortgage, charge or security interest (subject to the provisions of Section 39 of the CCAA relating to the priority of statutory Crown securities); or (iv) prevent the registration or filing of a lien or claim for lien or the commencement of a Proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided, however: (a) that no further step shall be taken in respect of such lien, claim for lien or Proceeding except for service of the initiating documentation on the applicable Black Press Entities; and (b) that any deemed trust claims or other claims of any government agency in Canada or any province or territory thereof or any foreign governmental agency shall not be perfected or rank as secured claims and shall rank as unsecured claims, including pursuant to section 38 of the CCAA.

NO INTERFERENCE WITH RIGHTS

19. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence, or permit in favour of or held by any of the Black Press Entities, except with the prior written consent of the applicable Black Press Entitie(s) and the Monitor or leave of this Court.

CONTINUATION OF SERVICES

20. During the Stay Period, all Persons having oral or written agreements with any of the Black Press Entities or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, banking services, payroll services, insurance, transportation, utility, or other services, to the Business or any of the Black Press Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by any of the Black Press Entities, and that the Black Press

Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Order Date are paid by the Black Press Entities in accordance with normal payment practices of the Black Press Entities or such other practices as may be agreed upon by the supplier or service provider and the applicable Black Press Entitie(s) and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

21. Notwithstanding any provision in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Order Date, nor shall any Person be under any obligation to advance or re-advance any monies or otherwise extend any credit to the Black Press Entities on or after the Order Date. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

22. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of any of the Black Press Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of any of the Black Press Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Petitioners, if one is filed, is sanctioned by this Court or is refused by the creditors of the Petitioners or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of any of the Black Press Entities that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

DIRECTORS AND OFFICERS INDEMNIFICATION AND CHARGE

23. The Black Press Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the applicable Black Press Entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

24. The directors and officers of the Black Press Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $10,674,000, as security for the indemnity provided in paragraph 23 of this Order. The Directors' Charge shall have the priority set out in paragraphs 41 and 43 herein.

25. Notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Black Press Entities' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 23 of this Order.

APPOINTMENT OF MONITOR

26. KSV Restructuring Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Petitioners with the powers and obligations set out in the CCAA or set forth herein, and that the Petitioners and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Petitioners pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

27. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Petitioners' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the DIP Term Sheet, the Definitive Documents and such other matters as may be relevant to the proceedings herein;

(c) assist the Petitioners, to the extent required by the Petitioners, in their dissemination, to the Interim Lender (as hereinafter defined) and their counsel, as and when required or permitted under the DIP Term Sheet or the Definitive Documents, of financial and other information as agreed to between the Petitioners and the Interim Lender which may be used in these proceedings including reporting on a basis to be agreed with the Interim Lender;

(d) advise the Petitioners in their preparation of the Petitioners' cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel as and when required under the DIP Term Sheet and Definitive Documents, or as otherwise agreed to by the Interim Lender;

(e) advise the Petitioners in their development of the Plan (if any) and any amendments to the Plan;

(f) assist the Petitioners, to the extent required by the Petitioners, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) monitor all payments, obligations and transfers as between the Petitioners and their affiliates;

(h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Petitioners, to the extent that is necessary to adequately assess the Petitioners' business and financial affairs or to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(j) assist the Foreign Representative (as defined below) and its legal counsel as may be required to give effect to the terms of this Order; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

28. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer or a successor employer, within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

29. Nothing herein contained shall require or allow the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the British Columbia *Environmental Management Act*, the British Columbia *Fish Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. For greater certainty, the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

30. The Monitor shall provide any creditor of the Petitioners and the Interim Lender with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Petitioners is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Petitioners may agree.

31. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the rights and protections afforded the Monitor by the CCAA or any applicable legislation.

ADMINISTRATION CHARGE

32. The Monitor, counsel to the Monitor, and counsel to the Petitioners shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Petitioners as part of the cost of these proceedings. The Petitioners are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor and counsel to the Petitioners on a periodic basis and, in addition, the Petitioners are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Petitioners, retainers, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

33. The Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the British Columbia Supreme Court who may determine the manner in which such accounts are to be passed, including by hearing the matter on a summary basis or referring the matter to a Registrar of this Court.

34. The Monitor, counsel to the Monitor, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $750,000, as security for their

respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order which are related to the Petitioners' restructuring. The Administration Charge shall have the priority set out in paragraphs 41 and 43 hereof.

INTERIM FINANCING

35. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility (the "**DIP Facility**") from Canso Investment Counsel Ltd. as portfolio manager for and on behalf of Canso Strategic Credit Fund (the "**Interim Lender**") in order to finance the continuation of the Business and preservation of the Property, provided that borrowings under such credit facility shall not exceed the aggregate principal amount of $500,000 unless permitted by further Order of this Court.

36. The DIP Facility shall be on the terms and subject to the conditions set forth in the term sheet between the Petitioners and the Interim Lender dated as of January 12, 2024 (the "**DIP Term Sheet**"), attached to the First Hargreaves Affidavit, as Exhibit "M".

37. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the DIP Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

38. The Interim Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property up to the maximum amount of $500,000 (plus accrued and unpaid interest, fees and expenses). The Interim Lender's Charge shall not secure an obligation that exists before this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 41 and 43 hereof.

39. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence and during the continuance of an Event of Default (as defined in the DIP Term Sheet), the Interim Lender, upon 3 business days notice to the Petitioner and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the DIP Term Sheet, Definitive Documents and the Interim Lender's Charge, including without limitation, to cease making advances to the Petitioners and set off and/or consolidate any amounts owing by the Interim Lender to the Petitioners against the obligations of the Petitioners to the Interim Lender under the DIP Term Sheet, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioners or the Property.

40. The Interim Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada (the **"BIA"**), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

41. The priorities of the Administration Charge, the Directors' Charge and the Interim Lender's Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $750,000);

Second – Directors' Charge (to the maximum amount of $10,674,000); and

Third – Interim Lender's Charge (to the maximum amount of $500,000 plus accrued and unpaid interest, fees and expenses).

42. Any security documentation evidencing, or the filing, registration or perfection of, the Charges shall not be required, and the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

43. Each of the Charges shall constitute a mortgage, security interest, assignment by way of security and charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any Person, save and except those claims contemplated by section 11.8(8) of the CCAA. Notwithstanding the foregoing, the Charges shall rank behind Encumbrances in favour of any Persons that have not been served with notice of this application. The Petitioners and the beneficiaries of the Charges shall be entitled to seek priority of the Charges ahead of such Encumbrances on a subsequent application on notice to those parties.

44. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant or suffer to exist any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Petitioners obtain the prior written consent of the Monitor, the Interim Lender and the beneficiaries of the Administration Charge and the Directors' Charge.

45. The Administration Charge, the Directors' Charge, the DIP Term Sheet, the Definitive Documents and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings,

incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioners; and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Term Sheet or the Definitive Documents shall create or be deemed to constitute a breach by any of the Petitioners of any Agreement to which any of the Petitioners is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Petitioners entering into the DIP Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Petitioners pursuant to this Order, the DIP Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. Any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Petitioners' interest in such real property leases.

SERVICE AND NOTICE

47. The Monitor shall (i) without delay, publish in *The Globe and Mail* (National Edition) a notice containing the information prescribed under the CCAA, and (ii) within five days after Order Date, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Petitioners of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

48. The Petitioners and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Petitioners' creditors or other interested parties at their respective addresses as last shown on the records of the Petitioners and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

49. Any Person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to a service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up to date form of the Service List on its website at: www.ksvadvisory.com/experience/case/black-press.

50. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on its website at: www.ksvadvisory.com/experience/case/black-press.

51. Notwithstanding paragraphs 48 and 49 of this Order, service of the Petition, the Notice of Hearing of Petition, any affidavits filed in support of the Petition and this Order shall be made on the Federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and regulations thereto, in respect of the Federal Crown, and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, in respect of the British Columbia Crown.

GENERAL

52. The Petitioners or the Monitor may from time to time apply to this Court for directions in the discharge of their powers and duties hereunder.

53. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Petitioners, the Business or the Property.

54. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative, the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Petitioners in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

55. Black Press Ltd. is hereby authorized and empowered to act as the foreign representative (the "**Foreign Representative**") in respect of these proceedings for the purpose of having these proceedings recognized in a foreign jurisdiction and to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Foreign Representative is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Code Bankruptcy Code*, 11 U.S.C., §§ 101 – 1532, as amended.

56. The Petitioners may (subject to the provisions of the CCAA and the BIA) at any time file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if and when the Petitioners determine that such a filing is appropriate.

57. The Petitioners are hereby at liberty to apply for such further interim or interlocutory relief as they deem advisable within the time limited for Persons to file and serve Responses to the Petition.

58. Leave is hereby granted to hear any application in these proceedings on two (2) clear days' notice after delivery to all parties on the Service List of such Notice of Application and all affidavits in support, subject to the Court in its discretion further abridging or extending the time for service.

59. Any interested party (including the Petitioners and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to all parties on the Service List and to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order, provided, however, that the Chargees shall be entitled to rely on this Order as granted and on the Charges and priorities set forth in paragraphs 41 and 43 hereof with respect to any fees, expenses, liabilities and disbursements incurred, as applicable until the date this Order may be amended, varied or stayed.

60. Endorsement of this Order by counsel appearing on this application is hereby dispensed with.

61. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

62. Leave is hereby granted for counsel to appear at future hearings in this matter remotely by video.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Vicki Tickle and Jared Enns
Lawyers for the Petitioners

BY THE COURT

REGISTRAR

SCHEDULE "A"

Petitioners

A. Canadian Petitioners

Black Press Ltd.

311773 B.C. Ltd.

Black Press Group Ltd.

0922015 B.C. Ltd.

Central Web Offset Ltd.

B. US Petitioners

Sound Publishing Holding, Inc.

Sound Publishing Properties, Inc.

Sound Publishing, Inc.

Oahu Publications, Inc.

The Beacon Journal Publishing Company

WWA (BPH) Publications, Inc.

San Francisco Print Media Co.

SCHEDULE "B"

Non-Petitioner Stay Parties

Black Press (Barbados) Ltd.

Whidbey Press (Barbados) Inc.

Black Press Delaware LLC

Black Press Group Oregon LLC

SCHEDULE "C"

LIST OF COUNSEL

Name of Counsel	Party Represented
Vicki Tickle, Jared Enns, Shayna Clarke	The Petitioners
Mary I.A. Buttery, K.C.	KSV Restructuring Inc., in its capacity as the Proposed Monitor
David E. Gruber and Michael Shakra	Canso Investment Counsel Ltd., as portfolio manager for and on behalf of Canso Strategic Credit Fund

TAB 3

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

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[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

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[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

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[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

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[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Pepall J.

Released: October 13, 2009

TAB 4

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6] and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

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[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

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[8] 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

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[12] Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
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> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
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> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
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> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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[13] This exception also applies to the other charges granted.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

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[14] Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

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[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

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[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) 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.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

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[19] Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

TAB 5

CITATION: Re Chalice Brands Ltd., 2023 ONSC 3174
COURT FILE NO.: CV-23-00699872-00CL
DATE: 20230526

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CHALICE BRANDS LTD.

BEFORE: Kimmel J.

COUNSEL: *Shawn Irving, / Marc Wasserman, / Kathryn Esaw, / Fabian Suárez-Amaya*, for Chalice Brands Ltd.

Jeremy Bornstein, Counsel for KSV Restructuring Inc., the Proposed Monitor

HEARD: May 23, 2023

ENDORSEMENT
(CCAA- INITIAL ORDER)

[1] Chalice Brands Ltd. brings this application for an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Having been satisfied that the preconditions were met, I signed the Initial Order on May 23, 2023 with a brief endorsement and reasons to follow. These are my reasons.

Background – The Chalice Group and its Current Liquidity Crisis

[2] Chalice Brands Ltd. ("Chalice" or the "Applicant") is the ultimate parent company of the Chalice Group, a vertically integrated group of cannabis companies operating primarily in Oregon's regulated adult-use market. The Chalice Group operates a farm-to-table cannabis business. They grow, process, distribute and sell their own cannabis and cannabis products.

[3] Chalice is incorporated and headquartered in Ontario.

[4] The Ontario Securities Commission issued a cease-trade order on May 6, 2022 ("CTO") after Chalice missed its 2021 annual filing deadline. Prior to the CTO, Chalice's common shares traded on the Canadian Securities Exchange ("CSE") as well as over the counter on the OTCQX®.

[5] Chalice's assets are comprised of cash and its direct and indirect ownership of the remaining entities in the Chalice Group. Chalice has five bank accounts in Canada. Chalice is the 100 percent owner of Greenpoint Holdings Inc. ("Greenpoint Holdings"), a Delaware company. Greenpoint Holdings is the 100 percent owner of each operating company in the Chalice Group.

[6] All entities in the Chalice Group, other than Chalice, are United States based direct and indirect subsidiaries of Chalice with no assets in Canada (the "Non-Filing Affiliates"). Most of the operating entities are in Oregon.

[7] The Chalice Group has twenty-one active bank accounts in the United States. The Chalice Group leases certain properties in Oregon, including its 16 retail stores, 3 production facilities and its cultivation location. Chalice has guaranteed some of those leases.

[8] The Chalice Group does not own any real property in Canada or the United States.

[9] The Chalice Group holds 32 regulatory licenses in Oregon related to producing, processing, wholesaling and retailing cannabis and cannabis products. While all these licenses are in good standing, four are on temporary closure status under the licensing regime. In Nevada, the Chalice Group holds four licenses related to cultivation and product manufacturing of medical marijuana. All four licenses are in good standing but are currently inactive.

[10] The Chalice Group has 134 full-time employees and 37 part-time employees, all of whom work in the United States. All employees of the Chalice Group are employed and paid by one of Chalice's subsidiaries, Greenpoint Workforce, Inc. ("Greenpoint Workforce").

[11] Employee retention tax credits are an important asset of the Chalice Group. In 2020, the U.S. Congress passed the *Coronavirus Aid, Relief, and Economic Security (CARES) Act* which, among other things, created a new employee retention tax credit ("ERTCs"). The ERTCs are a refundable tax credit created to encourage employers to keep their employees on the payroll during the months in 2020 affected by the pandemic.

[12] To date, Greenpoint Workforce has received $2,700,000 worth of ERTCs. Greenpoint Workforce anticipates receiving another $2,300,000 of ERTCs in the near future.

[13] The Chalice Group's most recent financial statements are its unaudited, consolidated financial statements as at December 31, 2021. These statements disclosed that its liabilities exceeded its assets and that it had a net loss of almost $17 million. The evidentiary record indicates that its financial situation has deteriorated since 2021.

[14] The current financial circumstances of the Chalice Group appear to be the result of its premature pursuit of an expansion plan. Anticipating that cannabis would be legalized on a Federal level in the United States, in 2021, the Chalice Group undertook an acquisition-based strategy, taking on debt to acquire retail stores and production facilities in Oregon to support its vertical integration. However, Federal deregulation did not occur.

[15] In the meantime, capital investments in the cannabis industry have become more difficult to secure and Chalice's inability to finalize its 2021 (and subsequently, its 2022) audited financial statements and the subsisting CTO prevent the Chalice Group from raising funds through issuing securities. This, combined with supply chain issues, inflation, oversupply in the retail cannabis market driving retail prices down and detrimental tax treatment of controlled substances in the United States have reduced the Chalice Group's gross margins, profitability and cash flows.

[16] Chalice's primary assets are inter-company receivables from the Non-Filing Affiliates. Its principal liabilities consist of outstanding debt obligations under three notes and two series of unsecured debentures with an aggregate outstanding principal of $10,259,297 (USD). Four of its subsidiaries also have funded debt obligations of $8,864,616 (USD). Chalice and certain of the Non-Filing Affiliates are alleged to be, or are, in default under their respective debt obligations.

[17] These circumstances have led to the urgent liquidity crisis that the Chalice Group now faces. Chalice and its operating subsidiaries are unable to satisfy their obligations as they come due. The Chalice Group cannot pay its trade creditors, its landlords or its employees. At present, the Chalice Group owes approximately $6 million in trade payables, including over $1 million in missed rent.

[18] Of immediate concern is that:

a. One of the lenders has threatened to move forward with nonjudicial foreclosure on the collateral and has written directly to the Oregon's cannabis regulator (the "OLCC") advising that they were purportedly taking steps to foreclose on assets of the Chalice Group and seeking approval for temporary authority to operate five of the Chalice Group's cannabis licenses; and

b. Chalice's subsidiaries have also fallen behind on making lease payments to certain of their landlords, which may entitle the landlords to declare a default under the lease and lock them out. This, in turn, would put the Chalice Group's store-based cannabis licenses at risk since, in Oregon, cannabis licenses are specific to a particular retail location. Therefore, the licenses risk being suspended or terminated if the retail location ceases operating.

[19] Chalice and its subsidiaries (the Non-Filing Affiliates) need "breathing space" from their creditors to pursue a going-concern sale. Chalice seeks to extend the benefit of the *CCAA* stay in this proceeding to its Non-Filing Affiliates, all of which are integral to the operations of the Chalice Group. If proceedings were taken against the Non-Filing Affiliates, it would be highly detrimental to the Chalice Group's ability to achieve a going-concern solution.

[20] Chalice has prepared a Cash Flow Forecast for the period from the week ending May 22, 2023 to the week ending August 18, 2023 (the "Period"). It indicates that Chalice requires $1,030,000 cash flow to meet anticipated obligations during the Period. Chalice's ability to do so is based on it having already received, or receiving, partial repayments of intercompany loans owing to it using proceeds from the recent ERTCs received by Greenpoint Workforce. Based on

this Cash Flow Forecast, Chalice is not expecting to require a debtor-in-possession facility. Chalice intends to use these funds, in addition to certain other anticipated receipts, to fund Chalice's operations during this *CCAA* proceeding.

[21] KSV Restructuring Inc. is the proposed monitor (the "Proposed Monitor" or "KSV"). The Proposed Monitor's pre-filing report reflects its understanding that, aside from Chalice, Greenpoint Workforce's only other creditors are three bridge lenders (the "Bridge Lenders") that advanced Greenpoint Workforce approximately $831,250 in aggregate loans (together the "Bridge Loans") to fund working capital requirements until it received the ERTCs from the Internal Revenue Service. The Proposed Monitor further reports, based on discussions with Scott Secord, the Chief Restructuring Officer ("CRO"), that the Chalice Group intends to repay the Bridge Lenders during the *CCAA* proceeding. The receipts in the Cash Flow Forecast represent the repayment of the intercompany debt from the anticipated receipt of the second round of ERTC payments less the repayment of the Bridge Loans.

The Planned Oregon Receivership – the Intended Co-ordinated Going Concern Solution

[22] Since cannabis has not been legalized Federally in the United States, the Chalice Group is unable to seek protection under the U.S. Bankruptcy Code, irrespective of its compliance with state cannabis laws. As such, concurrently with the filing of this Application, proceedings were commenced in Oregon to place certain Non-Filing Affiliates which are formed or have assets in Oregon (the "Oregon Subsidiaries") into state receivership (the "Oregon Receivership"). Should the Oregon Subsidiaries be placed in receivership, there shall be an automatic stay of proceedings against those entities and their property in Oregon; however, there was no such stay as of May 23, 2023 when the Initial *CCAA* Order was granted.

[23] Chalice seeks to have the *CCAA* stay of proceedings extended to all the Non-Filing Affiliates, with a carve-out for the Oregon receivership proceedings and the potential for a parallel stay in that jurisdiction. Subsidiaries in other states, such as Delaware, California and Nevada, will remain subject to the *CCAA* proceedings.

[24] It is intended that Chalice, together with the CRO and the proposed Monitor, will work in a coordinated manner with the receiver appointed in Oregon (the "Oregon Receiver") to conduct a sales process to achieve a going concern solution.

Issues

[25] The following issues raised by the relief sought are whether:

a. The Applicant meets the criteria for *CCAA* protection;
b. The *CCAA* stay should be extended to the Non-Filing Affiliates; and
c. The Administration Charge should be granted.

Analysis

Is the Applicant Eligible for CCAA Protection?

[26] Section 9(1) of the *CCAA* provides that an application under the *CCAA* may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." The *CCAA* applies to a "debtor company" or "affiliated debtor companies" where the total claims against the debtor or its affiliates exceeds $5 million.

[27] Chalice is incorporated in Ontario, with assets in Ontario (its bank accounts and shareholdings) and with total claims against it exceeding $5 million.

[28] Chalice is in default under various secured debt obligations and does not have sufficient liquidity to make payments on unsecured debentures when the next interest payments come due on June 30, 2023. Given the CTO and the lack of interest in the capital markets for cannabis companies, Chalice's only immediate sources of funds are its subsidiaries. Those subsidiaries are struggling to pay retail landlords and employees.

[29] Chalice has established that it is unable to meet its obligations as they become due and that it has ceased paying its current obligations in the ordinary course of business. It is an "insolvent person" within the meaning of s. 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and under the expanded concept of insolvency accepted by this court in *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.), leave to appeal to ONCA ref'd, 2004 CarswellOnt 2936, leave to appeal to SCC ref'd, [2004] S.C.C.A. No. 336.

[30] Chalice fits within the definition of a debtor company under s. 2 of the *CCAA* and is eligible to make this application under the *CCAA*.

[31] Under s. 11.7 of the *CCAA*, when an Initial Order is made in respect of a *CCAA* debtor company, the court shall at the same time appoint a monitor. Chalice proposes to have KSV appointed as the monitor. KSV has consented to act as such.

[32] KSV is a "trustee" within the meaning of subsection 2(1) of the *BIA*, it is established and qualified and has consented to act as monitor. KSV's involvement as the court-appointed monitor will lend stability and assurance to the Chalice Group's stakeholders. KSV is not subject to any of the restrictions set out in s. 11.7(2) of the *CCAA*.

Should the Stay of Proceedings be Extended to the Non-Filing Affiliates?

[33] Section 11.02(1) of the *CCAA* permits this court to grant an initial stay of up to 10 days on an application for an initial order, provided the applicant establishes that such a stay is appropriate and that the applicant has acted with due diligence and in good faith (s. 11.02(3)(a-b)). The primary purpose of the *CCAA* stay is to maintain the *status quo* for a period while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors.

[34] I am satisfied that the Applicant requires a stay of proceedings in order to provide it with the breathing room necessary to obtain the required funding to continue operations while pursuing various restructuring options.

[35] Chalice seeks to extend the stay of proceedings to the Non-Filing Affiliates. The court's authority to grant such an order is derived from the broad jurisdiction under s. 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. The court has, on other occasions, extended the initial stay of proceedings to non-applicants, including foreign non-applicant affiliates. See for example, *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461, 6 C.B.R. (6th) 328, at para. 2; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Re Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at para. 42; *In the matter of a plan of compromise or arrangement of Lydian Group*, Court File No. CV-19-00633392-00CL (SCJ: Toronto, Commercial List) Order of Morawetz J. (Initial Order) dated December 23, 2019, at paras. 2, 10.

[36] Further, in proceedings under Part IV of the *CCAA*, this court routinely extends a *CCAA* stay over non-applicants subject to foreign main insolvency proceedings. See for example, *In the matter of Hollander Sleep Products, LLC*, CV-19-620484-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated May 23, 2019, at para. 4; *In the matter of Brooks Brothers Group, Inc.*, Court File No. CV-20-00647463-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated September 14, 2020, at para. 4.

[37] It has been held to be just and reasonable to extend a stay of proceedings to non-applicant affiliates when:

a. The applicant and its subsidiaries are "highly integrated … and indispensable to the Applicants' business and restructuring… Failure to [extend the stay] would undermine the intent of the stay." See *Re Imperial Tobacco Canada Limited, et al*, 2019 ONSC 1684, 68 C.B.R. (6th) 322, at para. 12);
b. Without the benefit of a stay, the Non-Filing Affiliates would "run out of liquidity before the time that would reasonably be required to implement a restructuring." See *Re Urbancorp Toronto Management Inc.*, 2016 ONSC 3288, 37 C.B.R. (6th) 44, at para. 44.

[38] The Proposed Monitor explains that the extension of the stay over the Non-Filing Affiliates is critical to the stabilization of the Chalice Group's operation and ensuring a co-ordinated restructuring process, for a variety of reasons, including:

a. The vertically integrated nature of the Chalice Group's business, in which most key decision making is done through the Canadian parent company;
b. Greenpoint Workforce acts as the only employer within the Chalice Group and funds payroll;
c. The Non-Filing Affiliates hold the cannabis licences, operate the cultivation and production facilities and operate the sixteen retail stores;
d. Certain creditor and landlord-driven enforcement action is being pursued against certain Non-Filing Affiliates that may put the licences at risk; and

e. If enforcement steps are taken against the Non-Filing Affiliates, it is expected to materially destroy value and negatively impact a going-concern sale of the Chalice Group's assets or business.

[39] These are among the factors described in *Re JTI-Macdonald Corp.*, 2019 ONSC 1625 at para. 15, as well as factors identified in the other case law cited above, that exist in this case in support of the extension of the stay to the Non-Filing Affiliates. The Applicant summarizes these factors in their factum as follows:

a. The business and operations of the Non-Filing Affiliates are significantly intertwined with those of the Applicant. The Chalice Group operates as a vertically integrated business and most key decision-making is done through the Applicant.
b. Not extending the stay to the Non-Filing Affiliates could jeopardize the success of a potential going concern sale of the business. Creditors are already pursuing enforcement action against the Non-Filing Affiliates that may put the Chalice Group's cannabis licenses at risk.
c. Failure of the restructuring would be more detrimental than extending the stay to the Non-Filing Affiliates. Enforcement action against the Non-Filing Affiliates, in Canada or elsewhere, would be detrimental to the Applicant's efforts to pursue a going concern sale of the Chalice Group and would undermine a process that would otherwise benefit the stakeholders of the Chalice Group as a whole.
d. The Non-Filing Affiliates will run out of liquidity before this proceeding can be completed. The Non-Filing Affiliates do not have enough cash to maintain regular operations, and cannot even independently fund the proposed Oregon Receivership.
e. The balance of convenience favours extending the stay. Extending the *CCAA* stay, concurrent with the stay of proceedings pursuant to the Oregon Receivership, will protect the Applicant's creditors by protecting the investment in its subsidiaries, as well as the stakeholders including employees, suppliers, customers, and lenders.
f. The Proposed Monitor supports extending the stay to the Non-Filing Affiliates.

[40] Federal laws in the United States have precluded Chalice from pursuing a coordinated U.S. *Bankruptcy Code* proceeding. Any stay granted pursuant to the Oregon Receivership may not have effect beyond Oregon. In the circumstances, where protection under the U.S. *Bankruptcy Code* is not available to the Chalice Group, extending the *CCAA* stay to the Non-Filing Affiliates is the best option to achieve the breathing space necessary to preserve the value of the Chalice Group while efforts are co-ordinated between the Monitor, the CRO and the Oregon Receiver in the Oregon Receivership (if granted) for a going concern transaction.

[41] No authority was cited for the precise situation in this case, of the *CCAA* stay being extended over Non-Filing Applicants that include some entities over which it is expected that a stay may be granted in another jurisdiction (the Oregon Receivership). However, it is not expected to be a conflicting or competing stay, but rather one that will be complementary and utilized in the co-ordinated efforts of the Monitor, the CRO and the Oregon Receiver.

[42] The commencement of a *CCAA* proceeding to address the significant issues the Chalice Group faces represents the only realistic path forward at this time. An inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Chalice Group, including the employees and creditors of Chalice and its Non-Filing Affiliates.

Should the Administration Charge be Granted?

[43] The proposed Initial Order creates a first-ranking Administration Charge of $400,000 CAD over Chalice's assets to secure the fees and expenses disbursements of the Proposed Monitor and its counsel and of Chalice's counsel. The services of these advisors are critical to the Applicant's ability to restructure. The Chalice Group requires the expertise of these professionals who will have distinct roles in the cross-border restructuring efforts of the Chalice Group. The Proposed Monitor has reviewed the Administration Charge and considers it to be reasonable and appropriate in the circumstances given the anticipated services to be provided by the professionals involved.

[44] The Cash Flow Forecast anticipates professional fees payable as of June 2, 2023 of $300,000, with a similar monthly amount payable in early July and August. The initial anticipated payment of professional fees reflects the fact that pre-filing efforts have been undertaken to organize a co-ordinated restructuring plan which have brought the Applicants to the point they are in the current proceedings. The court expects that the payment of any professional fees will be subject to the usual review requirements in *CCAA* proceedings.

[45] Section 11.52 of the *CCAA* gives this court the jurisdiction to grant a charge for the fees and expenses of financial, legal and other advisors or experts. Such charge can rank in priority to the claims of existing secured creditors. I am satisfied that the Administration Charge is necessary in the circumstances, is appropriately sized given the nature and complexity of the proceeding and should be granted.

The Initial Order and the Comeback Hearing

[46] Chalice has worked with its advisors and the Proposed Monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses within the initial stay period. I am satisfied that the requested relief is necessary for the immediate stabilization of Chalice's businesses and to protect it and the interests of its various stakeholders. Additional authorizations must be addressed at the comeback hearing.

[47] For the foregoing reasons the Initial Order was granted on May 23, 2023.

[48] The "come back" hearing shall take place before me on June 1, 2023 at 2:00 p.m. on Zoom.

Kimmel J.

Date: May 26, 2023

TAB 6

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

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R.S.C., 1985, c. C-36

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Interpretation

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

L.R.C., 1985, ch. C-36

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies.*

S.R., ch. C-25, art. 1.

Définitions et application

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

a.1) dans la province d'Ontario, la Cour supérieure de justice;

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Meaning of *related* and *dealing at arm's length*

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89.

Définition de *personnes liées*

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37; 2018, ch. 10, art. 89.

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

Scope of Act

8 This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Le tribunal peut donner des instructions

7 Si une modification d'une transaction ou d'un arrangement est proposée après que le tribunal a ordonné qu'une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l'avis et autrement, et ces instructions peuvent être données tant après qu'avant l'ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu'il ne sera pas nécessaire d'ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Champ d'application de la loi

8 La présente loi n'a pas pour effet de limiter mais d'étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

PARTIE II

Juridiction des tribunaux

Le tribunal a juridiction pour recevoir des demandes

9 (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

Lien avec la *Loi sur la faillite et l'insolvabilité*

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

Miscellaneous Provisions

Authorization to act as representative of proceeding under this Act

56 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

2005, c. 47, s. 131.

Foreign representative status

57 An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

2005, c. 47, s. 131.

Foreign proceeding appeal

58 A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

2005, c. 47, s. 131.

Presumption of insolvency

59 For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

2005, c. 47, s. 131.

Credit for recovery in other jurisdictions

60 (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and

(b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires

Dispositions diverses

Autorisation d'agir à titre de représentant dans toute procédure intentée sous le régime de la présente loi

56 Le tribunal peut autoriser toute personne ou tout organe à agir à titre de représentant dans le cadre de toute procédure intentée sous le régime de la présente loi en vue d'obtenir la reconnaissance de celle-ci dans un ressort étranger.

2005, ch. 47, art. 131.

Statut du représentant étranger

57 Le représentant étranger n'est pas soumis à la juridiction du tribunal pour le motif qu'il a présenté une demande au titre de la présente partie, sauf en ce qui touche les frais de justice; le tribunal peut toutefois subordonner toute ordonnance visée à la présente partie à l'observation par le représentant étranger de toute autre ordonnance rendue par lui.

2005, ch. 47, art. 131.

Instance étrangère : appel

58 Le fait qu'une instance étrangère fait l'objet d'un appel ou d'une révision n'a pas pour effet d'empêcher le représentant étranger de présenter toute demande au tribunal au titre de la présente partie; malgré ce fait, le tribunal peut, sur demande, accorder des redressements.

2005, ch. 47, art. 131.

Présomption d'insolvabilité

59 Pour l'application de la présente partie, une copie certifiée conforme de l'ordonnance d'insolvabilité ou de réorganisation ou de toute ordonnance semblable, rendue contre une compagnie débitrice dans le cadre d'une instance étrangère, fait foi, sauf preuve contraire, de l'insolvabilité de celle-ci et de la nomination du représentant étranger au titre de l'ordonnance.

2005, ch. 47, art. 131.

Sommes reçues à l'étranger

60 (1) Lorsqu'une transaction ou un arrangement visant la compagnie débitrice est proposé, les éléments énumérés ci-après doivent être pris en considération dans la distribution des dividendes aux créanciers d'un débiteur au Canada comme s'ils faisaient partie de la distribution :

a) les sommes qu'un créancier a reçues — ou auxquelles il a droit — à l'étranger, à titre de dividende, dans le cadre d'une instance étrangère le visant;

b) la valeur de tout bien de la compagnie que le créancier a acquis à l'étranger au titre d'une créance prouvable ou par suite d'un transfert qui, si la présente loi

TAB 7

CITATION: Dondeb Inc. (Re), 2012 ONSC 6087
COURT FILE NO.: CV-12-00009865-00CL
DATE: 20121122

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

BETWEEN:	)	
	)	
IN THE MATER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	*David P. Preger*, *Lisa S. Corne*, *Michael Weinczok*, for the Applicants
- AND -	)	
IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO DONDEB INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")	)	*Jeffrey J. Simpson*, *A. Ronson*, for Pace Savings & Credit Union Limited *Gary Sugar*, for David Sugar, *et al* *D.R. Rothwell*, for RMG Mortgage/MCAP Financial Corporation *Harry Fogul*, for Regional Financial *Robin Dodokin*, for Empire Life Insurance Co. *Beverly Jusko*, *M.R. Kestenberg*, for TD Bank Canada Trust *Roger Jaipargas*, for Faithlife Financial *R.B. Bissell*, for Vector Financial Services Limited *Jeffrey Larry*, for First Source Mortgage Corporation *Douglas Langley*, for Virgin Venture Capital Corporation *David Mende*, for Addenda Capital Inc. *J. Dietrich*, *W. Rabinovitch*, for A. Farber & Partners Inc. *M. Church*, for SEIU (Union)
Applicants	)	
	)	

HEARD: October 11, 15, 17 and 18, 2012

C. CAMPBELL J.

REASONS FOR DECISION

[1] The applicants seeking an Initial Order under the *Companies Creditors Arrangement Act* are a group of companies owned and controlled by or through the main holding company

Dondeb Inc. The proposed relief would include a stay of proceedings in respect of the various companies which own and or operate businesses and real property in Ontario.

[2] The application is vigorously opposed by numerous secured creditors which have mortgage or other security on property beneficially owned by one or more of the companies in the Dondeb "group".

[3] The applicants seek the protection of the *CCAA* to enable an orderly liquidation of the assets and property of the various companies to enable what is asserted to be the remaining equity after sale and expenses to accrue to the benefit of the Dondeb Group.

[4] It is urged that the flexible mechanism of the *CCAA* is appropriate as there are common expenses across some of the companies', common security across others and that any order in liquidation would prevent the incurrence of added cost should individual properties and companies placed in liquidation with the loss of remaining equity.

[5] The applications propose a Debtor in Possession (DIP) financing and administrative charge to secure the fees of professionals and expenses associated with *CCAA* administration. The application is opposed by approximately 75% in value of the secured creditors.

[6] The basis of the opposition can be summarized as follows:

i) That in many instances the properties over which security is held is sufficiently discrete with specific remedies including sale being more appropriate than the "enterprise" approach posed by the applicants.

ii) That the proposed DIP/financial and administration changes are an unwarranted burden to the equity of specific properties are evidence of the inappropriate application of the *CCAA*.

iii) That in the circumstances individual receivership orders for many of the properties is a more appropriate remedy where the creditors and not the debtor would have control of the process.

iv) That the creditors have lost confidence in the Dondeb family owners of the Dondeb group for a variety of reasons including for breach of promise and representation.

v) That it is now evident that the applicants will be unable to propose a realistic plan that is capable of being accepted by creditors given a difference in position with respect to value of various properties.

[7] Those who support the applicants in the main wish to see those businesses that are operating on some of the properties such as in one instance, a school, and others like retirement homes continue in a way that may not be possible in a bankruptcy.

[8] During the course of the submissions on the first return date an alternative was proposed by a number of secured creditors, namely a joint or consolidated receivership of the various entities to maximizing creditor control of the process and ensure that costs of administration be allocated to each individual property and company.

[9] The application was adjourned to be returnable October 15, 2012 to allow both the applicants and the opposing creditors to consider their positions hopefully achieve some compromise. In the meantime 4 notices of intention under the BIA were stayed.

[10] The return of the application on October 15, 2012 did produce some modification of position on both sides but not sufficient to permit a *CCAA* order to be agreed to.

[11] The applicants revised the proposed form of Initial Order to allow for segregation of accounts on the individual properties an entitlement.

[12] The rationale of the applicants for the original Initial Order sought was that if liquidated or otherwise operated in an orderly way by the debtor and a "super" monitor, greater value could be achieved than the secured debt owing in respect to at least a number of the properties which could be available (a) to other creditors in respect of which guarantees or multiple property security could enhance recovery and or (b) the equity holders.

[13] The second major reason advanced by a significant number of creditors appearing through counsel was that they no longer had any confidence in Mr. Dandy, the principal of Dondeb Inc. Significant examples of alleged misleading supported the positions taken.

[14] I accept the general propositions of law advanced on behalf of the applicants that pursuant to s.11.02 of the *CCAA* the court has wide discretion "on any terms it may impose" to make an Initial Order provided the stay does not exceed 30 days [see *Nortel Networks Corporation (Re)* 2009, CanLII 39492 (ONSC) at para 35 and *Lehndorff General Partners Ltd. (Re)* (1993), 17 CBR (3d) 24 (Ont.Gen.Div. Commercial) CF 33.

[15] The more recent decision of the Supreme Court of Canada in *Century Services Inc*. v. *Canada* (*Attorney General)*, (2010), (S.C.C.) 60 at para 15 confirms the breadth and flexibility of the CCAA to not only preserve and allow for restructuring of the business as a going concern but also to permit a sale process or orderly liquidation to achieve maximum value and achieve the highest price for the benefit of all stakeholders. See also *Timminco Limited (Re)* (2012), ONSC 506 at para 49-50 (leave to appeal denied 2012 ONCA 552).

[16] I also accept the general proposition that given the flexibility inherent in the *CCAA* process and the discretion available that that an Initial Order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the "enterprise" may be themselves insolvent but a number are and to propose of the restructuring is to restore financial health or maximize benefit to all stakeholders by permitting further financing. Such process can include liquidation. See *First Leaside Wealth Management*

(Re) (2012) (ONSC) 1299 and also *Edgeworth Properties Inc. (Re)* CV-11-9409-CL [Commercial List].

[17] I also accept that while each situation must be looked at on its individual facts the court should not easily conclude that a plan is likely to fail. See *Azure Dynamics Corp. (Re)* (2012), (BCSC) 781 at paras 7-10.

[18] In *Cliffs Over Maple Bay Investments, Ltd. v. Fisgard Capital Corp.* 2008 Carswell BC 1758 (BCCA), the British Columbia Court of Appeal overturned the decision of the chambers' judge extending a stay of proceedings and authorizing DIP financing under the *CCAA* in the case of a debtor company in the business of land development because:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[19] Similarly, in *Octagon Properties Group Ltd.* 2009 Carswell Alta 1325 (Q.B.) paragraph 17, Kent, J. made the following comments:

> This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable

> arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[20] A similar result occurred in *Shire International Real Estate Investments Ltd.* (2010) CarswellAlta 234 even after an initial order had been granted.

[21] In Edgeworth, dealing with the specifics of that case I noted:

> Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

[22] At the conclusion of oral submissions which followed on a hearing of the application which commenced on Friday October 11, 2012 continued on October 15 with additional written material and concluded on Wednesday October 17, 2012 again with additional written material and oral submissions the following conclusions were reached.

(i) The application for an Initial Order under the CCAA based on the material filed be dismissed.

(ii) The issue of costs incurred by the proposed Monitor Farber and of counsel to the debtor be reserved for further consideration (if not resolved) basis on material to be provided to counsel for the creditors and their submissions.

(iii) The request for a more limited *CCAA* Initial Order which like the Original Application is opposed by a significant body of creditors is also rejected.

(iv) A Global Receivership Order which is supported by most of the creditors appearing to oppose the application and which has the support of Farber which will become Receiver of those companies and properties covered by the application will issue in a format to be approved by counsel and the court.

[23] For ease of administration the Global Receivership Order will issue in Court File No. CV-12-9794-CL and make reference to the various companies and properties to be covered by the Order.

[24] In order to further facilitate administration the following proceedings, each being Notices of Intention to make a proposal

Dondeb Inc.	31-1664344
Ace Sel/Storage & Business Centre	31-1664774
1711060 Ontario Ltd.	31-1664775
2338067 Ontario Ltd.	31-1664772
King City Holdings Ltd.	31-1671612

1182689 Ontario Inc.	31-1671611
2198392 Ontario Inc.	31-1673260

hereby stayed and suspended pending further order of the court.

[25] The request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

[26] In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

[27] Under the proposed Initial Order the fees of the proposed monitor and of counsel to the debtor were an issue as well as leaving the debtor in possession with the cost that would entail.

[28] Counsel for each of the various creditors represented urged that their client's individual property should not be burdened with administrative expenses and professional fees not associated with that property.

[29] Counsel for the debtor advised that to the extent possible his client and the monitor would keep individual accounts. This proposal did not appease the opposing creditors who did agree that their clients could accept what was described as a "global" receiver and that the Farber firm would be acceptable as long as the receiver's charge was allocated on an individual property basis. In other words, the opposing creditors are prepared to accept the work of the professionals of the receiver but not fund the debtor or its counsel.

[30] The issue of the fees of Farber incurred todate in respect of preparation of the *CCAA* application was agreed between the opposing creditors, Farber and its counsel and are not an issue. Counsel for the debtor requested that the court consider a request for fees and costs on the part of the debtor. In order to give an opportunity for the parties to consider the details of such request and possible resolution the issue was deferred to a later date.

[31] Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.

[32] Counsel are to be commended for the effort and success in reaching agreement on the form of order acceptable to the court.

[33] The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

[34] In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

C. CAMPBELL J.

Released: November 22, 2012

Schedule "A"

1. Dondeb Inc.
2. Ace Self Storage and Business Centre Inc.
3. 1182689 Ontario Inc.
4. King City Holdings Inc.
5. 1267818 Ontario Ltd.
6. 1281515 Ontario Inc.
7. 1711060 Ontario Ltd.
8. 2009031 Ontario Inc.
9. 2198392 Ontario Ltd.
10. 2338067 Ontario Inc.
11. Briarbrook Apartments Inc.
12. Guelph Financial Corporation

CITATION: Dondeb Inc. (Re), 2012 ONSC 6087
COURT FILE NO.: CV-12-00009865-00CL
DATE: 20121122

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL)

BETWEEN:

IN THE MATER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

- AND -

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO DONDEB INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

Applicants

REASONS FOR DECISION

C. CAMPBELL J.

Released: November 22, 2012

TAB 8

CITATION: First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299
COURT FILE NO.: CV-12-9617-00CL
DATE: 20120226

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc., Applicants

BEFORE: D. M. Brown J.

COUNSEL: J. Birch and D. Ward, for the Applicants

P. Huff and C. Burr, for the proposed Monitor, Grant Thornton Limited

D. Bish, for the Independent Directors

B. Empey, for Investment Industry Regulatory Organization of Canada

J. Grout, for the Ontario Securities Commission

R. Oliver, for Kenaidan Contracting Limited

J. Dietrich, the proposed Representative Counsel for the investors

E. Garbe, for Structform International Limited

N. Richter, for Gilbert Steel Limited

M. Sanford, for Janick Electrick Limited

M. Konyukhova, for Midland Loan Services Inc.

C. Prophet, for the Canadian Imperial Bank of Commerce

HEARD: February 23, 2012

REASONS FOR DECISION

I. Overview: *CCAA* Initial Order

[1] On Thursday, February 23, 2012, I granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in respect of the Applicants. These are my Reasons for that decision.

II. The applicant corporations

[2] The Applicants are members of the First Leaside group of companies. They are described in detail in the affidavit of Gregory MacLeod, the Chief Restructuring Officer of First Leaside Wealth Management ("FLWM"), so I intend only refer in these Reasons to the key entities in the group. The parent corporation, FLWM, owns several subsidiaries, including the applicant, First Leaside Securities Inc. ("FLSI"). According to Mr. MacLeod, the Group's operations centre on FLWM and FLSI.

[3] FLSI is an Ontario investment dealer that manages clients' investment portfolios which, broadly speaking, consist of non-proprietary Marketable Securities as well as proprietary equity and debt securities issued by First Leaside (the so-called "FL Products"). All segregated Marketable Securities are held in segregated client accounts with Penson Financial Services Canada Inc.

[4] First Leaside designed its FL Products to provide investors with consistent monthly distributions. First Leaside acts as a real estate syndicate, purchasing real estate through limited partnerships with a view to rehabilitating the properties for lease at higher rates or eventual resale. First Leaside incorporated special-purpose corporations to act as general partners in the various LPs it set up. The general partners of First Leaside's Canadian LPs – i.e. those which own property in Canada – are applicants in this proceeding. First Leaside also seeks to extend the benefits of the Initial Order to the corresponding LPs.

[5] First Leaside has two types of LPs: individual LPs that acquire and operate a single property or development, and aggregator LPs that hold units of multiple LPs. Investors have invested in both kinds of LPs. In paragraph 49 of his affidavit Mr. MacLeod detailed the LPs within First Leaside. While most First Leaside LPs hold interests in identifiable properties, for a

few, called “Blind Pool LPs”, clients invest funds without knowing where the funds likely were to be invested. Those LPs are described in paragraph 51 of Mr. MacLeod’s affidavit.

[6] The applicant, First Leaside Finance Inc. (“FL Finance”), acted as a “central bank” for the First Leaside group of entities.

III. The material events leading to this application

[7] In the fall of 2009 the Ontario Securities Commission began investigating First Leaside. In March, 2011, First Leaside retained the proposed Monitor, Grant Thornton Limited, to review and make recommendations about First Leaside’s businesses. Around the same time First Leaside arranged for appraisals to be performed of various properties.

[8] Grant Thornton released its report on August 19, 2011. For purposes of this application Grant Thornton made several material findings:

(i) There exist significant interrelationships between the entities in the FL Group which result in a complex corporate structure;

(ii) Certain LPs have been a drain on the resources of the Group as a result of recurring operating losses and property rehabilitation costs; and,

(iii)The future viability of the FL Group was contingent on its ability to raise new capital:

> “If the FL Group was restricted from raising new capital, it would likely be unable to continue its operations in the ordinary course, as it would have insufficient revenue to support its infrastructure, staffing costs, distributions, and to meet their funding requirements for existing projects.”

[9] As a result of the report First Leaside hired additional staff to improve accounting resources and financial planning. Last November the Board appointed an Independent Committee to assume all decision-making authority in respect of First Leaside; the Group’s founder, David Phillips, was no longer in charge of its management.

[10] FLSI is regulated by both the OSC and the Investment Industry Regulatory Organization of Canada (“IIROC”). In October, 2011, IIROC issued FLSI a discretionary early warning level 2 letter prohibiting the company from reducing capital and placing other restrictions on its activities. At the same time the OSC told First Leaside that unless satisfactory arrangements were made to deal with its situation, the OSC almost certainly would take regulatory action, including seeking a cease trade order.

[11] First Leaside agreed to a voluntary cease trade, retained Grant Thornton to act as an independent monitor, informed investors about those developments, and made available the August Grant Thornton report.

[12] Because the cease trade restricted First Leaside's ability to raise capital, the Independent Committee decided in late November to cease distributions to clients, including distributions to LP unit holders, interest payments on client notes/debts, and dividends on common or preferred shares.

[13] In December the Independent Committee decided to retain Mr. MacLeod as CRO for First Leaside and asked him to develop a workout plan, which he finalized in late January, 2012. Mr. MacLeod deposed that the downturn in the economy has resulted in First Leaside realizing lower operating income while incurring higher operational costs. In his affidavit Mr. MacLeod set out his conclusion about a workout plan:

> After carefully analyzing the situation, my ultimate conclusion was that it was too risky and uncertain for First Leaside to pursue a resumption of previous operations, including the raising of capital. My recommendation to the Independent Committee was that First Leaside instead undertake an orderly wind-down of operations, involving:
>
> (a) Completing any ongoing property development activity which would create value for investors;
>
> (b) Realizing upon assets when it is feasible to do so (even where optimal realization might occur over the next 12 to 36 months);
>
> (c) Dealing with the significant inter-company debts; and,
>
> (d) Distributing proceeds to investors.

Mr. MacLeod further deposed:

> [T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues – especially the numerous investor and creditor claims and inter-company claims – can be dealt with in one forum under the supervision of the court.

The Independent Committee approved Mr. MacLeod's recommendations. This application resulted.

IV. Availability of *CCAA*

A. The financial condition of the applicants

[14] According to Mr. MacLeod, First Leaside has over $370 million in assets under management. Some of those, however, are Marketable Securities. First Leaside is proposing that clients holding Marketable Securities (which are held in segregated accounts) be free to transfer them to another investment dealer during the *CCAA* process. As to the value of FL Products, Mr. MacLeod deposed that "it remains to be determined specifically how much value will be realized for investors on the LP units, debt instruments, and shares issued by the various First Leaside entities."

[15] First Leaside's debt totals approximately $308 million: $176 million to secured creditors (mostly mortgagees) and $132 million to unsecured creditors, including investors holding notes or other debt instruments.

[16] Mr. MacLeod summarized his assessment of the financial status of the First Leaside Group as follows:

> [S]ince GTL reported that the aggregate value of properties in the First Leaside exceeded the value of the properties, there will be net proceeds remaining to provide at least some return to subordinate creditors or equity holders (i.e., LP unit holders and corporation shareholders) in many of the First Leaside entities. The recovery will, of course, vary depending on the entity. At this stage, however, it is fair to conclude that there is a material equity deficit both in individual First Leaside entities and in the overall First Leaside group.

[17] In his affidavit Mr. MacLeod also deposed, with respect to the financial situation of First Leaside, that:

(i) The cease trade placed severe financial constraints on First Leaside as almost every business unit depended on the ability of FLWM and its subsidiaries to raise capital from investors;

(ii) There are immediate cash flow crises at FLWM and most LPs;

(iii) FLWM's cash reserves had fallen from $2.8 million in November, 2011 to $1.6 million at the end of this January;

(iv) Absent new cash from asset disposals, current cash reserves would be exhausted in April;

(v) At the end of December, 2011 Ventures defaulted by failing to make a principal mortgage payment of $4.25 million owing to KingSett;

(vi) Absent cash flow from FLWM a default is imminent for Investor's Harmony property;

(vii) First Leaside lacks the liquidity or refinancing options to rehabilitate a number of the properties and execute on its business plan; and,

(viii) First Leaside generally has been able to make mortgage payments to its creditors, but in the future it will be difficult to do so given the need to expend monies on property development and upgrading activities

[18] In his description of the status of the employees of the Applicants, Mr. MacLeod did not identify any issue concerning a pension funding deficiency.[1] The internally-prepared 2010 FLWM financial statements did not record any such liability. Grant Thornton did not identify any such issue in its Pre-filing Report.

[19] First Leaside is not proposing to place all of its operations under court-supervised insolvency proceedings. It does not plan to seek Chapter 11 protection for its Texas properties since it believes they may be able to continue operations over the anticipated wind-up period using cash flows they generate and pay their liabilities as they become due. Nor does First Leaside seek to include in this *CCAA* proceeding the First Leaside Venture LP ("Ventures") which owns and operates several properties in Ontario and British Columbia. On February 15, 2012 Ventures and Bridge Gap Konsult Inc. signed a non-binding term sheet to provide some bridge financing for Ventures. First Leaside decided not to include certain Ventures-related limited partnerships in the *CCAA* application at this stage,[2] while reserving the right to later bring a motion to extend the Initial Order and stay to these Excluded LPs. The Initial Order which I signed reflected that reservation.

[20] As noted above, over the better part of the past year the proposed Monitor, Grant Thornton, has become familiar with the affairs of the First Leaside Group as a result of the review it conducted for its August, 2011 report. Last November First Leaside retained Grant Thornton as an independent monitor of its business.

[21] In its Pre-filing Report Grant Thornton noted that the last available financial statements for FLWM were internally prepared ones for the year ended December 31, 2010. They showed a net loss of about $2.863 million. The Pre-filing Report contained a 10-week cash flow projection (ending April 27, 2012) prepared by the First Leaside Group. The Cash Flow Projection does not contemplate servicing interest and principal payments during the projection period. On that basis the Cash Flow Projection showed the Group's combined closing bank balance declining from $6.97 million to $4.144 million by the end of the projection period. Grant Thornton reviewed the Cash Flow Projection and stated that it reflected the probable and hypothetical assumptions on which it was prepared and that the assumptions were suitably supported and consistent with the plans of the First Leaside Group and provided a reasonable basis for the Cash Flow Projection.

[22] Grant Thornton reported that certain creditors, specifically construction lien claimants, had commenced enforcement proceedings and it concluded:

> Given creditors' actions to date and due to the complicated nature of the FL Group's business, the complex corporate structure and the number of competing stakeholders, it is unlikely that the FL Group will be able to conduct an orderly wind-up or continue to

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[1] MacLeod Affidavit, paras. 104 to 106.
[2] The Excluded LPs were identified in paragraph 134 of Mr. MacLeod's affidavit.

> rehabilitate properties without the stability provided by a formal Court supervised restructuring process.
>
> …
>
> As the various stakeholder interests are in many cases intertwined, including intercompany claims, the granting of the relief requested would provide a single forum for the numerous stakeholders of the FL Group to be heard and to deal with such parties' claims in an orderly manner, under the supervision of the Court, a CRO and a Court-appointed Monitor. In particular, a simple or forced divestiture of the properties of the FL Group would not only erode potential investor value, but would not provide the structure necessary to reconcile investor interests on an equitable and ratable basis.
>
> A stay of proceedings for both the Applicants and the LPs is necessary if it is deemed appropriate by this Honourable Court to allow the FL Group to maintain its business and to allow the FL Group the opportunity to develop, refine and implement their restructuring/wind-up plan(s) in a stabilized environment.

B. Findings

[23] I am satisfied that the Applicants are "companies" within the meaning of the *CCAA* and that the total claims against the Applicants, as an affiliated group of companies, is greater than $5 million.

[24] Are the Applicant companies "debtor companies" in the sense that they are insolvent? For the purposes of the *CCAA* a company may be insolvent if it falls within the definition of an insolvent person in section 2 of the *Bankruptcy and Insolvency Act* or if its financial circumstances fall within the meaning of insolvent as described in *Re Stelco Inc.* which include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".[3]

[25] When looked at as a group the Applicants fall within the extended meaning of "insolvent": as a result of the cease trade their ability to raise capital has been severely restricted; cash reserves fell significantly from November until the time of filing, and the Cash Flow Projection indicates that cash reserves will continue to decline even with the cessation of payments on mortgages and other debt; Mr. MacLeod estimated that cash reserves would run out in April; distributions to unit holders were suspended last November; and, some formal mortgage defaults have occurred.

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[3] (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.).

[26] However, a secured creditor mortgagee, Midland Loan Services Inc., submitted that to qualify for *CCAA* protection each individual applicant must be a "debtor company" and that in the case of one applicant, Queenston Manor General Partner Inc., that company was not insolvent. In his affidavit Mr. MacLeod deposed that the Queenston Manor LP is owned by the First Leaside Expansion Limited Partnership ("FLEX"). Queenston owns and operates a 77-unit retirement complex in St. Catherines, has been profitable since 2008 and is expected to remain profitable through 2013. Queenston has been listed for sale, and management currently is considering an offer to purchase the property. Midland Loan submitted that in light of that financial situation, no finding could be made that the applicant, Queenston Manor General Partner Inc., was a "debtor company".

[27] Following that submission I asked Applicants' counsel where in the record one could find evidence about the insolvency of each individual Applicant. That prompted a break in the hearing, at the end of which the Applicants filed a supplementary affidavit from Mr. MacLeod. Indicating that one of the biggest problems facing the Applicants was the lack of complete and up-to-date records, in consultation with the Applicants' CFO Mr. MacLeod submitted a chart providing, to the extent possible, further information about the financial status of each Applicant. That chart broke down the financial status of each of the 52 Applicants as follows:

Insolvent	28
Dormant	15
Little or no realizable assets	5
More information to be made available to the court	3
Other: management revenue stopped in 2010; $70,000 cash; $270,000 in related-company receivables	1

Queenston Manor General Partner Inc. was one of the applicants for which "more information would be made available to the court".

[28] As I have found, when looked at as a group, the Applicants fall within the extended meaning of "insolvent". When one descends a few levels and looks at the financial situation of some of the aggregator LPs, such as FLEX, Mr. MacLeod deposed that FLEX is one of the largest net debtors – i.e. it is unable to repay inter-company balances from operating cash flows and lacks sufficient net asset value to settle the intercompany balances through the immediate liquidation of assets. The evidence therefore supports a finding that the corporate general partner of FLEX is insolvent. Queenston Manor is one of several assets owned by FLEX, albeit an asset which uses the form of a limited partnership.

[29] If an insolvent company owns a healthy asset in the form of a limited partnership does the health of that asset preclude it from being joined as an applicant in a *CCAA* proceeding? In the

circumstances of this case it does not. The jurisprudence under the *CCAA* provides that the protection of the Act may be extended not only to a "debtor company", but also to entities who, in a very practical sense, are "necessary parties" to ensure that that stay order works. Morawetz J. put the matter the following way in *Priszm Income Fund (Re)*:

> The *CCAA* definition of an eligible company does not expressly include partnerships. However, *CCAA* courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 (S.C.J.).
>
> The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.[4]

[30] Although section 3(1) of the *CCAA* requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the *CCAA* needed to extend both to the Applicants and the limited partnerships listed in Schedule "A" to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a "debtor company", or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

[31] In sum, I am satisfied that those Applicants identified as "insolvent" on the chart attached to Mr. MacLeod's supplementary affidavit are "debtor companies" within the meaning of the *CCAA* and that the other Applicants, as well as the limited partnerships listed on Schedule "A" of the Initial Order, are entities to which it is necessary and appropriate to extend *CCAA* protection.

C. "Liquidation" *CCAA*

[32] While in most circumstances resort is made to the *CCAA* to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all", the

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[4] 2011 ONSC 2061, paras. 26-27.

reality is that "reorganizations of differing complexity require different legal mechanisms." [5] That reality has led courts to recognize that the *CCAA* may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership,[6] or to wind-up or liquidate it. In *Lehndorff General Partner Ltd. (Re)*[7] Farley J. observed:

> It appears to me that the purpose of the *CCAA* is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Assoc. Investors, supra*, at p. 318; *Re Amirault Co*. (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

[33] In the decision of *Associated Investors of Canada Ltd. (Re)* referred to by Farley J., the Alberta Court of Queen's Bench stated:

> The realities of the modern marketplace dictate that courts of law respond to commercial problems in innovative ways without sacrificing legal principle. In my opinion, the Companies' Creditors Arrangement Act is not restricted in its application to companies which are to be kept in business. Moreover, the Court is not without the ability to address within its jurisdiction the concerns expressed in the Ontario cases. The Act may be invoked as a means of liquidating a company and winding-up its affairs but only if certain conditions precedent are met:
>
> > 1. It must be demonstrated that benefits would likely flow to Creditors that would not otherwise be available if liquidation were effected pursuant to the Bankruptcy Act or the Winding-Up Act.
> >
> > 2. The Court must concurrently provide directions pursuant to compatible legislation that ensures judicial control over the liquidation process and an effective means whereby the affairs of the company may be investigated and the results of that investigation made available to the Court.
> >
> > 3. A Plan of Arrangement should not receive judicial sanction until the Court has in its possession, all of the evidence necessary to allow the Court to properly

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[5] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paras. 15, 77 and 78.
[6] *Nortel Networks Corp. (Re)*, 2009 ONCA 833, para. 46; see Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), pp. 284 et seq.
[7] [1993] O.J. No. 14 (Gen. Div.). In *Brake Pro, Ltd. (Re)*, [2008] O.J. No. 2180 (S.C.J.), Wilton-Siegel J. stated, at paragraph 10: "While reservations are expressed from time to time regarding the appropriateness of a "liquidating" *CCAA* proceeding, such proceedings are permissible under the *CCAA*."

> exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality.[8]

The editors of *The 2012 Annotated Bankruptcy and Insolvency Act* take some issue with the extent of those conditions:

> With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, and there are cogent reasons for using the statute rather than the *BIA* or *WURA*, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*.[9]

[34] Mr. MacLeod, the CRO, deposed that no viable plan exists to continue First Leaside as a going concern and that the most appropriate course of action is to effect an orderly wind-down of First Leaside's operations over a period of time and in a manner which will create the opportunity to realize improved net asset value. In his professional judgment the *CCAA* offered the most appropriate mechanism by which to conduct such an orderly liquidation:

> [T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues – especially the numerous investor and creditor claims and the inter-company claims – can be dealt with in one forum under the supervision of the court.

In its Pre-filing Report the Monitor also supported using the *CCAA* to implement the "restructuring/wind-up plan(s) in a stabilized environment".

[35] Both the CRO and the proposed Monitor possess extensive knowledge about the workings of the Applicants. Both support a process conducted under the *CCAA* as the most practical and effective way in which to deal with the affairs of this insolvent group of companies. No party contested the availability of the *CCAA* to conduct an orderly winding-up of the affairs of the Applicants (although, as noted, some parties questioned whether certain entities should be included within the scope of the Initial Order). Given that state of affairs, I saw no reason not to accept the professional judgment of the CRO and the proposed Monitor that a liquidation under the *CCAA* was the most appropriate route to take.

[36] Moreover, I saw no prejudice to claimant creditors by permitting the winding-up of the First Leaside Group to proceed under the *CCAA* instead of under the *BIA* in view of the convergence which exists between the *CCAA* and *BIA* on the issue of priorities. As the Supreme Court of Canada pointed out in *Century Services*:

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[8] *First Investors Corp. (Re)* (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), para. 36.
[9] Houlden, Morawetz & Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act*, N§1, p. 1099.

> Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful.[10]

As the British Columbia Court of Appeal observed in *Caterpillar Financial Services Ltd. v. 360networks corp.* interested parties also use that priorities backdrop to negotiate successful *CCAA* reorganizations:

> While it might be suggested that *CCAA* proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.[11]

[37] I therefore concluded that the *CCAA* was available to the Applicants in the circumstances, and I so ordered.

V. Representative Counsel, CRO and Monitor

[38] The Applicants sought the appointment of Fraser Milner Casgrain ("FMC") as Representative Counsel to represent the interests of the some 1,200 clients of FLSI in this proceeding, subject to the right of any client to opt-out of such representation. The proposed Monitor expressed the view that it would be in the best interests of the FL Group and its investors to appoint Representative Counsel. No party objected to such an appointment. I reviewed the qualifications and experience of proposed Representative Counsel and its proposed fees, and I was satisfied that it would be appropriate to appoint FMC as Representative Counsel on the terms set out in the Initial Order.

[39] The Applicants sought the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside. No party objected to that appointment. The Applicants included a copy of the CRO's December 21, 2011 Retention Agreement in their materials. The proposed Monitor stated that the appointment of a CRO was important to ensure an adequate level of senior corporate governance leadership. I agree, especially in light of the withdrawal of Mr. Phillips last November from the management of the Group. The proposed Monitor reported that the terms and conditions of the Retention Agreement were consistent with similar arrangements approved by other courts in *CCAA* proceedings and the remuneration payable was reasonable in the circumstances. As a result, I confirmed the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside.

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[10] *Century Services, supra.*, para. 23.
[11] (2007), 279 D.L.R. (4th) 701 (B.C.C.A.), para. 42.

[40] Finally, I appointed Grant Thornton as Monitor. No party objected, and Grant Thornton has extensive knowledge of the affairs of the First Leaside Group.

VI. Administration and D&O Charges and their priorities

A. Charges sought

[41] The Applicants sought approval, pursuant to section 11.52 of the *CCAA*, of an Administration Charge in the amount of $1 million to secure amounts owed to the Estate Professionals – First Leaside's legal advisors, the CRO, the Monitor, and the Monitor's counsel.

[42] They also sought an order indemnifying the Applicants' directors and officers against any post-filing liabilities, together with approval, pursuant to section 11.51 of the *CCAA*, of a Director and Officer's Charge in the amount of $250,000 as security for such an indemnity. Historically the First Leaside Group did not maintain D&O insurance, and the Independent Committee was not able to secure such insurance at reasonable rates and terms when it tried to do so in 2011.

[43] The Monitor stated that the amount of the Administration Charge was established based on the Estate Professionals' previous history and experience with restructurings of similar magnitude and complexity. The Monitor regarded the amount of the D&O Charge as reasonable under the circumstances. The Monitor commented that the combined amount of both charges ($1.25 million) was reasonable in comparison with the amount owing to mortgagees ($176 million).

[44] In its Pre-filing Report the Monitor did note that shortly before commencing this application the Applicants paid $250,000 to counsel for the Independent Committee of the Board. The Monitor stated that the payment might "be subject to review by the Monitor, if/when it is appointed, in accordance with s. 36.1(1) of the *CCAA*". No party requested an adjudication of this issue, so I refer to the matter simply to record the Monitor's expression of concern.

[45] Based on the evidence filed, I concluded that it was necessary to grant the charges sought in order to secure the services of the Estate Professionals and to ensure the continuation of the directors in their offices and that the amounts of the charges were reasonable in the circumstances.

B. Priority of charges

[46] The Applicants sought super-priority for the Administration and D&O Charges, with the Administration Charge enjoying first priority and the D&O Charge second, with some modification with respect to the property of FLSI which the Applicants had negotiated with IIROC.

[47] In its Pre-filing Report the proposed Monitor stated that the mortgages appeared to be well collateralized, and the mortgagees would not be materially prejudiced by the granting of the proposed priority charges. The proposed Monitor reported that it planned to work with the

Applicants to develop a methodology which would allocate the priority charges fairly amongst the Applicants and the included LPs, and the allocation methodology developed would be submitted to the Court for review and approval.

[48] In *Indalex Limited (Re)*[12] the Court of Appeal reversed the super-priority initially given to a DIP Charge by the motions judge in an initial order and, instead, following the sale of the debtor company's assets, granted priority to deemed trusts for pension deficiencies. In reaching that decision Court of Appeal observed that affected persons – the pensioners – had not been provided at the beginning of the *CCAA* proceeding with an appropriate opportunity to participate in the issue of the priority of the DIP Charge.[13] Specifically, the Court of Appeal held:

> In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".
>
> While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.[14]

[49] In his recent decision in *Timminco Limited (Re)*[15] ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

> In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of

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[12] 2011 ONCA 265.
[13] *Ibid*., para. 155.
[14] *Ibid.*, paras. 178 and 179.
[15] 2012 ONSC 506.

> the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.[16]

[50] In its Pre-filing Report the proposed Monitor expressed the view that if the priority charges were not granted, the First Leaside Group likely would not be able to proceed under the *CCAA*.

[51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

[52] Accordingly I raised that issue at the commencement of the hearing last Thursday and requested submissions on the issues of priority and paramountcy from any interested party. Several parties made submissions on those points: (i) the Applicants, proposed Monitor and proposed Representative Counsel submitted that the Court should address any priority or paramountcy issues raised; (ii) IIROC advised that it did not see any paramountcy issue in respect of its interests; (iii) counsel for Midland Loan submitted that a paramountcy issue existed with respect to its client, a secured mortgagee, because it enjoyed certain property rights under provincial mortgage law; she also argued that the less than full day's notice of the hearing given by the Applicants was inadequate to permit the mortgagee to consider its position, and her client should be given seven days to do so; and, (iv) counsel for a construction lien claimant, Structform International, who spoke on behalf of a number of such lien claimants, made a similar submission, contending that the construction lien claimants required 10 days to determine whether they should make submissions on the relationship between their lien claims and any super-priority charge granted under the *CCAA*.

[53] I did not grant the adjournment requested by the mortgagee and construction lien claimants for the following reasons. First, the facts in *Indalex* were quite different from those in the present case, involving as they did considerations of what fiduciary duty a debtor company owed to pensioners in respect of underfunded pension liabilities. I think caution must be exercised before extending the holding of *Indalex* concerning *CCAA*-authorized priority charges to other situations, such as the one before me, which do not involve claims involving pension

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[16] *Ibid*., para. 66.

deficiencies, but claims by more "ordinary" secured creditors, such as mortgagees and construction lien claimants.

[54] Second, I have some difficulty seeing how constitutional issues of paramountcy arise in in a *CCAA* proceeding as between claims to the debtor's property by secured creditors, such as mortgagees and construction lien claimants, and persons granted a super-priority charge by court order under sections 11.51 and 11.52 of the *CCAA*. At the risk of gross over-simplification, Canadian constitutional law places the issue of priorities of secured creditors in different legislative balliwicks depending on the health of the debtor company. When a company is healthy, secured creditor priorities usually are determined under provincial laws, such as personal property security legislation and related statutes, which result from provincial legislatures exercising their powers with respect to "property and civil rights in the province".[17] However, when a company gets sick - becomes insolvent - our *Constitution* vests in Parliament the power to craft the legislative regimes which will govern in those circumstances. Exercising its power in respect of "bankruptcy and insolvency",[18] Parliament has established legal frameworks under the *BIA* and *CCAA* to administer sick companies. Priority determinations under the *CCAA* draw on those set out in the *BIA*, as well as the provisions of the *CCAA* dealing with specific claims such as Crown trusts and other claims.

[55] As it has evolved over the years the constitutional doctrine of paramountcy polices the overlapping effects of valid federal and provincial legislation: "The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers."[19] Since 1960 the Supreme Court of Canada has travelled a "path of judicial restraint in questions of paramountcy".[20] That Court has not been prepared to presume that, by legislating in respect of a matter, Parliament intended to rule out any possible provincial action in respect of that subject,[21] unless (and it is a big "unless"), Parliament used very clear statutory language to that effect.[22]

[56] I have found that the Applicants have entered the world of the sick, or the insolvent, and are eligible for the protection of the federal *CCAA*. The federal legislation *expressly* brings mortgagees and construction lien claimants within its regime – the definition of "secured creditor" contained in section 2 of the *CCAA* specifically includes "a holder of a mortgage" and "a holder of a …lien…on or against…all or any of the property of a debtor company as security for indebtedness of the debtor company". The federal legislation also *expressly* authorizes a court to grant priority to administration and D&O charges over the claims of such secured

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[17] *Constitution Act, 1867*, s. 92 ¶13.
[18] *Ibid*., s. 91 ¶21.
[19] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, para. 69.
[20] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, para. 21
[21] *Canadian Western Bank, supra.,* para. 74.
[22] *Rothmans, supra.,* para. 21.

creditors of the debtor.[23] In light of those express provisions in sections 2, 11.51 and 11.52 of the *CCAA*, and my finding that the Applicants are eligible for the protection offered by the *CCAA*, I had great difficulty understanding what argument could be advanced by the mortgagees and construction lien claimants about the concurrent operation of provincial and federal law which would relieve them from the priority charge provisions of the *CCAA*. I therefore did not see any practical need for an adjournment.

[57] Finally, sections 11.51(1) and 11.52(1) of the *CCAA* both require that notice be given to secured creditors who are likely to be affected by an administration or D&O charge before a court grants such charges. In the present case I was satisfied that such notice had been given. Was the notice adequate in the circumstances? I concluded that it was. To repeat, making due allowance for the unlimited creativity of lawyers, I have difficulty seeing what concurrent operation argument could be advanced by mortgagee and construction lien claims against court-ordered super-priority charges under sections 11.51 and 11.52 of the *CCAA*. Second, as reported by the proposed Monitor, the quantum of the priority charges ($1.25 million) is reasonable in comparison with the amount owing to mortgagees ($176 million) and the mortgages appeared to be well collateralized based on available information. Third, the Applicant and Monitor will develop an allocation methodology for the priority charges for later consideration by this Court. The proposed Monitor reported:

> It is the Proposed Monitor's view that the allocation of the proposed Priority Charges should be carried out on an equitable and proportionate basis which recognizes the separate interests of the stakeholders of each of the entities.

The secured creditors will be able to make submissions on any proposed allocation of the priority charges. Finally, while I understand why the secured creditors are focusing on their specific interests, it must be recalled that the work secured by the priority charges will be performed for the benefit of all creditors of the Applicants, including the mortgagees and construction lien claimants. All creditors will benefit from an orderly winding-up of the affairs of the Applicants.

[58] In the event that I am incorrect that no paramountcy issue arises in this case in respect of the priority charges, I echo the statements made by Morawetz J. in *Timminco I* which I reproduced in paragraph 49 above. In *Indalex* the Court of Appeal accepted that "the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation".[24] I find that it is both necessary and appropriate to grant super priority to both the Administration and D&O Charges in order to ensure that the objectives of the *CCAA* are not frustrated.

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[23] *CCAA* ss. 11.51(2) and 11.52(2).
[24] *Indalex, supra.*, para. 176.

[59] For those reasons I did not grant the adjournment requested by Midland Loan and the construction lien claimants, concluding that they had been given adequate notice in the circumstances, and I granted the requested Administration and D&O Charges.

VII. Other matters

[60] At the hearing counsel for one of the construction lien claimants sought confirmation that by granting the Initial Order a construction lien claimant who had issued, but not served, a statement of claim prior to the granting of the order would not be prevented from serving the statement of claim on the Applicants. Counsel for the Applicants confirmed that such statements of claim could be served on it.

[61] At the hearing the Applicants submitted a modified form of the model Initial Order. Certain amendments were proposed during the hearing; the parties had an opportunity to make submissions on the proposed amendments.

VIII. Summary

[62] For the foregoing reasons I was satisfied that it was appropriate to grant the *CCAA* Initial Order in the form requested. I signed the Initial Order at 4:08 p.m. EST on Thursday, February 23, 2012.

D. M. Brown J.

Date: February 26, 2012

TAB 9

CITATION: Re Ghana Gold Corporation, 2013 ONSC 3284
COURT FILE NO.: CV-13-10107-00CL
DATE: 20130607

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GHANA GOLD CORPORATION, GHANA GOLD INC., COASTAL EXPLORATIONS LIMITED AND ABURI GOLDFIELDS GHANA LTD.

BEFORE: Justice Newbould

COUNSEL: C. Michael Citak and G.F. Camelino, for Minatura (BVI) Ltd.

John T. Porter and Kyla E.M. Mahar, for Applicants

Ian Aversa, for FCMI Parent Co. and FCMI Financial Corporation

Greg Azeff and Asim Iqbal, for the Monitor Ernst & Young Inc.

HEARD: June 3, 2013

ENDORSEMENT

[1] On May 9, Ghana Gold Corporation, Ghana Gold Inc., Coastal Explorations Limited and Aburi Goldfields (Ghana) Ltd. applied for protection under the CCAA and an Initial Order was granted which included a provision for immediate DIP financing, and an Administration charge, a DIP lender's charge and a directors' charge. It also provided for a sale and investment solicitation process ("SISP") that called for letters of intent to be submitted by June 11, 2013, offers by July 15, 2013 and court approval and closing by July 31, 2013.

[2] There is litigation between the parties. On February 12, 2013 Coastal and Aburi sued Minatura and related companies for damages arising from an alleged breach of a shareholders'

agreement which set up a joint venture between Coastal and Minatura pursuant to which Aburi would develop and operate an alluvial gold mining operation in Ghana. Under the agreement, Minatura was to deliver certain equipment and cash and in return was to obtain 50% of the shares of Aburi. It had the right to nominate two of four directors of Aburi. It is alleged in the statement of claim that Minatura wrongfully failed to fulfill its obligations and damages of $10 million plus punitive damages are sought.

[3] On April 11, 2013, Minatura commenced an action in Ghana against Coastal and Aburi for specific performance to compel the defendants to perform the shareholders' agreement, an injunction to restrain the defendants from carrying on the business of Aburi to the exclusion of the plaintiffs and an order to account to the plaintiffs the income of Aburi.

[4] Minatura (BVI) Ltd. applies for relief to remove Aburi from the proceedings. In its notice of motion, Minatura has requested a declaration that Aburi did not consent to being an applicant in this proceeding, an order that Aburi's application for relief under the CCAA is stayed or deemed withdrawn, a declaration that the property covered by the Initial Order does not include Aburi's property or in the alternative an order that the pending dispute between Coastal and Minatura should be determined in Ghana. In its factum, Minatura requests an order suspending Aburi's application as a debtor in this proceeding pending a determination of the dispute over the control of Aburi in the Ghanaian action or as directed by this court.

Terms of the JV Agreement

[5] Coastal and Minatura entered into the joint venture shareholders' agreement relating to Aburi dated April 27, 2012, and Aburi was subsequently incorporated on June 5, 2012. The regulations of Aburi named Robert Griffis as sole shareholder.

[6] Section 5.1 of the shareholders' agreement contemplated that the initial members of the board of directors of Aburi would be Joe Wojcik and Tod Turley as Minatura appointees and Robert Griffis and Tom Griffis as Coastal appointees. On June 19, 2012, the sole shareholder of Aburi, Robert Griffis, signed a resolution to effect such term of the shareholders' agreement. The sole shareholder of Aburi at that time remained Robert Griffis.

[7] Pursuant to section 3.1(a) of the shareholders' agreement, each of Coastal and Minatura were to receive an initial 50% participating interest in Aburi subject to the terms of the agreement. In exchange for its 50% participating interest, Minatura was required to deliver, among other things, certain equipment to the Aburi property at Minatura's sole cost and expense as set out in Schedule 7.3 (c), without liens and encumbrances, in good condition and working order to the reasonable satisfaction of Coastal (the "contributed equipment").

[8] The contributed equipment: (i) was to be owned beneficially by Aburi and held for its benefit, and for its sole and exclusive use; (ii) was to be delivered by no later than the equipment delivery date; (iii) was not be rented or leased, except under certain temporary and narrowly circumscribed constraints; and (iv) was to be free and clear of all liens or encumbrances, except as specifically permitted in the shareholders' agreement.

[9] Section 3.1(b) of the shareholders' agreement contemplated that shares of Aburi would be issued to Minatura after it wire transferred $480,000 to Ghana Rae Gold Mines Limited as contemplated by section 7.3(a). These shares were to be placed in escrow with an escrow agent and released to Minatura immediately once all of the contributed equipment arrived at the Aburi property as contemplated in section 7.3(a).

[10] Minatura made certain cash payments and delivered 2 of 11 specified pieces of the contributed equipment. Minatura never delivered the balance of the contributed equipment.

[11] The shareholders' agreement required the balance of the contributed equipment to be delivered by the "Equipment Delivery Date", which is defined as the date that is thirty days after delivery of a certificate, confirming that the Ghana Environmental Protection Agency ("EPA") had issued the environmental licence necessary to conduct production on the Aburi property and attaching a copy of such licence.

[12] Section 7.3(a) of the shareholders' agreement provides that if all of the contributed equipment has not arrived as the Aburi property by the equipment delivery date, the shareholders' agreement shall terminate and Minatura will not receive any shares of Aburi and will be reimbursed for the funds provided to the project. It provided that in the case of non-

delivery of the contributed equipment by the equipment delivery date, Coastal was to provide Minatura with written notice that all the contributed equipment had not arrived and Minatura was to have a twenty day period from the date of such notice to cure the deficiency.

Issuance of EPA Certificate and dispute

[13] Romex Mining Ghana Limited holds the mining rights for the Aburi project. On October 24, 2012, it was granted an environmental permit to undertake the alluvial gold mining at the Aburi project from the Ghanaian EPA which was issued subject to the terms of the project environment impact statement submitted by Romex. The environment impact statement contemplated the mining at the Aburi project being conducted by mechanical means using rear-end tipper trucks.

[14] On October 29, 2012, the executed certificate was delivered to Minatura attaching the licence in accordance with the shareholders' agreement. The delivery of the certificate set the equipment delivery date as November 28, 2012, being thirty days after the issuance of the certificate.

[15] On November 14, 2012, Minatura advised Coastal that it had reviewed the EPA environmental permit and said that its terms appeared to contradict Coastal's ability to use mechanized equipment on the Aburi Project. Minatura took the position that Coastal needed to correct this as soon as possible as the joint venture would be in violation of the licence. Mr. Turley of Minatura said that he was confident that the mistake was an oversight and perhaps a clerical error but it needed to be corrected.

[16] Coastal contacted the EPA regarding the error in the licence. The EPA confirmed that it was simply a clerical error and provided Coastal with a replacement page which corrected the clerical error and confirmed that the licence was always valid and effective from its original date of issue. On November 15, 2012, the confirmed licence was provided to Minatura.

[17] At a meeting of the directors of Aburi held on November 16, 2012, it was agreed that Minatura and Coastal would each make $50,000 available to the joint venture. There was no

complaint raised by the Minatura nominees about the corrected EPA licence. Minatura committed to sending its $50,000 before November 22, 2012. This amount was not paid by Minatura by that date or at any time subsequently. Coastal paid its $50,000 to the joint venture.

[18] On November 26, 2012, Minatura took the position that the corrected licence was not valid and that the EPA had to follow a formal procedure in order to amend the licence. In response, Coastal pursued the issue with the EPA by requesting clarification on the validity of the corrected licence in writing. The EPA advised Coastal that clarification was not necessary since the permit spoke for itself. The EPA offered to speak to Minatura about the issue and confirmed that the licence was valid as of October 24, 2012. Minatura has never contacted the EPA regarding this issue.

[19] Minatura did not deliver the balance of the remaining contributed equipment by the equipment delivery date of November 28, 2012 and has not delivered it since then. Minatura also did not deliver the $50,000 cash call by the deadline agreed in the November 16th board meeting and has not done so since.

[20] Coastal gave written notice of default under the shareholders' agreement to Minatura on November 29, 2012, in which it notified Minatura that all of the contributed equipment had not arrived at the Aburi property by the equipment delivery date and that Minatura had 20 days to cure its default, otherwise the shareholders' agreement would terminate.

[21] Minatura did not take any steps pursuant to the notice of default delivered by Coastal. Coastal delivered a notice of termination to Minatura on December 20, 2012 notifying Minatura that the shareholders' agreement was terminated. Coastal took the position that based on section 7.3(a), the effect of this termination was that Minatura had no right to receive any shares of Aburi but was entitled to be reimbursed for the funds it provided to the project to the date of termination.

[22] On December 21, 2012, the two nominees of Minatura were removed as directors of Aburi and a third nominee of Coastal was appointed as a director of Aburi. On January 10, 2013, Coastal advised Minatura that their nominees had been removed as directors of Aburi.

[23] Minatura now takes the position that the licence from the EPA is not valid and that therefore there was no obligation on it to deliver the contributed equipment as the equipment delivery date has not yet occurred due to the failure to obtain a valid licence from the EPA. Therefore it says that the removal of its nominees as directors of Aburi was invalid.

[24] On May 8, 2013, the three directors of Aburi authorized Aburi to make the application under the CCAA that led to the Initial Order on May 9, 2013.

Issues

[25] Minatura raises several issues. It says there was a lack of proper disclosure of relevant facts to the court on the CCAA application. It says that Aburi cannot be a debtor company under the CCAA as it has no debts and that there was no valid consent to the CCAA application as its nominees to the board, improperly removed, did not consent. It says that the litigation regarding the removal of the directors should be tried in Ghana as the Ontario courts do not have jurisdiction and the appropriate forum for the resolution of the dispute is in Ghana.

[26] The applicants take a contrary position on all of these points. They also say that if Minatura is successful in its position on this motion, the restructuring of the applicants will not be possible as the cash from the DIP lender will run out by the end of July. The Monitor takes no position on the dispute but is of the opinion that if the relief sought by Minatura were granted, it would be highly detrimental to the prospects of a successful restructuring.

Lack of proper disclosure

[27] Rule 39.01(6) of the rules provide that where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

[28] In his text Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Toronto: Canada Law Book 2012) Canada Law Book, Sharpe J.A. stated at para. 2.45 that inflexible application of this rule is to be avoided and failure to make full disclosure is not invariably fatal. He referred to

English authority that has held that a court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of an *ex parte* order, nevertheless to continue the order, or to make a new order on the same terms. He also states that if dissolution would result in injustice to the plaintiff, the punitive rationale for dissolving the injunction may be outweighed. Justice Sharpe also referred to opinion that expressed concern that applications to dissolve for non-disclosure were becoming routine, a view which in recent experience in our courts is all too true. See *Univalor Trust S.A. v. Link Resource Partners Inc.* [2012] O.J. No. 5021.

[29] Minatura asserts that the material on the motion for the Initial Order failed to disclose that Minatura disputed the right of Coastal to terminate the Shareholders' agreement on the basis that a valid licence had not been obtained from the EPA and that Coastal had no right to remove the Minatura directors from the board of Aburi. It asserts that while the pleadings in the Ontario and Ghanaian litigation were made exhibits in the affidavit material, the reference in the affidavit of Mr. Griffis was insufficient.

[30] In my view, there was no failure to make material disclosure in the material that led to the Initial Order. The dispute and the reasons for it are quite apparent in the pleadings that were exhibits to the affidavit. It is a counsel of perfection to say what should have been said in the affidavit itself.

[31] Even if there had been a failure to make material disclosure, I would not exercise my discretion to set aside the Initial Order. That order, among other things, permitted necessary DIP financing that has been advanced and used to pay the indebtedness, interest and fees up to $750,000 owed to the secured creditor, an affiliate of the DIP lender, who negotiated the DIP financing in a process that called for a very timely SISP. Without Aburi, the project would not be financeable or saleable. Aburi operates the project pursuant to an operating agreement between Aburi and Romex Mining Corp. It is Romex that holds the licence from the Ghanaian EPA.

Is Aburi an affiliated debtor?

[32] Minatura has asserted in its material that Aburi has no debts. It also asserts that Aburi is not an affiliated company to the other applicants within the meaning of the CCAA as it is not controlled by any of them. Section 3(3) of the CCAA provides that a company is controlled if more than 50% of its voting securities are held by another person or company.

[33] Aburi is a debtor. As of May 6, 2013, the applicants had accounts payable of approximately $2.2 million apart from the US$4 million owed to FCMI. The Monitor advises that Aburi is the debtor for approximately $1.3 million of these accounts payable. As well, Aburi owed approximately $1.6 million in intercompany debt to Coastal. The pre-filing cash available to the applicants was only $165,000.

[34] Section 3.1(b) of the shareholders' agreement contemplated that 50% of the shares of Aburi would be issued to Minatura after it provided $480,000 to the operator of the project, which it did. These shares were to be placed in escrow with an escrow agent and released to Minatura once all of the contributed equipment to be provided by Minatura was delivered to the Aburi property. After Coastal sent notice of termination of the shareholders' agreement to Minatura, Robert Griffiths transferred all of the shares of Aburi to Coastal, making Coastal the sole named shareholder of Aburi. It was this status that led to the applicants' position that they had more than 50% control of Aburi.

[35] At the time of the CCAA application, therefore, Aburi was a debtor and 100% of its shares were held by Coastal.

[36] The issue for Minatura is whether that control should be set aside by virtue of the alleged improper steps taken by Coastal in taking the position that the shareholders' agreement had been terminated by virtue of the failure of Minatura to deliver the balance of the equipment that it was to contribute to the project. That in turn depends on whether the corrected licence issued by the Ghanaian EPA is, as asserted by Minatura, invalid.

Should the CCAA be stayed as it relates to Aburi?

[37] It my view, it should not. It is clear from the record that Aburi did consent to being an applicant in this CCAA proceeding. Its board of directors authorized the proceeding. There is no basis for the declaration sought by Minatura that Aburi did not consent to the proceedings.

[38] What Minatura is asserting in the litigation it has commenced in Ghana is that the corporate steps that were taken by Coastal should be set aside. However, until a court set aside those corporate steps, they would stand. What Minatura therefore seeks, essentially, is some kind of interim injunction requiring the parties to act on the basis that the corporate steps that were taken by Coastal should be ignored. It would effectively be a mandatory injunction requiring the parties to temporarily set aside the removal of the Minatura nominees to the board of Coastal.

[39] The normal test for an interlocutory injunction is the tri-partite test contained in *R.J.R.-MacDonald Inc. v. Canada (A.G.),* [1994] 1 S.C.R. 311, which includes a consideration of whether there is a serious issue to be tried. A higher test of a strong *prima facie* case being required to be established applies where a mandatory injunction is sought. See the discussion by Karakatsanis J. (as she then was) in *Bark & Fitz Inc. v. 2139138 Ontario Inc.* 2010 ONSC 1793.

[40] The higher test of a strong *prima facie* case is also required where the practical effect of an injunction will be to put an end to the action or impose such hardship on a party as to remove the potential benefit of the action. See *R.J.R.-MacDonald Inc. v. Canada (A.G.)* at paras. 56 and 57.

[41] In this case, it appears clear from the record that if the CCAA proceedings by Aburi are stayed, the strong likelihood is that the restructuring of the applicants business will fail. As stated by the Monitor, the Aburi project is a key asset of the applicants and is integral to its value and if the relief sought by Minatura is granted, it would be highly detrimental to the prospects of a successful restructuring. As well, the SISP could not possibly be successful if any party offering to finance or acquire the assets did not know if it was investing in 50% or 100% of Aburi.

[42] In the circumstances, I am of the view that Minatura is required to establish a strong *prima facie* case that it will succeed on the merits of its position. Be that as it may, I am not

satisfied on the record before me that Minatura can establish either the stronger *prima facie* case or the weaker serious issue to be tried case.

[43] Minatura's case boils down to the assertion that a valid EPA licence has not been issued. It is a fact that the Ghanaian EPA issued a licence. The evidence of the applicants is that once the error in the licence was discovered, the EPA issued a correcting page to its issued licence, and informed the applicants that no further document was required as the licence was valid with the correcting page. Although an officer of Minatura asserted in e-mail correspondence that some formal procedure of the EPA was necessary, no evidence of Ghanaian law was filed by Minatura to support that position.

[44] The evidence of the applicants is that after they provided to Minatura the position of the EPA that no further steps were necessary to confirm the correction to the licence, Minatura was invited by the EPA and the applicants to contact the EPA to discuss it. During argument, counsel for Minatura said that Minatura did not contact the EPA to discuss the issue out of a concern of a possible fraud involving the EPA in the issuing of the correcting page for the licence, although he was quick to say there was no evidence of such fraud but only a suspicion. On his cross-examination, Mr. Turley of Minatura speculated that it might be that Aburi had itself fraudulently drafted the correcting EPA page, although he had no evidence of that. If there was any such concern, one would think that the person with the concern would contact the EPA to find out if the correcting page was legitimate.

[45] On the cross-examination of Mr. Turley, counsel for Minatura took the position that questions as to whether there had been a breach of the shareholders' agreement were improper and constituted a breach of process. In light of the position now asserted by Minatura on this motion that a stay of the CCAA process regarding Aburi should be ordered, it is difficult to understand the position of counsel for Minatura on the cross-examination of Mr. Turley.

[46] What we are left with on the record is that the Ghanaian EPA issued a licence and a correcting document. There is no evidence that more from the EPA was required and no cogent

evidence of any kind to establish a strong *prima facie* case, let alone any serious issue, of fraud. Thus there are no grounds for a stay to be granted.

[47] There is also an issue as to whether Minatura would be entitled to an order for specific performance. No evidence was provided by Minatura as to Ghanaian law, and on this motion it must be assumed that Ghanaian law is the same as Ontario law. See the discussion on this subject in *Bank of Nova Scotia v. Wassef* (2000), 11 C.P.C. (5th) 338 at para. 17.

[48] In this case, if it were established that there had been a breach of the shareholders' agreement by Coastal in taking the position that the shareholders' agreement had been breached by Minatura, it is highly problematical that the relief would be an order enforcing the shareholders' agreement and requiring two Minatura nominees to be two of the four directors of Aburi.

[49] Of obvious concern would be the deadlock in the board of Aburi, with each side opposing the other. Ontario courts are reluctant to say to the parties that they must continue to operate under the terms of an agreement in the face of the deterioration of their relationship. It would be difficult for such an order to be supervised in a way that would make sense given the commercial realities that exist between the parties. See the discussion in *Natrel Inc. v. Four Star Dairy Ltd.*, 1996 CarswellOnt 1205 at para. 13. See also R.J. Sharpe, *Injunctions and Specific Performance* looseleaf ed. (Toronto: Canada Law Book 2012) at paras. 7.340, 7.510.

[50] As well, a plaintiff deprived of an investment property does not have a fair, real or legitimate claim to specific performance unless it can show that money is not a complete remedy because the land has a peculiar and special value to it. Where an investment property's particular qualities are only of value due to their ability to further profitability, a claim for specific performance cannot be justified. See *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675 at paras. 40-41.

[51] It is not necessary to consider the second and third test in *R.J.R.-MacDonald Inc. v. Canada (A.G.)* of irreparable harm and balance of convenience. However, it is clear that the applicants would suffer irreparable harm given the negative impact of any stay on the success of

the CCAA proceedings. Moreover, Minatura has no assets in Canada or the United States and has given no undertaking as to damages.

Jurisdiction to decide the litigation between the parties

[52] Minatura takes the position that Ontario lacks jurisdiction to deal with the dispute between the parties and that even if it did, the dispute should be dealt with in Ghana on a *forum non conveniens* analysis.

[53] The applicants say that Ontario has jurisdiction and that a forum selection clause in the shareholders' agreement directing the dispute to be litigated in Canada should be enforced.

[54] The starting point in the analysis is *Van Breda v. Village Resorts Ltd.* [2012] 1 S.C.R. 572, which dealt with the subject of both jurisdiction and *forum non conveniens* in the context of tort actions. It did not deal with a breach of contract case or a CCAA proceeding. In a lengthy judgment, LeBel J. for the Court confirmed the test of a real and substantial connection to ground jurisdiction in a Canadian court. He listed presumptive connecting factors for a tort case. In dealing with presumptive factors, he stated:

> [82] Jurisdiction must - irrespective of the question of forum of necessity, which I will not discuss here - be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.
>
> [85] The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.
>
> **(a) CCAA proceeding**

[55] Aburi is one of the applicants in the CCAA proceeding. The evidence of Mr. Griffis is that the centre of main interest of all of the applicants, including Aburi, is Ontario. See paragraphs 18 to 20 of his affidavit sworn May 8, 2013. Included in the list of factors in his affidavit are (i) all corporate decision making occurs at the head office in Ontario, (ii) all treasury management functions, including a centralized cash management system, are conducted from the head office, (iii) the only financing available to the applicants is with FCMI, which manages its financing in Toronto and (iv) the board of directors' meetings are customarily held in Ontario. In his responding affidavit, Mr. Turley, the president of Minatura, made the bald allegation that Aburi's banking is done in Ghana. What banking he is talking about is not stated, and I do not take his statement to be contradicting the affidavit of Mr. Griffis that all treasury management functions, including a centralized cash management system, are conducted from the head office in Ontario. Mr. Turley may be talking about a bank account in Ghana used to pay suppliers or Ghanaian employees.

[56] In this case, it is critical to a restructuring that the entire group of applicants be included in the CCAA proceeding. Without Aburi, a restructuring is highly unlikely. The Monitor has made that clear. The evidence of Mr. Griffis is that the applicants' business is fully integrated, and that is apparent from the entire record. With the centralized cash management of all applicants, including Aburi, being conducted in Ontario, and the lender FCMI being in Ontario, this Court in my view has the jurisdiction to deal with this CCAA proceeding, including any issue as to whether Aburi consented to its commencement. There are, in the language of LeBel J., objective factors that connect the legal situation or the subject matter of the litigation with the forum.

(b) Tort claim

[57] The statement of claim of Coastal and Aburi commenced in Ontario includes a claim in paragraph 19 that Minatura has misrepresented a number of things to "plaintiffs' suppliers, operators, bankers, financiers and government regulators". Where the misrepresentation took place is not pleaded in that paragraph, although in paragraph 22 it is alleged that the misrepresentations were disseminated in Ontario and elsewhere. In his affidavit, Mr. Griffis

stated that the financier for the plaintiffs is FCMI in Ontario, and thus it can be taken that the pleading asserts misrepresentations being made to FCMI in Ontario.

[58] One of the presumptive connecting factors for a tort claim enunciated by LeBel J. in *Van Breda* is that the tort was committed in the province. Thus the presumption in this case is that Ontario has jurisdiction to deal with the misrepresentation claim as there is a sufficient basis to conclude that it is alleged that the misrepresentation took place in Ontario. The burden of rebutting the presumption of jurisdiction rests on Minatura, which must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. In this case, Minatura has not done so.

[59] Thus in this case Ontario has jurisdiction over the claim for misrepresentation. In such a situation, *Van Breda* directs that the entire case, including the breach of contract claim, should be dealt with in Ontario. LeBel J. stated:

> [99] I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

(c) Breach of contract claim

[60] As stated, because an Ontario court has jurisdiction to deal with the misrepresentation case, it also has jurisdiction to deal with the entire case, including the claim for breach of contract. Apart from that, however, in my view on basis of the principles referred to and established in *Van Breda*, an Ontario court has jurisdiction to deal with the breach of contract case.

[61] In this case, the applicants rely on a choice of forum provision contained in the shareholders' agreement which provides:

> If the cumulative amount of the claims of one Participant against the other Participant is greater than or equal to five million dollars ($5,000,000) then the dispute or issue will be subject to adjudication in the Courts of Canada.

[62] Coastal and Aburi have claimed damages of $10 million plus punitive damages, and thus their claim falls within the forum provision clause in the shareholders' agreement. Courts of Canada would include the Superior Court of Justice in Ontario in which Coastal and Aburi commenced their claim.

[63] In *Van Breda*, LeBel J. looked to rule 17.02 for guidance to discern factors that could be presumptive. He stated:

> [83] At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law. (emphasis added)

[64] Rule 17.02 refers to the following in dealing with contract claims:

> **17.02** A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> **Contracts**
>
> (f) in respect of a contract where,
>
> (i) the contract was made in Ontario,

> (ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,
>
> (iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or
>
> (iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario.

[65] In *Van Breda*, LeBel J. did not deal with rule 17.02(f) other than to state "Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i))" and that a presumptive factor for a tort claim was if a contract connected with the dispute was made in the province. He did so presumably because in *Van Breda*, the contract was made in Ontario. He did not comment on rule 17.02(f)(iii) that deals with a contract in which the parties have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract.

[66] If one starts with rule 17.02 as directed with *Van Breda*, the issue arises as to whether rule 17.02(f)(iii) that deals with a contract in which the parties have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract should be considered a presumptive connecting factor. In my view it should, as it is clear that judicial policy in Canada is that choice of forum provisions should be accorded great weight. See *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 at para. 20.

[67] It is not necessary, however, to decide if a choice of forum clause should be considered to be a presumptive connecting factor in light of the following statement of LeBel J. in *Van Breda* and the dictates of traditional private international law. In *Van Breda*, LeBel J. stated:

> [79] From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's

> presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction. (emphasis added)

[68] What is the traditional private international law basis for court jurisdiction? It is clear that a prior agreement to submit disputes to the jurisdiction a domestic court will provide that jurisdiction. It is not only attorning to the jurisdiction by appearing in the action that will provide jurisdiction.

[69] In *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), Sharpe J.A. stated:

> [19] There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. (emphasis added).

[70] In *Loat v. Howarth* (2011), 89 B.L.R. (4th) 177 (O.C.A.), a forum selection clause in a contract was held to give an Ontario court jurisdiction over the dispute. The Court stated:

> 28. Further, on the plain language of the forum selection clause in the Service Agreement, the plaintiff and Storetech Ontario expressly attorned to Ontario's jurisdiction in respect of any disputes arising with respect to his employment. Under the clause, Ontario has jurisdiction *simpliciter* regarding such disputes.

[71] The text authorities also state clearly that a forum selection clause will provide the basis for jurisdiction. Castel & Walker, *Canadian Conflict of Laws*, 6th ed (April 2013) state at p. 11-6.1 that apart from attornment, "Parties who have entered into agreements nominating particular courts for the resolution of disputes between them may rely on those agreements to found jurisdiction." In Dicey, Morris and Collins on *The Conflict of Laws,* 14th ed. (2006), it is stated at para. 12R-086 that where a contract provides that all disputes between the parties are to be referred to the jurisdiction of the English courts, the court normally has jurisdiction to hear and determine the proceedings. In Chesire and North's *Private International Law,* 13th ed. (1999), it is stated at p. 296 :

> Further, any person may contract…to submit to the jurisdiction of a court to which he would otherwise not be subject. Thus, in the case of an international contract it is common practice for the parties, one or even both of whom are resident abroad, to agree to any dispute arising between them shall be settled by the English court… A party to such a contract, having consented to the jurisdiction, cannot afterwards contest the binding effect of the judgment.

[72] In Pitel and Rafferty, *Conflict of Laws*, (Irwin Law Inc.) it is stated at p. 67:

> Finally, it is well recognized that a defendant can submit to the jurisdiction of a court by a contract or agreement to submit. Thus, parties to a contract may agree that all disputes arising thereunder are to be referred to the courts of, for example, Ontario. Such a choice of forum clause will bestow jurisdiction on the Ontario courts.

[73] Minatura contends that there is authority to the contrary. In *2249659 Ontario Ltd. v. Sparkasse Siegen*, 2013 ONCA 354, Doherty J.A. stated:

> [25] A forum selection clause applicable to the relevant litigation identifying a forum other than Ontario as the forum of choice cannot deprive Ontario of jurisdiction *simpliciter*. A forum selection clause is relevant to whether Ontario should exercise its jurisdiction and not whether Ontario has jurisdiction [1]: see *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467, at paras. 33-40, aff'd 2012 SCC 9, [2012] 1 S.C.R. 359. The motion judge should have considered the question of jurisdiction *simpliciter* before examining the forum selection clauses. Those clauses, even if applicable to this litigation, could not assist in determining jurisdiction *simpliciter*.

[74] However, footnote [1] referred to by Doherty J.A. stated:

> The situation is quite different where the forum selection clause identifies Ontario as the forum of choice. In that situation, the clause arguably gives Ontario jurisdiction through the consent of the parties.

[75] It is clear from this footnote that the *Sparkasse Siegen* case is distinguishable from this case in which there is a forum selection clause identifying Canada, or Ontario, as the forum of choice. I do not therefore take the statement of Doherty J.A. to run counter to the authorities to which I have referred, including LeBel J. in *Van Breda*, Sharpe J.A. in *Muscutt v. Courcelles*, the Court in *Loat v. Howarth* and the text authorities, that a forum selection clause is recognized in private international law to give jurisdiction to the court selected, in this case the courts of

Canada. To the extent that the statement may run counter to these authorities, I am of course bound by *Van Breda*, and *Muscatt v. Courcelles* is concurrent authority to *Sparkasse Siegen*.

(d) Summary

[76] In summary, the Superior Court of Justice in Ontario has jurisdiction, referred to in some cases as jurisdiction *simplicter*, over the CCAA application and the issue of whether Aburi consented to that application and to the misrepresentation and breach of contract claims commenced by Coastal and Aburi against Minatura in Ontario.

Forum non conveniens

[77] Minatura contends that Ghana is the more appropriate forum to decide the dispute between the parties. The burden, of course, rests on Minatura to establish that Ghana would be a more appropriate forum. See *Van Breda* at para. 103.

[78] The forum selection clause in this case looms large in a *forum non conveniens* analysis. In *Z.I. Pompey Industrie v ECU-Line N.V.*, [2003] 1 S.C.R. 450 it was held that strong cause must be shown before a forum selection clause will not govern. Bastarache J. for the Court stated:

> Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts"…. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law…The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. …

[79] In *Expedition Helicopters Inc. v. Honeywell Inc.* (2010), 100 O.R. (3d) 241 (C.A.), Jurianz J.A., in dealing with a forum selection clause in a *forum non conveniens* analysis, stated:

> 24. A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[80] None of the facts referred by Jurianz J.A. are present in this case. I see no basis to hold that in the circumstances the parties should litigate their dispute in Ghana.

[81] I mention only some of the grounds advanced by Minatura. One is that the shareholders' agreement provides that it shall be construed and governed by the laws of Ghana. Thus it is asserted by Minatura that it is appropriate that the dispute be litigated in Ghana. However, no evidence has been provided in this motion as to what the law of Ghana is so far as the construction of the shareholders' agreement is concerned. In the absence of any such evidence, it is to be assumed on this motion that Ghanaian law is no different than Ontario law. See the discussion on this subject in *Bank of Nova Scotia v. Wassef* (2000), 11 C.P.C. (5th) 338 at para. 17.

[82] Another is that it is contended by Minatura that persons from the Ghanaian EPA will need to be called as witnesses and that this favours Ghana as the best forum. However, this must involve speculation on the part of Minatura. Although invited, Minatura has not seen fit to contact anyone at the EPA to discuss the correcting document provided by it to deal with the mistake in the licence as first issued. Minatura can hardly assert with any confidence that someone from the EPA will necessarily be a witness. In any event, in dealing with an international situation today, parties must know that in the event of a dispute, people will need to travel to get to the location in which the dispute is heard. I note that Mr. Turley, the president of Minatura, resides in California and swore his affidavit in Washington D.C.

[83] Minatura has filed an affidavit of Mr. Amarteifio in which he swears that a judgment of a Canadian court will not be enforceable in Ghana, except where there is a reciprocal enforcement agreement between Ghana and Canada, and as there is no such agreement, the matter would have to be re-litigated in Ghana.

[84] Mr. Amarteifio is litigation counsel for Minatura in the action commenced by it in Ghana. He is hardly non-partisan and it is admitted by Mr. Turley that Mr. Amarteifio is not impartial. Therefore he does not meet one of the requirements of rule 4.1.01 that an expert must be non-partisan. He has also failed to include the information required of an expert in rule 53.03(2.1), including his credentials to provide the opinion, other than to say he has been a lawyer in Ghana since 1979. What expertise he has in private international law is not stated.

[85] Mr. Amarteifio has provided no support for his statement that without a reciprocal enforcement agreement between Canada and Ghana, a judgment in Canada would not be recognized in Ghana. It is generally known that the Ghanaian legal system is based on British common law, and it would be surprising if there were no common law tests for recognition by Ghana of foreign judgments. The Dicey rule of English common law is that England will recognize a foreign judgment if the judgment debtor had before the commencement of the proceedings agreed to submit to the jurisdiction of the court in which the judgment debt was obtained. See *Rubin v. Eurofinance S.A. & Ors*, [2012] UKSC 46 in which the Dicey rule was confirmed. See also Dicey, Morris and Collins on *The Conflict of Laws,* 14th ed. (2006) at paras. 14R-048 and 14-069.

[86] Because Mr. Amarteifio is not non-partisan, his report should not be admissible. In any event, I do not give it any weight, both because of the partisan position of its author and because there is no indication of any expertise he has in the area and no support for his bald statements.

[87] There is also an issue of timing. It is critical that if there is to be litigation, it must be determined very quickly, as any restructuring must take place and be closed by the end of July, 2013. In our Commercial List in Toronto, accommodation can be made extremely quickly for a determination of disputes in real time. Counsel for the applicants points out that so far the action

commenced by Minatura in Ghana has not moved quickly. After being instructed by Minatura on February 13, 2013 to expedite its intended action, it took two months until April 10, 2013 for Mr. Amarteifio to have the writ issued.

[88] I am advised by counsel for the applicants that their information is that it will take a year to get to trial in Ghana. Counsel for Minatura advises that his information is that it will take six to twelve months. If the restructuring were held up for that period of time, it would mean there would be no restructuring. Timing is an important factor that favours Ontario as the appropriate forum.

[89] Counsel for Minatura in argument said that Minatura wanted the dispute dealt with quickly. However when asked if in that case Minatura would agree to a fast trial in the Commercial list in Toronto, the answer was no. The answer leads to a concern that Minatura is taking the positions it is as tactics to obtain leverage against the applicants.

[90] In the circumstances, Minatura has not satisfied the onus of establishing that Ghana is the more appropriate forum for trying the issues raised in the litigation.

Conclusion

[91] The notice of motion of Minatura and the relief sought in it is dismissed. As well, the stay of the CCAA proceedings as they relate to Aburi as requested by Minatura in its factum is dismissed. The dispute between the parties is to be litigated in this Court.

[92] If either party wishes to have their dispute tried quickly, a 9:30 am appointment may be made to discuss the mechanics and timing. The Court will do all it can to accommodate a quick trial or a hybrid proceeding based on the material filed to date and any further evidence the parties may wish to call.

[93] The applicants are entitled to their costs. If costs cannot be agreed, brief written argument along with a proper cost outline may be delivered by the applicants within 10 days and Minatura shall have a further 10 days to deliver a brief written reply argument.

Newbould J.

Date: June 7, 2013

TAB 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***In the Matter of Global Light Telecommunications Inc. et al.,*** 2004 BCSC 745

Date: 20040604
Docket: L021991
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36

And

In the Matter of the *Yukon Business Corporations Act,* R.S.Y. 1986, c. 15

And

In the Matter of Global Light Telecommunications Inc., Un Limited and Brightstar Limited

Petitioner

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Petitioners:	Scott A. Turner David E. Gruber
Counsel for the Respondents: UBS Capital Americas II, LLC and Canven V (Barbados) Limited	Gordon D. Phillips
Counsel for York Capital Management LP	Douglas B. Hyndman
Counsel for Credit Suisse First Boston	Alan B. Brown
Counsel for the Monitor: PricewaterhouseCoopers Inc.	Heather M. Ferris
Date and Place of Hearing:	April 26, 2004 Vancouver, B.C.

[1] Global Light Telecommunications Inc., Un Limited and Brightstar Limited apply for an order under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-25 sanctioning a consolidated Plan of Arrangement approved by creditors in the manner contemplated by the *Act*.

[2] If approved, the Plan would permit distribution of cash on hand in the approximate amount of US $658,000 to the petitioners' creditors on a rateable basis in the calculation of which the claims of creditors owed more than $100,000 would be capped at $100,000. Creditors with claims in excess of $100,000 would receive shares in a corporation to be incorporated for the purpose of acquiring Global's interest in Bestel, S.A., a Mexican company that operates a telecommunications network located primarily in Mexico. Share entitlement would be determined on a rateable basis by reference to the gross amount of each creditor's claim.

[3] The Plan has been approved by the requisite majority of creditors. However, York Capital Management LP, York Offshore Investors Unit Trust and York Investment Limited oppose the application to sanction on the grounds that Brightstar and Un Limited are not debtor companies for *CCAA* purposes and cannot be included in the Plan; Brightstar and Un Limited should not have been added as petitioners in the proceeding and the order purporting to do so was a nullity; and the Plan is not fair and reasonable.

[4] The relevant background is the following. Global is a Yukon corporation. It raised substantial amounts of capital by issuing shares and various debt instruments. The capital so acquired was used, in part, to capitalize Un Limited as a wholly owned subsidiary. In turn, Un Limited capitalized Brightstar. Both Un Limited and Brightstar are Bermuda

corporations. Global also capitalized GST Mextel, Inc., a Delaware corporation, as a wholly owned subsidiary. Following capitalization by Global, Brightstar acquired a 49% interest in New World Network Holdings Ltd., and GST Mextel acquired a 49% interest in Bestel.

[5] Global borrowed US $4 million from York pursuant to a series of loan agreements dated June 29, 2001. That sum compares to debts in excess of US $40 million owed to other debenture holders. By January 2002, Global was in default under the York loan agreements. York agreed to extend the loan repayment date to June 30, 2002, in consideration for, among other things, loan guarantees from Brightstar and Un Limited.

[6] On June 28, 2002, Global was granted a stay of proceedings under the *Act* in order to allow it to construct a plan of Arrangement or Compromise for presentation to its creditors. On August 15, 2003, Global applied to add its subsidiary, Un Limited, and that company's subsidiary, Brightstar, as petitioners in the proceeding. The application to add clearly identified the fact that Brightstar and Un Limited had provided guarantees in relation to some of Global's debts. York appeared at the hearing of the application but took no position in relation to it.

[7] On August 28, 2003, the court granted an order approving the sale of Brightstar's 49% equity interest in New World Network Holdings Ltd. on condition that the sale price of approximately US $658,000 be remitted to, and held by, the Monitor in trust for the benefit of the petitioners' creditors. York Capital appeared on that application but took no position.

[8] On February 18, 2004, the court granted a procedural order authorizing the petitioners to seek creditor approval of the consolidated Plan of Arrangement in respect of which sanction is now sought. Counsel for York appeared on that application but took no position.

[9] On March 23, 2004, the Plan was approved by 83% of creditors in number and 86% of creditors in dollar value. The percentages exceeded the minimum required by the *Act*. This application to sanction followed as a result.

[10] At the hearing of this application, York claimed that it had recently learned that Brightstar and Un Limited had opened Canadian bank accounts with nominal deposits of US $100 immediately prior to applying to be added as petitioners. It claimed to have been informed that the accounts were closed immediately after the granting of the order adding them as petitioners. These statements of fact, not verified by affidavit at the time of the hearing, were not disputed by the petitioners. York relied on this information to support its claim that Brightstar and Un Limited, as Bermuda corporations, were not companies that could not benefit from a *CCAA* proposal because the bank accounts with nominal amount on deposit did not satisfy the *CCAA* requirement that the companies have assets in Canada before availing themselves of the protection afforded by the *Act*.

[11] Following the hearing, I directed the petitioners to file affidavit evidence explaining the origin, operation, and current status of the bank accounts. The affidavits indicate that each of Un Limited and Brightstar opened an account with HSBC in Vancouver on July 24, 2003. The amount of US $100 was deposited to each account. The monitor deposes as follows in relation to the origin of the funds:

> The funds that were deposited to the Brightstar and Un Limited accounts were provided to Brightstar and Un Limited by Global Light. This was consistent with the dealings between Global Light, Un Limited and Brightstar throughout their existence. Whenever Brightstar or Un Limited required funds in the past, those funds were always provided by Global Light.

[12] The affidavit evidence establishes that the accounts have remained open. No additional deposits have been made. The only debits to the accounts have been the bank's monthly minimum balance service charges. At March 31, 2004, the balance in each account was US $45.15.

[13] I invited the parties to make additional submissions having regard for the additional evidence. None were forthcoming.

[14] York does not challenge the efficacy of the transactions resulting in the creation of the accounts but says the "instant" Canadian bank accounts created shortly before the application to add Brightstar and Un Limited as petitioners do not qualify as assets sufficient to bring Brightstar within the definition of "company" as defined in s. 2 of the *Act*. In the alternative, York says that the Plan is unfair because Brightstar has no real connection to Canada and consolidation produces an inappropriate result by permitting creditors of a Canadian company to enjoy benefits that should accrue solely to York under the guarantees granted to it by Brightstar.

[15] The petitioners submit that the Plan is fair and reasonable. They say that York failed to object to the procedural order that permitted the presentation of a consolidated plan to creditors and did not appeal the order or apply to have it set aside as a nullity.

[16] In my opinion, York's claim that Brightstar does not qualify as a company for purposes of the *Act* must fail. Section 2 of the *Act* defines "company" as follows:

> ..."company" means any company, corporation or legal person incorporation by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of

> section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;...

[17] The substance of York's claim is that the court must engage in a qualitative or quantitative analysis of the Canadian assets in order to decide whether a company that is not incorporated in Canada and is not doing business in Canada otherwise qualifies as one "having assets ... in Canada". In my opinion, the court must not engage in that kind of analysis. Certainty is required in so far as the availability of the *Act* is concerned. In my opinion, importing an element of discretion into the question of eligibility would diminish the effectiveness of the *Act* as a means of assisting in the evolution of plans of arrangement acceptable to companies and their creditors. It is for that reason, I suggest, that courts concerned with the application of the *Act* have acknowledged the efficacy of "instant assets": see, for example, *Nova Metal Products Inc. v. Cominskey (Trustee of) (sub nom. Eland Corp. v. Cominskey)* (1990), 1 O.R. (3d) 289 (C.A.)***;*** *Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]); *Philips Manufacturing Ltd., Re* (1991), 9 C.B.R. (3d) 1 (B.C.S.C.)***;*** and *P.R.O. Holdings Ltd., Re* (1998), 24 C.B.R. (3d) 1 (N.B.C.A.). If a *de minimis* standard is thought to be appropriate in determining whether a company has assets in Canada, it is for parliament to amend the *Act* accordingly.

[18] I conclude that Brightstar qualified as a company at the time it applied to be added as a petitioner. It qualified as a company at the time of the application for the procedural order and at the time of the application to sanction the plan. It would not have qualified without opening the bank account. It would have ceased to qualify if the account balance had been reduced to nil, or if the bank account had been closed. The qualitative and quantitative analyses urged by York are only relevant in the assessment of the suitability of a

consolidated plan of arrangement in any particular circumstances. In that regard, York expressed no opposition to a consolidated plan of arrangement when it was first proposed by the petitioners at the time of applying for the procedural order.

[19] In considering whether to sanction the Plan, the court must have regard for three well-established principles, as set out in *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.* (1989), 73 C.B.R. 195 (B.C.C.A.) at 201:

1. There must be strict compliance with all statutory requirements;
2. All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the *CCCA*;
3. The plan must be fair and reasonable.

[20] Brightstar qualifies as a company under the *CCAA* and has complied with the technical requirements. That which has been done to date is authorized by the *Act*. The only issue is whether the consolidated Plan is fair and reasonable.

[21] York says the Plan is not fair and reasonable because Brightstar has no real connection to this jurisdiction other than a hastily opened bank account of an insignificant amount. This objection amounts to a back door attempt to oppose the permission granted to the petitioners to submit a consolidated proposal to creditors.

[22] York must have been aware that the consolidated Plan would deprive it of the right to seek to recover on its guarantees. It did not attempt to suggest in its submissions that the operating relationship among Global, Un Limited and Brightstar was such that consolidation was inappropriate. Indeed, York became involved as a lender to Global, as did other lenders, knowing that Global's capital would be directed to the capitalization of subsidiaries. York

did not oppose the application to consolidate at the hearing of the application regarding the procedural order. It did not appeal that order. In the circumstances, York cannot now be heard to complain about adverse effects flowing from the consolidated Plan.

[23] Is the Plan otherwise fair and reasonable? In addressing that question the court must not insist on perfection with respect to fairness and reasonableness. Rather, a fair and reasonable plan is meant to be an equitable arrangement in the nature of a compromise: *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 17 (Ont. Gen. Div. [Commercial List]) at 173. Each of the creditors will not necessarily be treated equally, but the Plan must satisfy the majority of creditors on the whole. This Plan has that effect. All creditors became involved with Global and its subsidiaries knowing they were dealing with Global as the parent. While one may query whether the guarantee in favour of York is valid given that it was granted when the group was seemingly insolvent, there is nothing in the evidence tendered by York that would suggest it accommodated the Global group in a manner that should result in it being potentially the sole beneficiary of the sale proceeds of a subsidiary's interest in a distant investment. The majority has voted in favour of the Plan. There is a heavy burden on parties seeking to oppose sanctioning: *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]). York has not discharged that burden.

[24] In my view, the Plan is sufficiently fair and reasonable in the circumstances of this case. Accordingly, the application for an order sanctioning the Plan dated February 18, 2004 is granted.

"I.H. Pitfield, J."
The Honourable Mr. Justice I.H. Pitfield

June 23, 2004 – ***Revised Judgment***

David E. Gruber should be added as counsel for the petitioners and Heather M. Ferris should be added as counsel for the monitor, PricewaterhouseCoopers Inc.

TAB 11

CITATION: Index Energy Mills Road Corporation (Re), 2017 ONSC 4944
COURT FILE NO.: CV-17-580840-00CL
DATE: 2017-08-23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT INDEX ENERGY MILLS ROAD CORPORATION

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Shane Kukulowicz*, for the Index Energy Mills Road Corporation

Brian Empey and *Melaney Wagner,* for Grant Thornton Ltd., Proposed Monitor

Grant Moffat, for the National Bank of Canada, as Agent for a Syndicate of Lenders

David Bish, for DIP Lender (Index Equity US LLC), Index Equity Sweden AB and Index Residence AB

HEARD and ENDORSED: August 16, 2017
TYPED REASONS RELEASED: August 23, 2017

ENDORSEMENT

Overview

[1] This application is brought by Index Energy Mills Road Corporation ("Index Energy Ajax" or the "Applicant") for an order (the "Initial Order") pursuant to the Companies' Creditors Arrangement Act (the "CCAA").

[2] In addition to requesting a stay of proceedings and authorization to carry on business in a manner consistent with the preservation of its property, the Applicant also requests that Grant Thornton Ltd. ("GTL") be appointed as monitor (the "Monitor"); authorization for the Applicant to borrow $5 million pursuant to a credit facility (the "DIP Facility") as interim financing from Index Equity US LLC ("Index US"), in such capacity, (the "DIP Lender") with a maximum amount of $1.6 million being advanced by the DIP Lender prior to the CCAA comeback hearing (the "Comeback Hearing"); and a sealing order with respect to certain confidential information described in the pre-filing report of the Monitor (the "Pre-Filing Report").

[3] Index Energy Ajax owns and operates an electrical co-generation facility located in Ajax, Ontario that generates electricity by burning wood waste from the construction industry to produce steam to drive turbine generators (the "Biomass Facility").

[4] Index Energy Ajax has encountered difficulties in retrofitting the Biomass Facility and energy output has been lower and operational costs higher than anticipated. Index Energy Ajax has also been engaged in litigation with its former engineering, procurement and construction contractor, HMI Construction Inc. ("HMI"), and has also been forced to deal with numerous liens arising from the construction associated with the Biomass Facility, including a lien claim of approximately $31.3 million registered by HMI (the "HMI Lien Claim"). The sum of $7,053,890 plus HST has been paid into court as an agreed upon holdback (the "Holdback Funds").

[5] Index Energy Ajax is in default on various obligations to a syndicate of lenders comprised of National Bank of Canada, Canadian Western Bank, Laurentian Bank of Canada and Business Development Bank of Canada (collectively, the "Syndicate"). National Bank of Canada is the agent of the Syndicate (in that capacity, the "Agent"). The Syndicate has made demand for payment of amounts in excess of $45 million. Mr. Rickard Haraldsson, a Director of Index Energy Ajax has stated in his affidavit that Index Energy Ajax is insolvent.

[6] The Applicant is of the view that its underlying business remains strong, but that it ultimately requires a restructuring to inject new funds into its operations to address the various deficiencies in the Biomass Facility. Accordingly, Index Energy Ajax states that it requires protection under the CCAA to allow it a period of time to develop and implement a sales and investment solicitation process ("SISP") and to access interim financing on a priority basis to preserve value for all stakeholders and ensure its viability as a going concern.

[7] The Applicant has advised that it is currently in negotiations with Index US and the Syndicate to reach agreement on terms of a mutually acceptable SISP, which would include a stalking-horse bid, and to allow further advances under the DIP Facility beyond the initial permitted draw amount.

The Facts

[8] The facts have been set out in detail in the affidavit of Rickard Haraldsson (the "Haraldsson Affidavit").

[9] Index Energy Ajax was incorporated pursuant to the laws of Ontario on November 7, 2006. Its registered office is located at 170 Mills Road, Ajax, Ontario.

[10] Index Energy Ajax is owned by three shareholders. Index Energy Sweden is the owner of 70% of the common shares, R. Andrews Investment Company, LLC ("R. Andrews") is the owner of 10% of the common shares and Jacqueline Kerr ("J. Kerr") is the owner of 20% of the common shares.

[11] Index Energy Ajax was incorporated to retrofit the existing energy plant located in Ajax (the "Property") to become the Biomass Facility.

[12] Index Energy Ajax entered into a feed-in-tariff with the Ontario Power Authority in 2010 (the "FIT Contract"). In order to retrofit the Biomass Facility, Index Energy Ajax entered into a construction contract with HMI in 2012 (the "EPC Contract"). Since 2015, there has been substantial litigation between Index Energy Ajax and HMI with regard to the HMI Lien Claim.

[13] In March 2017 Index Energy Ajax paid an agreed holdback amount of $7,053,890 plus HST (the "Holdback Funds") into court and all subcontractor lien claims were vacated from title to the Property

Index Energy Ajax's Creditors

[14] In 2013, Index Energy Ajax entered into a credit agreement (the "Syndicate Credit Agreement") with the Syndicate. Pursuant to the Syndicate Credit Agreement, the Syndicate agreed to provide a non-revolving construction facility in the maximum sum of $60 million and a non-revolving term facility once the retrofit was satisfactorily completed (collectively, the "Syndicate Facilities").

[15] Index Energy Ajax has been in default of the Syndicate Agreement since at least May 2015.

[16] On January 18, 2017, the Agent sent Index Energy Ajax a demand letter (the "Demand Letter") demanding full payment of all amounts owing to the Syndicate under the Syndicate Facilities, which at that date totaled $49,427,871.94, with interest.

[17] Other creditors include Index Residence for an amount in excess of $102 million and trade creditors for an amount in excess of $4 million.

[18] The proposed monitor has filed a pre-filing report which details the efforts Index Energy Ajax has taken, with the assistance of the Monitor, to solicit an appropriate DIP financier. After consulting with Index Sweden and Index Residence, one party was selected as a potential DIP lender, however, after protracted negotiations, the parties were not able to come to terms. As an alternative, Index US has agreed to act as DIP Lender with the consent of the Syndicate, on terms more favourable to Index Energy Ajax than those offered by this potential lender. Details are provided in the Pre-Filing Report at paragraphs 46-53 and in the Haraldsson Affidavit at paragraph 94.

[19] The DIP Lender has agreed to provide Index Energy Ajax with a DIP Facility in order for Index Energy Ajax to meet its immediate funding requirements.

[20] The DIP Facility, extended by the DIP Lender is the maximum amount of $5 million (the "Principal Amount") with a maximum amount of $1.6 million being advanced by the DIP Lender prior to the CCAA Comeback Hearing pursuant to the DIP Credit Agreement.

[21] The DIP Facility requires that the DIP Lender receive a court ordered priority charge over the assets of Index Energy Ajax (the "DIP Lender's Charge") which Charge will attach to all of the Index Energy Ajax Property other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of Index Energy Ajax other than Caterpillar Financial Services Limited, who has a specific security interest over a construction loader (the "Loader").

The Law

[22] The CCAA applies to a "debtor company" with total claims against it for more than $5 million. I am satisfied that Index Energy Ajax is such a "debtor company" and is entitled to relief under the CCAA.

[23] I am also satisfied that Index Energy Ajax is insolvent. Index Energy Ajax's liabilities exceed the current value of its assets and Index Energy Ajax has insufficient funds to pay its debts and has ceased to meet its obligations as they become due.

[24] I am also satisfied that Index Energy Ajax has met the other threshold requirements include the filing of cash-flow statements required by Section 10 of the CCAA. Further, since the chief place of business of Index Energy Ajax is Ajax, Ontario, this court has jurisdiction to hear this application.

[25] I am also satisfied that it is both necessary and appropriate to grant a stay of proceedings to Index Energy Ajax. The stay is crucial as it preserves the status quo among the stakeholders while Index Energy Ajax stabilizes operations and considers its alternatives. Index Energy Ajax has indicated that it wishes to embark on a SISP and a stay is necessary to allow the time for the SISP to unfold.

[26] Index Energy Ajax also seeks authorization to pay pre-filing expenses up to the amount of $450,000 if it is determined, in consultation with the Monitor, to be necessary for the continued operation of the business or preservation of the Property.

[27] Index Energy Ajax takes the position that the continued availability of supplies is necessary to ensure a successful SISP and ultimate emergence of a restructured business in some form. Mr. Haraldsson states that a number of the suppliers to Index Energy Ajax are vital to its ongoing operations and it may be necessary for them to be paid all or a portion of the obligations arising prior to the date of the Initial Oder to ensure their survival and their continued ability to provide supplies to Index Energy Ajax.

[28] Mr. Haraldsson states that the operation of the Biomass Facility, and the maximizing of value for the stakeholders would be materially prejudiced if the required suppliers ceased to carry on business and ceased to supply.

[29] Accordingly, Index Energy Ajax seeks authority to pay such amounts as they are required, including amounts owing prior to the date of the Initial Order, to ensure continued supply and successful restructuring.

[30] There is authority to authorize an applicant to pay certain amounts, including pre-filing amounts to suppliers where the applicant is not seeking a charge in respect of critical suppliers (see: *Cinram International Inc.*, 2012 ONSC 3767 (Ont. SCJ [Comm. List]), at para. 68 of Schedule "C", ("Cinram") and *Smurfit-Stone Container Canada Inc.*, 2009 CanLII 2493 (Ont. SCJ [Comm. List], at para. 21 ("Smufit-Stone")).

[31] In granting this authority, the courts have considered a number of factors, including:

(a) whether the goods and services are integral to the business of the applicants;

(b) the applicants dependency on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made with the consent of the monitor;

(d) the monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

(e) whether the applicant has sufficient inventory of the goods on hand to meet its needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if it were unable to make pre-filing payments to their critical suppliers.

[32] In these circumstances, I have been persuaded that it is both necessary and appropriate to provide the requested authorization to Index Energy Ajax.

[33] Pursuant to section 11.7 of the CCAA, the court is required to appoint a monitor. GTL has consented to its appointment as Monitor in this case and I am satisfied that it is appropriate to appoint GTL as Monitor.

[34] The proposed Initial Order provides for the following charges, in the following priority:

(a) First - the Administration Charge (to the maximum amount of $1 million);

(b) Second – the DIP Lender's Charge; and

(c) Third – the Director's Charge (to the maximum amount of $250,000).

[35] The Applicant proposes that the Administration Charge rank in priority to the DIP Lender's Charge. The Applicant proposes that the Charge attach to all of its Property, other than the Holdback Funds, to the extent they are valid claims to rank in priority to all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof.

[36] With respect to the DIP Facility, Index Energy Ajax is seeking approval of a $5 million DIP Facility. The DIP Facility would be secured by a DIP Lender's Charge, which would attach

to all of the Applicant's Property, other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof and subject only to the Administration Charge.

[37] As previously noted, the granting of the DIP Lender's Charge is condition precedent under the DIP Credit Agreement and I am satisfied that it is an integral part of the negotiating consideration of the DIP Facility.

[38] The court has jurisdiction to grant a priority DIP financing charge pursuant to section 11.2 of the CCAA.

[39] Subsection 11.2(4) of the CCAA sets out the factors to be considered by the court in determining whether to grant a priority DIP financing charge. The factors are not exhaustive and in *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (SCJ) ("Canwest"), Pepall J. (as she then was) stressed the importance of meeting the following three criteria:

(a) whether notice has been given to secured creditors likely to be affected by the security of the charge;

(b) whether the amount to be granted under the DIP financing is appropriate and required having regard to the debtor's cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the order was made (which it should not).

[40] In this case, I have concluded that the proposed DIP Lender's Charge satisfies the relevant criteria and should be granted. In arriving at this conclusion, I have considered the following:

(i) The secured creditors who would be primed by the proposed DIP Lender's Charge, namely the Syndicate, Index Residence and HMI were given notice of the proposed DIP Lender's Charge. Caterpillar, the secured creditor who will not be primed, was not given notice;

(ii) The maximum amount of the DIP Facility is appropriate based on the anticipated cash requirements, as reflected in the cash-flow projections prepared with the assistance of GTL. The amount advanced under the DIP Facility is limited to $1.6 million until the Comeback Hearing, when more comprehensive service will have occurred;

(iii) Management of Index Energy Ajax's business and affairs will have the benefit of additional oversight and consultation provided by the Monitor;

(iv) It is conceivable that the DIP Facility will enhance the value expected to be available for all stakeholders.

[41] The Proposed Initial Order, contemplates the indemnification of the Applicant's directors and officers, the creation of a Directors' Charge and a related stay of proceedings in respect of claims against the directors and officers. The statutory authority for the granting of this relief is found in sections 11.03 and 11.51 of the CCAA.

[42] I am satisfied that it is appropriate to extend coverage to the directors and officers and that it is necessary to grant the requested Charge as Index Energy Ajax does not have any directors' and officers' insurance. This relief is accordingly granted.

[43] The Pre-Filing Report contains certain appendices which the Applicant regards as sensitive commercial information relating to the process undertaken to obtain DIP financing and the optimization plan of the Applicant. The Applicant is of the view that if publically available, this information could have a material detrimental effect on the Applicant's restructuring. Having considered the guidance provided by the Supreme Court of Canada in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, (2002) 2 S.C.R. 522, I am satisfied that it is appropriate, in order to protect the integrity and fairness of the process, to grant an order sealing the confidential appendices.

Summary

[44] In the result, the Initial Order is granted in the form requested by Index Energy Ajax. The Comeback Hearing has been scheduled before me on Monday, September 11, 2017 at 8:30 a.m.

Regional Senior Justice G.B. Morawetz

Date: August 23, 2017

TAB 12

CITATION: JTI-Macdonald Corp., Re, 2019 ONSC 1625
COURT FILE NO.: CV-19-615862-00CL
DATE: 2019/03/12

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERIAL LIST

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

Applicant

BEFORE: Hainey J.

COUNSEL: *Robert I. Thornton*, *Leanne M. Williams*, *Rachel Bengino and Mitch Grossell*, for the Applicant

Scott A. Bomhof and Adam M. Slavens, for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

Pamela L.J.Huff, Linc A. Rogers and Christopher Burr, for the Proposed Monitor, Deloitte Restructuring Inc.

HEARD: March 8, 2019

ENDORSEMENT

Background

[1] On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

> I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

Facts

[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages totaling $13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with JTIM's operations (of which $500 million per year is paid directly by JTIM and another $800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed $500 billion.

[6] JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

(a) declaring that it is a company to which the CCAA applies;

(b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;

(c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these CCAA proceedings;

(d) granting an Administrative Charge, Directors' Charge and Tax Charge;

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");

(g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

(h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

Issues

[8] I must decide the following issues:

(a) Should the Court grant protection to JTIM under the CCAA?

(b) Is it appropriate to grant the requested stay of proceedings?

(c) Should the Proposed Monitor be appointed as Monitor in these proceedings?

(d) Should the Court grant the requested charges?

(e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

(f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

Analysis

Should the Court grant protection to JTIM under the CCAA?

[9] The CCAA applies to an insolvent company whose liabilities exceed $5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM's liabilities clearly exceed $5 million. It faces a judgment for $13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

Is it appropriate to grant the requested stay of proceedings?

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461, Newbould J stated as follows at para. 21:

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to

proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

Should the Proposed Monitor be appointed as the Monitor?

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

Should the requested charges be granted?

Administrative Charge

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of $3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

(a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;

(b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;

(c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of $4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of $127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

[24] In *Cinram International Inc., Re,* 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

[30] At para. 75 of its Factum, JTIM submits as follows:

> 75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion

[32] For the reasons set out above the Application is granted.

HAINEY J.

Date Released: March 12, 2019

TAB 13

CITATION: Re Just Energy Corp., 2021 ONSC 1793
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20210309

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

BEFORE: Koehnen J.

COUNSEL:

Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt and Justine Erickson, for the Applicants

Robert Thornton, Rebecca Kennedy and Rachel Bengino, Puya Fesharaki, for the Proposed Monitor

Scott Bomhof, for the Term Loan Lenders

Heather Meredith and James D. Gage, for the Credit Facility Lenders

Ryan Jacobs, Jane Dietrich and Michael Wunder, for the DIP Lender

Howard Gorman, for Shell

Robert Kennedy and Kenneth Kraft, for BP

Paul Bishop and Jim Robinson, Proposed Monitor

Brian Schartz, and Mary Kogut Brawley, US counsel for the Applicants

Chad Nichols and David Botter, U.S. Counsel to DIP Lender

Kelli Norfleet, U.S. Counsel to BP

Doug McIntosh, Advisor to the Credit Facility Lenders

John Higgins

HEARD: March 9, 2021

ENDORSEMENT

Overview

[1] The applicant, Just Energy Group Inc. ("Just Energy") seeks protection under *the Companies' Creditors Arrangement Act*, (the "*CCAA*")[1] by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.

[2] Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.

[1] R.C.C. 1985, c. c-36, as amended

[3] Unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. The amounts the regulator imposes must be paid within 2 days, failing which Just Energy could lose its licence and have its customers distributed among other distributors.

[4] Those price increases have imposed a serious, temporary liquidity crisis upon Just Energy and others in its position. That liquidity crisis prompts the *CCAA* application. It appears that the price increases may have been imposed by a computer program that misunderstood the data it received as indicating a shortage of power that could be corrected by price increases. Price increase could not lead to more power being generated because the energy shortage was caused by the freezing and consequent breakdown of generating and transmission equipment. Price increases could not remedy that.

[5] Just Energy is appealing the price increases and is seeking rebates from the Texas regulator. That process has not been completed.

[6] The issue before me today is whether to grant *CCAA* protection for an initial period of 10 days. It is complicated by the fact that Just Energy also seeks a stay of regulatory action in Canada and the United States and seeks what at first blush, is an unusually large amount of debtor in possession financing (the "DIP") of $125 million for the initial 10 day period.

[7] For the reasons set out below, I grant the stay and the DIP. It strikes me that the circumstances facing Just Energy are precisely the sort for which the *CCAA* is appropriate: a sudden, unexpected liquidity crisis, brought on by the action of others, which actions may still be rescinded. Without a stay, Just Energy faces almost certain bankruptcy with a loss of approximately 1,000 jobs and the possibility that a good part of the debt it owes will not be repaid. Those catastrophic consequences may be avoidable if Just Energy succeeds in its appeals of the Texas price increases and if all players are given adequate time to find solutions in a more orderly fashion than the weather crisis allowed them to.

[8] A number of critical parties were given notice of today's hearing. Just Energy had consulted widely with them before the hearing. These parties included secured creditors, banks, unsecured term lenders and essential suppliers. Some, including banks and some of the term lenders wish to "reserve their rights" to the comeback hearing. The DIP lender, and two important suppliers (Shell and BP) expressed concern about the reservation of rights. While those who are "reserving their rights" are of course free to do so, as a practical matter, they will be hard-pressed to undo rights that I am affording today in the initial order when the recipients of those rights will be relying on them to their detriment over the next 10 days and when the parties "reserving their rights" have not opposed the relief I am granting.

I Background to the Liquidity Crisis

[9] Just Energy Group Inc. ("Just Energy") is incorporated under the *Canada Business Corporations Act*. Its shares are publicly traded on the Toronto Stock Exchange and the New York Stock Exchange. Its registered office is in Toronto, Ontario. Just Energy is primarily a holding company that directly or indirectly owns the other companies in the Just Energy Group, including operating subsidiaries.

[10] At the risk of oversimplifying, it sells energy to customers under long-term fixed-price contracts and then purchases energy in the market to fulfil those contracts. It has over 950,000 customers, for the most part in Canada and the United States, approximately 979 full-time employees and debts estimated at $1.25 billion.

[11] In recent years Just Energy has suffered challenges that it has sought to remedy by way of a recapitalization through a plan of arrangement under section 192 of the *CBCA* which was approved by this court on September 2, 2020.

[12] Just Energy's largest market in the United States is in the state of Texas.

[13] Just Energy faces a sudden and unexpected liquidity crisis as a result of an extreme winter storm that hit Texas on February 12, 2021. The storm caused a surge in demand for electrical power. In response, natural gas prices jumped from US $3.00 to over US $150/mmBTU on February 12.

[14] The demand for power was exacerbated by the fact that much of the Texas electrical grid began to shut down because it was not equipped to deal with cold weather. As a result, critical components necessary for the generation and transmission of electricity froze thereby increasing demand even further on the limited resources that remained available. By the early morning hours of February 15, 2021, the stress on the electrical grid was so great that it came within minutes of a catastrophic failure.

[15] In response, the Electric Reliability Council of Texas ("ERCOT") which is responsible for managing the Texas electrical grid ordered transmission operators to implement deep cuts in the form of rotating outages to avoid a complete collapse of the grid.

[16] In an apparent effort to stimulate more power production, ERCOT's regulator, the Texas Public Utility Commission ("PUCT") increased the real-time settlement price of power from approximately US $1,200 per megawatt hour to US $9,000 per megawatt hour. It appears that this price was set by a computer program that was supposed to adjust prices to help match supply and demand. The increase in price to $9,000 per megawatt hour did not, however, increase supply because supply was blocked by frozen equipment. The price remained at $9,000 MWh for four days. The real time settlement price did not reach $9,000 even for a single 15 minute interval in all of 2020.

[17] In addition, Just Energy pays ERCOT a fee referred to as the Reliability Deployment Ancillary Service Imbalance Revenue Neutrality. It ranges between U.S. $0 to U.S.

$23,500 per day. Between June 2015 and February 16, 2021, Just Energy paid approximately $504,000 in respect of this charge. For February 17, 18 and 19, 2021, the aggregate charge was over U.S. $53 million.

[18] ERCOT and PUCT have issued additional invoices of US $55 billion to wholesale energy purchasers as a result of the storm. Just Energy's share of that is approximately $250 million.

[19] These additional fees pose a severe liquidity challenge for Just Energy because it is required to pay them within two days of being imposed. Although Just Energy has a means to dispute ERCOT's invoices, it must pay them before it can initiate the dispute resolution process. ERCOT has already barred two electricity sellers from the Texas power market for failing to make timely payments arising out of the storm.

[20] There is considerable controversy surrounding these fees. PUCT and ERCOT have been subject to severe criticism for their actions. The chair of PUCT and several of ERCOT's board members have resigned. The board of ERCOT terminated the employment of its CEO.

[21] Others in the Texas electrical market have also suffered. The largest power generation and transmission cooperative in Texas, Brazos Electric Power Cooperative, filed for Chapter 11 bankruptcy protection on March 1, 2021.

[22] Although Just Energy hedges for weather risks, its hedging and pricing models did not, however, take into account the extraordinary power demands caused by the storm and the unprecedented fees that ERCOT and PUCT imposed during and after the storm. By way of example, Just Energy's weather hedges contemplate a 50% increase in power usage above average consumption for the month of February. During the storm, usage was 200% above the previous week.

[23] As a result of the additional payments it has had to make to date because of the storm, Just Energy's liquidity facilities are down to approximately $2.9 million. By the end of day on March 9, 2021 it will have to pay ERCOT an additional US $96.24 million.

[24] On March 22, 2021 Just Energy expects to have to pay $250,000,000 to counterparties for purchases at inflated prices during the storm and its aftermath. Sudden and unexpected obligations of that magnitude have a cascading effect on Just Energy's financial stability.

[25] In response to the dramatically increased charges by ERCOT, companies that have issued surety bonds in Just Energy's favour have demanded $30 million in additional collateral of which $10 million remains outstanding. Just Energy was obligated to provide additional collateral because the bonding companies had threatened to cancel their surety bonds if Just Energy did not do so. The cancellation of the bonds may have resulted in the revocation of licenses necessary for the Just Energy group to carry on business in certain jurisdictions.

[26] On March 8, 2021, the Just Energy group received another invoice from ERCOT for US $30.92 million, of which U.S. $23.89 million will be due by March 10, 2021.

[27] While Just Energy had sufficient liquidity to pay the obligations that it expected, it does not have enough liquidity to pay the additional fees charged by ERCOT, PUCT and creditors who have demanded more stringent terms in response to the ERCOT and PUCT fees. If Just Energy does not pay the fees to ERCOT, the latter can simply transfer all of the Just Energy Group's customers in Texas to another service provider. That would be devastating to Just Energy's business.

[28] In addition to the foregoing financial stresses, at least three provincial regulators have expressed concern about Just Energy's viability. Two regulators made inquiries as a result of media reports arising from Just Energy's disclosure about its storm related financial challenges. The third inquiry was prompted by a formal petition by another market participant who seeks to prevent the Just Energy operating entity in Manitoba from selling to new customers.

II. General Principles

[29] At a high level, this is precisely the sort of situation that the *CCAA* is designed for.

[30] The policy underlying the *CCAA* is that the best commercial outcomes are achieved when stays of proceedings provide debtors with breathing space during which solvency is restored or a reorganization of liabilities is explored. The *CCAA* offers a flexible mechanism to make it more responsive to the commercial needs of complex reorganizations. The overriding object is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating the business.[2]

[31] This will be a complex restructuring. It involves balancing the interests of various types of debt including secured debt, unsecured term loans, working capital provided by service providers, trade debt to commodities providers, ongoing obligations to customers, just shy of 1000 employees all overlaid with varying regulatory requirements of several different Canadian provinces and American states.

[32] Today's application invites me to make a number of rulings on a variety of discretionary issues. The Supreme Court of Canada provided guidance about whether and how to exercise that discretionary authority in *Century Services Inc. v. Canada (Attorney General)*.[3] It described the guiding principles as follows:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind

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[2] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 14-15.
[3] Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 (CanLII), [2010] 3 SCR 379

> when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[33] Three principles emerge from this passage: good faith, diligence and appropriateness. There is no suggestion that Just Energy is not proceeding in good faith or with diligence. I will return to the issue of appropriateness in my review of the individual forms of relief.

[34] Today I am being asked for a 10 day stay of proceedings, including a stay of proceedings by regulatory authorities. Such relief is appropriate in the circumstances of this case.

[35] To have Just Energy fail would cause severe hardship to 979 employees and their families and cause losses of up to $1.25 billion for creditors all because

(i) Just Energy is being forced to pay unprecedented fees that ERCOT and PUCT imposed,

(ii) which fees Just Energy is challenging,

(iii) which fees are highly controversial,

(iv) and which fees were imposed in circumstances where ERCOT's and PUCT's overall management of the crisis has led to the departure of their CEOs and the resignation of several of their board members.

[36] In granting the relief I ask myself, as the Supreme Court of Canada did in *Century Services* whether granting a stay will usefully further efforts to achieve the remedial purpose of the *CCAA*. If I apply that principle to the circumstances before me today, the question becomes whether a 10 day stay will avoid the social and economic losses resulting from the liquidation of Just Energy and give participants a chance to achieve common ground while treating all stakeholders as advantageously and fairly as the circumstances permit.

[37] I am satisfied that it does. This is precisely the sort of situation that demands breathing space for all actors involved, including regulators, to begin to sort things out in a calmer, more rational, orderly fashion than has been possible to date.

[38] I underscore that in making these comments I am not intending to criticize the Texas regulators. Whether there is anything to be criticized in their conduct or whether their imposition of dramatically higher fees is appropriate will be for another day and another forum. I frame the issue in this way only to demonstrate that there is a genuine issue about the circumstances giving rise to Just Energy's liquidity crisis and a genuine issue about how best to sort out that crisis. Working out those issues in a manner that is as advantageous and fair to all stakeholders as the circumstances permit requires the calm deliberation and reflection that a *CCAA* stay will afford.

III. Specific Issues

[39] This application requires me to address the following specific issues:

A. Is Ontario the Centre of Main Interest?

B. Does Just Energy meet the insolvency requirements of the *CCAA*?

C. Should the DIP be approved?

D. Should the regulatory actions be stayed?

E. Should suppliers' charges and pre-filing payments be authorized?

F. Should set off rights be stayed?

G. Should administrative and directors and officers charges be granted?

H. Should noncorporate entities be captured by the stay?

I. Should third-quarter bonuses be paid?

J. Should a sealing order be granted?

A. Is Ontario the Centre of Main Interest?

[40] Just Energy has operations primarily in Canada and the United States. It has advised that it intends to commence a recognition proceeding under chapter 15 of the *US Bankruptcy Code* in Texas. This will ensure that actions taken in relation to US entities and US property or by US regulators are overseen by the US courts.

[41] The presence of significant business activities in the United States and the intention to commence a chapter 15 proceeding, engages the principle of the Centre of Main Interest or COMI.

[42] Section 45 (2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its centre of main interest.

[43] The registered office of Just Energy is located in Toronto.

[44] Other evidentiary factors can displace the presumption of the registered office being the COMI. These include the location of the debtor's headquarters or head office functions, location of the debtor's management and the location that significant creditors recognize as being the centre of the company's operations.[4]

[45] Here, the parent company, Just Energy Group Inc. is a CBCA corporation. Although it has offices in Mississauga and Houston, its registered office is in Toronto. Its common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange. Just Energy is primarily a holding company although it is also the primary debtor or guarantor on substantially all of the obligations of its subsidiaries, including licenses granted by regulators to members of the Just Energy group. Just Energy has a number of subsidiaries throughout Canada, the United States and India. It has 333 Employees in Canada, 381 in the United States and 265 in India.

[46] The following additional factors point to Canada as the COMI:

a. During the recent *CCAA* plan of arrangement which was recognized under Chapter 15 of the US Bankruptcy Code, Canada was recognized as the COMI for the Just Energy group.

b. The operations of the Just Energy group are directed in part from its head office in Toronto. In particular, decisions relating to the Just Energy's primary business (buying, selling and hedging energy) are primarily made in Canada.

c. All other members of the Just Energy group report to Just Energy.

d. Just Energy Corp. (a Canadian subsidiary) acts as a centralized entity providing operational and administrative functions for the Just Energy group as a whole. These functions are performed by Canadian Just Energy employees and include, among other things:

    i. most enterprise-wide IT services;

    ii. enterprise-wide support for finance functions, including working capital management, credit management (including credit checks for customers), payment processing, financial reconciliations, managing business expenses, insurance, and taxation;

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[4] *Re Massachusetts Elephant & Castle Group* 2011 ONSC 4201

iii. oversight for the legal, regulatory, and compliance functions across the entire Just Energy Group;

iv. certain enterprise-wide HR functions, such as designing in-house learning and development programs;

v. financial planning and analysis services, including customer enrollment, billing, customer service, and load forecasting;

vi. supply planning services, including creating demand models which predict the amount of energy that each entity needs to purchase from suppliers and determining the proper distributor and pipeline necessary to get the gas to the end-consumer; and

vii. internal audit services.

[47] In the foregoing circumstances I am satisfied Canada is the appropriate COMI.

B. Does Just Energy Meet the Insolvency Requirements?

[48] There is no doubt that Just Energy meets the threshold required by s. 3(1) of the *CCAA* that it be a company with liabilities in excess of $5,000,000.

[49] A company must be "insolvent" to obtain protection under the *CCAA*.[5] Although the *CCAA* does not define "insolvent," the definition of insolvent under the *Bankruptcy and Insolvency Act* ("*BIA*")[6] is usually referred to meet this criteria.[7] Section 2 of the BIA defines "insolvent person" as meaning (i) one who is unable to meet his obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course or

> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

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[5] *CCAA* s. 2(1)(a) definition of a debtor company.
[6] R. S. C. 1985,c. B- 3
[7] *Laurentian University of Sudbury* 2021 ONSC 659

[50] In addition, Ontario courts have also held that a financially troubled Corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring" should also be considered to be insolvent for purposes of seeking *CCAA* protection.[8]

[51] I am satisfied from the affidavit of Michael Carter sworn March 9, 2021 that the liabilities of Just Energy exceed the value of its assets, that it will imminently cease to be able to meet its obligations as they become due, and will run out of liquidity in very short order.

C. Should a Priming DIP be Approved?

[52] Section 11.2(1) of the *CCAA* authorizes the court to approve debtor-in-possession financing (the "DIP") that primes existing debt.

[53] However, section 11.2 (5) provides that, on an initial application:

> (5) …. no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[54] In other words, I have no jurisdiction to authorize a priming DIP except for that amount of debt and on those terms as are required to see the debtor through the next 10 days.

[55] The object is to put those measures in place that are necessary to avoid an immediate liquidation and thereby improve the ability of all players to participate in a more orderly resolution of the company's affairs. [9] The objective is to preserve the status quo the company for those 10 days but to go no further.[10]

[56] As Morawetz J. (as he then was) pointed out in para. 27 of *Lydian International Limited*,[11] a 10 day stay allows a number of other steps to occur including notification of parties who could not be consulted before the initial application as well as further consultations with key stakeholders.

[57] This is a material limitation on the court's jurisdiction on an initial application. It is a recent amendment introduced by Parliament which restricts the powers the court had previously. Before the amendment, initial applications were granted for a period of 30

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[8] *Laurentian University* 2021 ONSC 659 at para. 32; *Stelco Inc., Re*, 2004 CanLII 24933 at para. 26.
[9] *Re Lydian International Limited*, 2019 ONSC 7473 at para. 25.
[10] *Lydian* at para. 26
[11] 2019 ONSC 7473.

days. That length of time often required more substantial DIPS which had the potential to prejudice other creditors without giving those creditors a meaningful opportunity to make submissions to the court. The 10 day rule is designed to correct that issue. I take that as a direct message from Parliament that is meant to be enforced seriously.

[58] Even before the amendment limiting initial orders to 10 days, the policy of courts was to limit DIP financing in initial orders to what was required to meet the company's "urgent needs over the sorting out period."[12] As Farley J. Noted in Re Royal Oak Mines Inc.

> … the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.[13]

[59] Several *CCAA* courts have approved interim financing as part of the initial order since the 10 day rule came into effect.[14]

[60] The distinguishing factor in this case is that even the 10 day DIP that Just Energy requests is large. It seeks a DIP of $125,000,000 almost all of which will be drawn in the initial 10 day period. Interest accrues at 13% annually. There is a 1% commitment fee and 1% origination fee.

[61] Section 11.2(4) of the *CCAA* lists some of the factors the Court should consider when deciding whether to approve DIP financing. These include:

(a) The period during which the Applicants are expected to be subject to the *CCAA* proceeding;

(b) How the company's business and financial affairs are to be managed during the proceedings;

(c) Whether the company's management has the confidence of its major creditors;

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement;

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[12] *Re Royal Oak Mines Inc*. (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.
[13] *Re Royal Oak Mines Inc.* (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.
[14] *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at para. 21; *Miniso International Hong Kong Limited v. Migu Investments Inc.,* 2019 BCSC 1234, at para. 90; *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586, at para. 2.

(e) The nature and value of the company's property;

(f) Whether any creditor would be materially prejudiced as a result of the DIP charge; and

(g) The Monitor's pre-filing report (if any).

[62] In *Re AbitibiBowater Inc*,[15] Gascon J.S.C., as he then was, described the analysis as having the court satisfy itself that the benefits of DIP financing to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

[63] Although the amount of the DIP for the initial 10 day stay is high, it is nevertheless necessary to "keep the lights on." Just Energy is required to pay ERCOT US $96.24 million by the end of today (March 9, 2021) or risk losing its licences. It will have to pay a further $54 million by March 14, 2021. Texas represents approximately 47% of Just Energy's margin. Without its Texas licenses, Just Energy would likely collapse.

[64] Just Energy's secured creditors do not oppose the DIP. Although they wish to "reserve their rights" on the comeback hearing, I take that to mean that they may wish to make arguments about the existence or the terms of the DIP from the comeback hearing onward. As noted earlier, they would be hard-pressed to challenge any priority given to the DIP for advances during the 10 day period the absence of any opposition today.

[65] The DIP lender is a consortium of Just Energy's largest unsecured lenders. For unsecured lenders to offer a DIP of that size to cover a 10 day stay suggests that they believe their prospects for recovery on their unsecured loan are better with a significant 10 day DIP than without.

[66] The loan clearly enhances the prospects of a viable compromise or arrangement. Without the loan, Just Energy cannot continue. Regulators will quickly take steps to suspended licenses. Even with the stay of regulatory proceedings, it would be difficult to allow Just Energy to continue to operate if it has no working capital and no means of purchasing power to sell to customers.

[67] Just Energy's business is capital-intensive. It requires the expenditure of large amounts of money to buy power and the subsequent receipt of large amounts from the sale of power. That requires substantial liquidity.

[68] In addition, the regulated nature of Just Energy's business can lead to unforeseen liquidity demands that may need to be satisfied to ensure the Applicants' ability to operate as a going concern. The added charges by PUCT and ERCOT are prime examples of that. Those charges must be paid within as short a period as 2 business days. While those charges may

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[15] *Re AbitibiBowater Inc,* 2009 QCCS 6453 at para 16.

ultimately be reversed through the dispute resolution process and while additional collateral that has been required may ultimately be released, those steps will take time to work out. Even if the charges are not reversed, it may well be possible to absorb those price shocks if given the time. Financing Just Energy at least through an interim period allows for greater insight into those possibilities.

[69] I am also mindful of the need to keep essential suppliers and regulators comfortable. Even though I am staying provincial regulatory proceedings, I do that knowing that I am treading on public policy territory that Parliament and provincial legislatures have chosen to ascribe to specialized bodies with specialized knowledge. A larger 10 day DIP decreases the risk that I am harming the public policy objectives they have been mandated to pursue than would a smaller DIP.

[70] The Monitor points out that, after netting out cash receipts and expenditures, approximately $33,000,000 of the DIP will remain at the end of day 10. One could see that as grounds to pare back the DIP by an equivalent amount I do not think it would be appropriate to do. As noted, the Just Energy business is unpredictable. It requires large amount of liquidity and liquidity buffers to take into account unexpected charges from regulators. The regulators who impose those charges do so to protect other interests. As a result, they cannot simply be dismissed. It strikes me that providing a business of this sort with a buffer is appropriate. The Monitor recommends allowing the buffer to continue. None of the other stakeholders object.

[71] In the foregoing circumstances, I am satisfied that the DIP should be approved as requested.

D. Should Regulatory Actions be Stayed?

[72] Just Energy is subject to a wide variety of provincial and state regulators in Canada and the United States. By way of example, in Canada five different provincial regulators have issued licenses to 16 different Just Energy entities allowing them to sell gas and electricity. Power cannot be sold to new customers or delivered to existing customers without these licenses.

[73] Concerns about a licensee's solvency can lead provincial regulators to suspend or cancel licenses or impose more onerous terms on license holders. Such steps can include prohibitions on sales to new customers, termination of the ability to sell to existing customers and the forced transfer of customers to other suppliers. This would cause a licensee to instantly lose revenue streams and threaten their long-term viability. Regulators have the power to impose such terms in extremely short order.

[74] The filing of this *CCAA* application could lead to such adverse steps by regulators.

[75] As part of the proposed Initial Order, the Applicants seek to stay provincial and foreign regulators from, among other things, terminating the licenses granted to any Just Energy entity.

[76] With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to their contractual counterparties (primarily utilities) in the ordinary course. Just Energy is concerned that even if it continues making such payments, regulators may still try to terminate its licenses or impose other conditions.

[77] In my view it is appropriate to stay the conduct of provincial regulators in Canada.

[78] Section 11.1 of the *CCAA* provides:

> 11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[79] More plainly put, the *CCAA* automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

[80] In the circumstances of this case, it is, in my view, appropriate to stay the exercise of other regulatory powers against Just Energy at least for the interim 10 day period.

[81] As noted earlier, Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging.

[82] It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.

[83] One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to Just Energy and to continue to service Just Energy customers according to their existing contracts. The DIP financing and the charge in favour of essential suppliers will ensure that this remains the case.

[84] Section 11.1 (3) of the *CCAA* allows the court to stay action by regulators on notice to the regulator. Regulators have not been given notice of today's hearing. I am nevertheless inclined to grant the relief sought.

[85] Providing notice would have potentially allowed regulators to cancel or suspend Just Energy's licenses before the hearing occurred. If such suspensions or cancellations were ultimately set aside, they would still have caused substantial disruption to the marketplace as a whole and to Just Energy in particular. Just one of the many regulators to whom Just Energy is subject could cause material disruption.

[86] Cancellation or suspension of licenses would, for example, mean that upstream suppliers of gas and electricity to Just Energy would have their contracts terminated. Any new power supplier to whom Just Energy's customers would be transferred would have their own source of power supply. That would create more market disruption than would a stay.

[87] In this light, the granting a 10 day stay against regulatory conduct is consistent with the remedial purpose of the *CCAA* which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy's licenses would not avoid social and economic losses but amplify them by extending them beyond Just Energy to its upstream suppliers.

[88] I am also mindful of the admonition of the Supreme Court of Canada in *Century Services* to the effect that general language in the *CCAA* should not be read as being restricted by the availability of more specific orders. Although the *CCAA* contains specific provisions relating to regulatory stays which require notice to the regulator, the general power to make such orders as are appropriate should not, in my view, be restricted by the notice requirement when the relief sought relates only to a 10 day temporary stay, when providing notice could undermine the entire scheme of the *CCAA* and when there are adequate financing mechanisms in place to ensure that the regulators' policy objectives are not undermined during the 10 day period.

[89] A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the *CCAA*. As such, foreign regulators do not benefit from the same exemption from the stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian *CCAA* Court. Canadian courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the *CCAA* court's jurisdiction.[16]

[90] This result is consistent with the language of the model CCAA order which stays, among other things, all rights and remedies of any "governmental body or agency"

[91] Whether and to what extent the stay should apply to American regulators will be for an American court to determine. To give effect to that stay in the United States, Just Energy intends to commence chapter 15 proceedings immediately for such a determination.

E. Should Supplier Charges and Prefiling Payments be Authorized?

[92] Just Energy seeks a charge in favour of what it has referred to as commodity suppliers and ISO Service Providers. Commodity suppliers are those who provide gas and electricity to Just Energy. ISO Service Providers are often commodity suppliers as well but also provide additional services to Just Energy such as working capital and credit support. By way of example, as noted earlier, ERCOT sends invoices to service providers like Just Energy. Those invoices must be paid within two days. In certain cases, Just Energy uses and ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended

[16] *Nortel Networks Corp., Re*, 2010 ONSC 1304 at para. 41 and 42.

time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

[93] Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*.[17] Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.

[94] Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.

[95] No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.

[96] I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.

[97] This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate.[18]

[98] The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.

[99] Certain prefiling obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make prefiling payments

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[17] *CCAA* s. 34 (1), (7), (8) and (9).
[18] Re CanWest Publishing Inc., 2010 ONSC 222 at para. 50.

with that sort of critical character that are integral to its ability to operate. In the absence of any objection, that relief is granted.

F. Should Set off Rights to Be Stayed?

[100] As part of the stay, Just Energy seeks an order precluding financial institutions from exercising any "sweep" remedies under their arrangements with Just Energy.

[101] The concern is that the financial institutions would empty Just Energy's accounts by reason of a claim to a right of set off. Exercise of such rights would effectively undermine any reorganization by depriving Just Energy of working capital and thereby impairing its business.

[102] Although s. 21 of the *CCAA* preserves rights of set-off, the Court may defer the exercise of those rights. Section 21 does not exempt set-off rights from the stay. This differs from other provisions of the *CCAA*, which provide that certain rights are immune from the stay.[19] As Savage J.A. of the British Columbia Court of Appeal observed, the broad discretion accorded to the *CCAA* Court to make orders in furtherance of the objectives of the statute must, as a matter of logic, extend to set-off.[20]

[103] Allowing banks to exercise a self-help remedy of sweeping the accounts by claiming set-off would in effect give them a preferred position over other creditors and deprive Just Energy of working capital. That would be contrary to the remedial purpose of the *CCAA* because it would ultimately shut down Just Energy and allow the banks to advantage themselves to the detriment of others in the process.

[104] Just Energy had consulted widely with various stakeholder groups had before today's hearing. Those included the banks with sweep rights, at least some of home were represented at today's hearing and did not object.

[105] In the foregoing circumstances it is appropriate to at least temporarily stay the exercise of any rights of set-off by the banks.

G. Should Administrative and D & O Charges be Granted?

[106] The Applicants propose that an Administration Charge for the first ten days be set at $2.2 million.

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[19] *North American Tungsten Corp. (Re)*, 2015 BCSC 1382 at para. 28; leave to appeal to BCCA refused, 2015 BCCA 390 [*Tungsten* (Leave)], leave to appeal decision affirmed by Review Panel of the BCCA.
[20] *Tungsten* (Leave), above at para. 12-16**;** see also *Air Canada (Re)*, 2003 CarswellOnt 4016 at para. 25.

[107] The largest expenditures in the administration charge involve the retainer of counsel in Canada and the United States for Just Energy and the retainer of the Monitor and its counsel.

[108] In addition, the company seeks a financial advisor charge of $1.8 million to retain BMO Nesbitt Burns as a financial advisor to assist in exploring potential alternative transactions.

[109] The directors and officers charge sought is in the amount of $30 million.

[110] The Monitor estimates that director liabilities in the United States for sales taxes, wages, source deductions and accrued vacation come to approximately $13.1 million. Director and officer exposure in Canada may be as high as $5.8 million.

[111] While insurance with an aggregate limit of $38.5 million is in place, the complexity of the overall enterprise creates the risk that it might not provide sufficient coverage against the potential liability that the directors and officers could incur in relation to this *CCAA* proceeding.

[112] In determining whether to approve administration charges, the Court will consider: (a) the size and complexity of the businesses under *CCAA* protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor.[21]

[113] The Just Energy business is large and complex. The proposed beneficiaries are essential to the success of the *CCAA*. No *CCAA* proceeding can advance without a Monitor or counsel. The addition of a financial advisor would appear to be a prudent step given the complexity of the business. Monetizing or restructuring all or portions of the Just Energy business is substantially more complicated than a sale of hard assets. It would appear to make good sense to have a financial advisor involved. The Monitor agrees to the appointment of a financial advisor. I infer from the Monitor's agreement that Nesbitt Burns will bring to the table a skill set or attributes that the Monitor either does not have or cannot exercise given its role as Monitor.

H. Should Noncorporate Entities Be Captured by The Stay?

[114] Many of the gas and electricity licences pursuant to which the Just Energy group conducts business in Canada are granted to limited partnerships.

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[21] *Canwest* 2010, , at para 54. *Target,* , at paras 74 and 75; *Lydian,* , paras 43 to 54; *Laurentian,* at paras. 48 to 59.

[115] On its face, the *CCAA* applies to corporations, not partnerships.[22]

[116] Where, however, the operations of partnerships are integral and closely related to the operations of the *CCAA* debtor, it is well-established that the Court has jurisdiction to extend the protection of the stay to partnerships in order to ensure that the purposes of the *CCAA* can be achieved. Relief of that sort has been granted on several occasions.[23]

[117] Here, it would be illusory to grant a stay in favour of the Just Energy corporate entities but not extend its benefit to the partnership entities. That would defeat the entire purpose of the exercise. As a result, is appropriate to extend *CCAA* protection to the Just Energy partnership entities.

I. Should Third Quarter Bonuses be Paid?

[118] The applicant seeks approval from the initial order for payment of third Quarter bonuses for fiscal 2021 on April 2, 2021. The bonuses were approved by the Compensation Committee on February 9, 2021 after it was reported that the third quarter base EBITDA result was $55.785 million compared to a target of $42 million.

[119] The Compensation Committee approved and asked the Board to approve a third-quarter bonus pool in the amount of $3.23 million. The Board approved the bonus on February 10, 2021.

[120] I am disinclined to approve the bonus payment on an initial order. The relief on the initial order is limited to the amount to keep the company afloat for 10 days. The bonus does not fit into that category. Even on the applicant's view of events, the bonuses are not payable until April 2, 2021. That is well after the comeback date.

[121] In addition, the Monitor has not yet had an opportunity to review and comment on the employee bonus and intends to do so in a further report to the court.

[122] Whether bonuses should or should not be paid will depend on a variety of factors that are not in the evidence before me. By way of example, I would want a better understanding of whether the beneficiaries of the bonuses are also intended beneficiaries of the key employee retention plan that Just Energy will be asking for on the comeback date. In addition, I will want a better sense of who the recipients of the bonuses are. If they are relatively modest income earners for whom the bonus is a key source of income, such as, for example, retail sales people, I would probably be inclined to pay the bonuses without question. If, however, they are high income earners, the intended beneficiaries of the

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[22] *CCAA*, s. 2, definition of "Debtor company."
[23] See, for example, *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 21; *Re Target Canada Co.,* 2015 ONSC 303 at paras 42 and 43; *4519922 Canada Inc., Re,* 2015 ONSC 124 at para. 37.

KERP, or if they are executives who make decisions about risk allocation, what Just Energy should insure against, to what extent it should hedge against weather risks and so on, I would want a more granular understanding about why the bonuses should be paid.

J. Should a Sealing order be Granted?

[123] Just Energy requests a sealing order in relation to the BMO Engagement Letter and the summary of the KERP**,** both of which are attached as confidential exhibits to the affidavit of Michael Carter sworn March 9, 2021.

[124] I am satisfied that the applicants have met the test established by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*.[24] The materials contain commercially sensitive information and/or personal information (in the case of the KERP). The order is necessary to prevent a serious risk to an important personal or commercial interest and the benefits of a sealing order outweigh the rights of others to a fair determination of the issues. No one advanced any need to see the information that is proposed to be sealed nor can I see any need for anyone to access such information in order to assert their rights fully within this proceeding.

Disposition

[125] In view of the foregoing, I granted an initial order in the form requested with the exception of authorization for bonus payments which will be addressed at the comeback hearing.

[126] The order will in effect provide that:

(a) Ontario is the Centre of Main Interest for the *CCAA* proceeding.

(b) Just Energy meets the insolvency requirements of the *CCAA*.

(c) The proposed DIP financing is approved.

(d) Any regulatory actions should be stayed.

(e) Commodity suppliers and ISO Service Providers who sign qualified service agreements will benefit from a charge.

(f) Set off rights of banks which may allow them to sweep accounts will be stayed.

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[24] Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at para 53; see also Target above at paras 28-30; Laurentian University, above at paras. 60 to 64.

(g) The administrative, financial advisor and directors and officers charges are granted.

(h) Noncorporate entities will be captured by the stay.

(i) A sealing order will be granted.

[127] The comeback date for the continuation of any CCAA relief is set for 10 AM on Friday, March 19, 2021.

Koehnen J.

Date: March 9, 2021

TAB 14

CITATION: Re: LTL Management LLC, 2021 ONSC 8357
COURT FILE NO.: CV-21-00673856-00CL
DATE: 20211217

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT. R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF LTL MANAGEMENT LLC

BEFORE: L. A. Pattillo J.

COUNSEL: See attached Appendix 'A'

HEARD by Videoconference: December 17, 2021

ENDORSEMENT

[1] This is an application by LTL Management LLC (the "Debtor") in its capacity as the foreign representative of the Debtor ("Foreign Representative") for an Initial Recognition Order and a Supplementary Recognition Order in relation to Chapter 11 proceedings commenced on October 14, 2021, in the United States Bankruptcy Court for the Western District of North Carolina and subsequently transferred to the United States Bankruptcy Court for the District of New Jersey (the "Chapter 11 Case").

[2] The Debtor is a North Carolina company and an indirect subsidiary of Johnson & Johnson (J&J), a global provider of health care products. The J&J group of companies includes approximately 250 subsidiaries with operations in 60 countries, including Johnson & Johnson Inc. in Canada ("J&J Canada").

[3] The Debtor was created in 2021 as part of a corporate re-structuring, to hold certain of Johnson & Johnson Consumer Inc.'s assets and all of the claims in respect of JOHNSON"S® Baby Powder (the "Talc-Related Claims"). Its only assets in Canada are funds held by its legal counsel.

[4] In addition to the Talc-Related Claims in the US, some of the J&J companies, including J&J Canada as well as Valeant Pharmaceuticals International Inc., now Bausch Health Companies Inc., are named co-defendants (collectively the "Canadian Co-Defendants") in some or all of the talc lawsuits in Canada (collectively the "Canadian Actions").

[5] On November 15, 2021, the North Carolina Bankruptcy Court issued a preliminary injunction (the "US Preliminary Injunction"), in effect for 60 days (January 14, 2022) staying and

enjoining commencement or continuation of any action plaintiffs in the Talc-Related Actions including the plaintiffs in the Canadian Actions. A hearing is scheduled for January 11, 2022 before the New Jersey Bankruptcy Court to determine whether a more permanent injunction should be put in place.

[6] On February 15, 2022, the Official Committee of Talc Claimants is moving before the New Jersey Bankruptcy Court to have the entire Chapter 11 proceedings dismissed.

[7] On December 15, 2021, the Debtor sought and obtained authorization from the New Jersey Bankruptcy Court to act as the Foreign Representative on behalf of its estate in any judicial or other proceeding in Canada ("Foreign Representative Order").

[8] The Foreign Representative seeks an order an order recognizing the Chapter 11 Case as a "foreign main proceeding" pursuant to s. 46(1) of the *Companies Creditors Arrangement Act* (CCAA); granting a stay of proceedings in respect of claims against the Debtor; and dispensing with the requirement under s. 53(b) of the CCAA to publish notice of the Recognition Proceedings in one or more Canadian newspapers.

[9] In addition, the Foreign Representative seeks a Supplemental Order recognizing and enforcing the US Preliminary Injunction; appointment of Ernst & Young Inc. as Information Officer; confirming that matters related to this proceeding shall be brought before this court; and adopting the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters issued by the Judicial Insolvency Network ("JIN Guidelines").

[10] Section 47 of the CCAA provides that a Court shall make an order recognizing a foreign insolvency proceeding if the following two requirements are met:

1) The application for recognition of a foreign proceeding relates to a "foreign proceeding" within the meaning of the CCAA; and

2) The applicant is a "foreign representative" within the meaning of the CCAA in respect of that foreign proceeding.

[11] Section 45(1) of the CCAA defines a "foreign proceeding" as any judicial proceeding in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

[12] As the Chapter 11 Case is such a judicial proceeding, I am satisfied it is a "foreign proceeding" as defined by the CCAA.

[13] Further, the Debtor is a debtor company within the meaning of the CCAA. It is insolvent and the funds held by its counsel are sufficient to satisfy the requirement to "have assets in Canada".

[14] In addition, pursuant to the Representative Order, the Foreign Representative meets the definition of "foreign representative" in s. 45 of the CCAA.

[15] I am also satisfied from the evidence that the Chapter 11 Case is a "foreign main proceeding" as defined in s., 45(1) of the CCAA. The Debtor's "centre of its main interests" is the United States. Its head office is in New Jersey, all members of its board of directors and management reside in the United States and all corporate and administrative services are provided in the United States.

[16] Based on the evidence, therefore, I am satisfied that an order should issue recognizing the Chapter 11 Case as a foreign proceeding and a stay should issue in respect of claims against the Debtor pursuant to s. 48(1) of the CCAA.

[17] The Foreign Representative also seeks an order exempting it from the requirements of s. 53(b) of the CCAA requiring it to publish, without delay, after the order recognizing the foreign proceeding is made once a week for two consecutive weeks in one or more newspapers in Canada a notice containing certain prescribed information.

[18] The Foreign Representative submits that notice to plaintiffs' counsel in the Canadian Actions was provided for this application and there are no other creditors, suppliers, customers, employees, and other stakeholders in Canada. While that may be, I am not prepared to dispense with the required notice which I direct be provided in newspapers with the largest circulation in Vancouver, British Columbia, Toronto, Ontario and Montreal, Quebec.

[19] The Foreign Representative also seeks an order recognizing and giving effect to the US Preliminary Injunction pursuant to s. 49 of the CCAA which gives the court the discretion to make any order necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

[20] As noted, the US Preliminary Injunction puts in place a preliminary injunction in effect until January 14, 2022, staying and enjoining the commencement or continuation of any Talc-Related Action, including the Canadian Actions.

[21] The Canadian Counsel for the Official Committee of Talc Claimants as well as counsel for the plaintiffs in the Class actions in Ontario, Quebec and British Columbia are not opposed to the recognition and giving effect to the US Preliminary on the condition that the terms, attached as Schedule "A" to this Endorsement, are incorporated in the Endorsement. Those provisions seek to ensure the order sought does not prejudice the Talc Claimants pending motion to dismiss the entire Chapter 11 Case. The Foreign Representative is in agreement with the proposed terms.

[22] Counsel for the plaintiffs in the Alberta Class Action opposed the order on the grounds of prejudice but filed no evidence to support his submissions. In any event, I consider that the terms in Schedule "A" resolve any prejudice issues.

[23] In my view, the recognition and enforcement of the US Preliminary Injunction in Canada is consistent with the principles of comity is fair and reasonable in the circumstances. I therefore

consider recognition and giving effect to the US Preliminary Injunction to be appropriate in the circumstances. I also adopt and incorporate into this endorsement the terms set out in Schedule "A".

[24] I also agree that E&Y should be appointed as information Officer to assist the court and keep it appraised of the status of the foreign proceedings.

[25] This court shall remain seized of any matters related to these recognition proceedings.

[26] Finally, the JIN Guidelines are adopted for the purposes to the Debtor's recognition proceeding.

[27] Accordingly, the Supplemental Recognition Order requested shall also issue.

[28] Orders signed by me.

L.A. Pattillo J.

Date: December 17, 2021

Schedule "A"

Additional Language to Court's Endorsement

1. This Initial Supplemental Order is made without prejudice to the Motion to Dismiss, filed by the Committee of Talc Claimants (the "**Official Committee**") in the US Bankruptcy Court for the District of New Jersey (the "**New Jersey Bankruptcy Court**") in the Debtor's bankruptcy proceedings commenced under Chapter 11 of Title 11 of the United States Code and scheduled to be heard on February 15, 2022 (the "**Motion to Dismiss**"). The granting of this Initial Supplemental Order should not be construed as a determination by this Court of any fact, matter or issue before the New Jersey Bankruptcy Court in the Motion to Dismiss.

2. In recognizing the US Preliminary Injunction pursuant to this Order, this Court has not made any findings or conclusions about (i) whether there are claims against any of the Protected Parties (as defined in the US Preliminary Injunction), other than the Debtor and Old JJCI (as defined in the US Preliminary Injunction), which should, or should not, be stayed or enjoined, and (ii) the right of any party to challenge on any basis the bankruptcy filing of the Debtor or the corporate transactions that created the Debtor.

3. In connection with the representations made by the Debtor at the hearing today about the interpretation of paragraph 7 of this Initial Supplemental Order, the Official Committee, or other interested party, may apply to this court for advice and direction on any matter in connection with this order, including whether any future order of the New Jersey Bankruptcy Court or the New Jersey District Court (in each case, the "**US Court**") modifying or extending the US Preliminary Injunction requires a further recognition order of this court to have force and effect in Canada. For greater certainty, any future request of the Debtor to seek recognition by this Court of an order of the US Court modifying or extending the US Preliminary Injunction shall be reviewed by this Court on a *de novo* basis.

TAB 15

CITATION: Lydian International Limited (Re), 2019 ONSC 7473
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2019-12-24

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Applicants

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Elizabeth Pillon, Sanja Sopic,* and *Nicholas Avis*, for the Applicants

Pamela Huff, for Resource Capital Fund VI L.P.

Alan Merskey, for OSISKO Bermuda Limited

D.J. Miller, for Alvarez & Marsal Canada Inc. proposed Monitor

David Bish, for ORION Capital Management

Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

HEARD and DETERMINED: December 23, 2019

REASONS RELEASED: December 24, 2019

ENDORSEMENT

Introduction

[1] Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

[2] The Applicants are part of a gold exploration and development business in south central Armenia (the "Amulsar Project"). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC ("Lydian Armenia"), a wholly-owned subsidiary of the Applicants.

[3] As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the "Sellers Affidavit"), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

[4] Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group's obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

[5] The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

[6] The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

[7] The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia ("GOA"). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

The Applicants

[8] Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the *Business Corporations Act*, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as "Dawson Creek Capital Corp.", and subsequently became Lydian International on December 12, 2007.

[9] Lydian International's registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

[10] Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

[11] Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

[12] Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

[13] Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

[14] The Applicants are part of a corporate group (the "Lydian Group") with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group's subsidiaries are Lydian U.S. Corporation ("Lydian US"), Lydian International Holdings Limited ("Lydian Holdings"), Lydian Resources Armenia Limited ("Lydian Resources") and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the "Non-Applicant" parties.

[15] The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

[16] The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

[17] Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group's secured indebtedness. The Lydian Group's loan agreements are governed primarily by the laws of Ontario.

[18] Finally, the Lydian Group's forbearance and restructuring efforts have been directed out of Toronto.

[19] The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

[20] The Applicants contend that time is of the essence given the Applicants' minimal cash position and negative cash flow.

Issues

[21] The issues for consideration are whether:

(a) the Applicants meet the criteria for protection under the CCAA;

(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

Law and Analysis

[22] Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

[23] Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

[24] Section 11.001 provides:

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[25] The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

[26] In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that

period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

[27] Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representativecounsel is required; and

(l) consultation and negotiation with key suppliers.

[28] This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

[29] Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

[30] The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

[31] In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.

[32] It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

[33] For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

[34] I am satisfied that Lydian Canada meets the CCAA definition of "company" and is eligible for CCAA protection.

[35] I have also considered whether the foreign incorporated companies are "companies" pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an "incorporated company" either "having assets or doing business in Canada".

[36] In *Cinram International Inc., (Re)*, 2012 ONSC 3767, 91 C.B.R. (5th) 46, I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of "company" under the CCAA.

[37] In this case, both Lydian International and Lydian UK meet the definition of "company" because both corporations have assets in and do business in Canada.

[38] In my view the Applicants are each "debtor companies" under the CCAA. The Applicants are insolvent and have liabilities in excess of $5 million. I am satisfied that the Applicants are eligible for CCAA protection.

[39] The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corporation (Re)*, 2012 ONSC 2063, at paras. 5, 18, and 31; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.); and *Target Canada Co. (Re)*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 49-50.

[40] I am also satisfied that is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

[41] With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada's registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK

have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

[42] I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

Administration Charge

[43] The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

[44] Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

[45] The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

[46] In *Canwest Publishing Inc.*, (Re), 2010 ONSC 222, 63 C.B.R.(5th) 115, Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

(a) the size and complexity of business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[47] It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

[48] I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

D & O Charge

[49] The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

[50] The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

[51] The D & O Insurance is set to expire on December 31, 2019.

[52] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

[53] In *Jaguar Mining Inc., (Re)*, 2014 ONSC 494, 12 C.B.R. (6th) 290, I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

> (a) whether notice has been given to the secured creditors likely to be affected by the charge;
>
> (b) whether the amount is appropriate;
>
> (c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and
>
> (d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

[54] Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

Extension of the Stay of Proceedings

[55] The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

[56] The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company (Re)*, 2019 ONSC 6966 and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV–19–00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

[57] I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

[58] However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

[59] As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

[60] It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

[61] However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

Disposition

[62] The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

[63] If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

Chief Justice Geoffrey B. Morawetz

Date: December 24, 2019

TAB 16

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mountain Equipment Co-Operative (Re),* 2020 BCSC 1586

Date: 20201028
Docket: S209201
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C. C-36, as amended

- AND -

In the Matter of MOUNTAIN EQUIPMENT CO-OPERATIVE and 1314625 ONTARIO LIMITED

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners, Mountain Equipment Co-Operative and 1314625 Ontario Limited:	H. Gorman, Q.C. S. Boucher
Counsel for the Monitor, Alvarez & Marsal Canada Inc.:	H.L. Williams J. Enns
Counsel for Royal Bank of Canada, as Administrative Agent and Collateral Agent under Credit Agreement:	J. Sandrelli V. Cross
Counsel for Kingswood Capital Management LP, Kingswood Capital Opportunities Fund I, LP, Kingswood Capital Opportunities Fund I-A, LP and 1264686 B.C. Ltd.:	D. Chochla K. Jackson

Counsel for Plateau Village Properties Inc.:	C. Ramsay K. Mak P. Cho N. Carlson
Counsel for Midtown Plaza Inc.:	K. McEwan, Q.C. C. Smith R. Atkins W. Stransky
Counsel for RioCan Real Estate Investment Trust Company:	L. Galessiere
Counsel for Crestpoint Real Estate Investments Ltd., as authorized asset manager of 0965311 B.C. Ltd.:	B. Wiffen
Counsel for Les Galeries de la Capitale Holdings Inc. and manager Oxford Properties Group:	F. Viau
Counsel for First Capital Holdings (Alta) Corp. and First Capital (Ontario) Corp.:	K. Hashmi
Counsel for Concert Properties Limited:	H. Meredith
Counsel for Kevin Harding, spokesperson for steering committee for “SaveMEC” campaign:	C. Gusikowski P. Reardon
Counsel for BC Co-op Association and Co-operatives and Mutuals Canada:	E. Bridgewater
Place and Date of Hearing:	Vancouver, B.C. September 28-30 and October 1, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. October 2, 2020
Place and Date of Written Reasons:	Vancouver, B.C. October 28, 2020

INTRODUCTION

[1] On September 14, 2020, the petitioners, Mountain Equipment Co-operative and its wholly owned subsidiary, 1314625 Ontario Limited ("131"), sought and obtained relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). I will refer to the petitioners jointly by the first petitioner's well-known acronym, "MEC".

[2] On September 14, 2020, I granted an Initial Order in favour of MEC that included a stay until September 24, 2020, although that was later extended to the time of this comeback hearing. I also approved an interim financing facility to a total of $100 million (the "Interim Financing"), although draws were then limited to $15 million, consistent with the test set out in s. 11.2(5) of the *CCAA*. I appointed Alvarez & Marsal Canada Inc. ("A&M") as the Monitor. Finally, I approved charges usually granted in these proceedings: an Administration Charge ($1 million), a D&O Charge ($4.5 million) and an Interim Financing Charge ($102 million).

[3] At this comeback hearing, MEC seeks an Amended and Restated Initial Order (ARIO) to continue the relief granted in the Initial Order, with approval to access the entire amount under the Interim Financing. In addition, MEC seeks approval of a Key Employee Retention Program (KERP) and a related charge. Finally, MEC seeks an order approving a sale of substantially all of its assets, pursuant to a Sale Approval and Vesting Order (SAVO).

[4] Since September 14, 2020, formidable opposition has formed in response to MEC's application for approval to sell its assets under the SAVO.

[5] Many parties now seek an adjournment of MEC's application for the SAVO, objecting to any sale at this time for various reasons. Those parties include two landlords, Plateau Village Properties Inc. ("Plateau") and Midtown Plaza Inc. ("Midtown"), and Kevin Harding, spokesperson for the steering committee for the "SaveMEC" campaign. Mr. Harding also seeks an order appointing his law firm as representative counsel for certain members of MEC, with an accompanying charge for their expenses.

[6] MEC contends that it is critical that the sale occur without delay. MEC opposes all of the relief sought by the objecting parties.

[7] On October 1, 2020, I concluded the comeback hearing. On October 2, 2020, I granted the orders sought by MEC, including the SAVO, and dismissed the relief sought by the objecting parties, with reasons to follow. These are my reasons.

BACKGROUND

[8] MEC is a co-operative association incorporated under the *Cooperative Association Act,* S.B.C. 1999, c. 28 (the "*Co-op Act*").

[9] In 1971, almost 50 years ago, MEC was formed from the passion of many Vancouverites who loved to spend time outdoors and appreciated having the right equipment and gear to do so. Since then, MEC has become an iconic retailer of outdoor activity equipment and clothing, serving the needs of the public who share that passion for the outdoors. MEC sells many well-known brands and also has its own very successful private label for many products.

[10] MEC's ownership is unique. MEC currently has approximately 5.8 million members, each having paid a $5 lifetime membership fee for the right to shop at MEC and participate in its governance as a co-operative member. Counsel advises that the breadth of MEC's membership in Canada is significant, representing some 22% of the Canadian working population.

[11] 131 owns a parcel of land that comprises the parking lot at the site of MEC's Ottawa Store. 131's assets are not significant in the overall circumstances. Similarly, MEC also owns an interest in a limited partnership which has nominal value.

[12] MEC has a significant history of community involvement. Since 1987, MEC has contributed approximately $44 million to organizations focused on conservation and outdoor recreation.

[13] MEC's head office is located at leased premises in Vancouver, BC. MEC operates online and also, operates 22 retail locations across Canada in BC, Alberta,

Manitoba, Ontario, Quebec and Nova Scotia. MEC leases its eastern distribution centre in Brampton, Ontario and most (16) of its store operations. MEC owns six store locations and its western distribution centre in Surrey, BC.

[14] As of September 7, 2020, MEC has approximately 1,516 employees: 1,143 active employees, 176 laid off employees, 118 employees on the Canada Emergency Wage Subsidy program and 79 employees on unpaid leave.

[15] MEC's board of directors (the "Board") has eight directors. As of September 10, 2020, MEC's senior management consists of seven officers. Philippe Arrata is MEC's Chief Executive Officer who has provided most of the sworn evidence on behalf of MEC in this proceeding.

[16] In 2015, MEC embarked on a significant growth plan. That plan resulted in six new stores and two new relocated stores in Vancouver and Toronto, a new head office, a new eastern distribution centre as well as significant investments in online retail resources. MEC has commitments for two additional new stores (Calgary North West and Saskatoon) that have not yet opened, which is a point of controversy on this application. Over the ensuing years, this growth plan was successful from a market expansion and sales perspective, but it also resulted in a higher fixed cost structure and increased debt levels.

[17] In August 2017, MEC, as borrower, and 131, as guarantor, entered into a credit agreement with the Royal Bank of Canada (RBC), as agent, and RBC, Canadian Imperial Bank of Commerce and the Toronto-Dominion Bank (collectively, the Lenders") for a senior secured asset-based revolving credit facility (the "Credit Facility").

[18] The Credit Facility initially allowed MEC to borrow up to a maximum of $130 million with a maturity date of August 3, 2020. Through various amendments implemented over 2020, that borrowing maximum was reduced to its present level, $100 million. The Lenders hold first priority security over all of MEC's assets.

[19] The results of MEC's growth strategy led to challenging fiscal circumstances. Since 2015, MEC's operating losses were approximately $80 million, offset to some extent by real estate transactions that realized capital gains. Even so, the net loss for the year ending February 23, 2020 was approximately $22.7 million, largely arising from increased costs, certain under-performing stores and liquidity strains.

[20] MEC's assets consist primarily of: owned and leased real property; equipment; inventory; accounts receivable; and intangible assets including certain trademarks on trade names, membership lists and goodwill. As of February 2020, MEC's recorded a book value of approximately $389 million in current and long-term assets.

[21] MEC's liabilities are comprised primarily of: amounts owed to suppliers; governments and employees; amounts owed to the Lenders under the Credit Facility; gift cards and provision for sales returns; lease obligations; and deferred lease liabilities. MEC's current and long-term liabilities, as reported in its February 2020 Financial Statements, totalled approximately $229.6 million.

EVENTS LEADING TO *CCAA* PROCEEDINGS

[22] In early 2020, MEC took steps to address its financial difficulties. MEC's Board brought in a new management team to focus on cost reduction and a return to profitability.

[23] On February 10, 2020, MEC engaged Alvarez and Marsal Canada Securities ULC ("A&M Securities") as a financial advisor to assist in a review of strategic alternatives, provide assistance to obtain and negotiate new financing. A&M Securities is an entity affiliated with A&M, the Monitor.

[24] In March 2020, the Board struck a special committee, comprised of three Board members (the "Special Committee"). The mandate of the Special Committee was to make recommendations to MEC's Board on strategic alternatives, including (a) transactions with a view to sell all or substantially all or any portion of MEC's assets (or a merger, amalgamation or some other strategic alliance involving MEC);

(b) pursuit of organic growth; (c) recapitalization, restructuring or reorganization; or (d) any other strategic alternative in the best interests of MEC.

[25] The efforts of the new management team, the Special Committee and A&M Securities led eventually to the implementation of a Sales and Investment Solicitation Process (SISP) that resulted in the proposed sale that MEC now seeks to have court approved.

[26] Under its initial mandate, A&M Securities made efforts toward identifying a satisfactory refinancing, including: establishing a data room; contacting a number of lenders; and, entering into a number of Non-Disclosure Agreements (NDAs) with lenders. However, MEC and A&M Securities' efforts to find a solution to MEC's very difficult financial difficulties were hampered by the COVID-19 pandemic that hit Canada in March 2020. As one might expect, the pandemic had a significant and negative impact on the retail sector generally and on MEC's already struggling operations. All of MECs stores closed as of March 18, 2020.

[27] As the Monitor notes, MEC's insolvency arose from an unsustainable 25 "bricks and mortar" store operating model, the "disastrous" impact from the pandemic on sales and cash flow and inadequate financing capacity to sustain ongoing losses and provide working capital.

[28] Although A&M Securities received a number of term sheets for a refinancing, none of them provided for a complete refinancing of MEC's debt that solved its serious financial challenges.

[29] On June 1, 2020, as permitted by the BC Registrar for all cooperative associations, MEC announced that its Annual General Meeting (AGM) (originally scheduled for June 23, 2020) would be postponed by up to six months due to the impact of COVID-19 and to allow MEC to focus on the urgent financial challenges impacting its business. The AGM is scheduled for December 10, 2020.

[30] On June 10, 2020, with the support of the Lenders, MEC expanded A&M Securities' engagement to explore whether there were other potential viable

refinancing options and to initiate a SISP. The Special Committee established guiding commercial principles in the design of the SISP to: provide maximum value to the broad stakeholder group; preserve the maximum number of store locations and jobs; and ensure that, if possible, the buyer preserved MEC's purpose, values and outreach programs.

[31] Again, A&M Securities followed the usual path in this effort, including establishing a data room, identifying potential interested purchasers, distributing an initial "teaser" letter to 158 parties and entering into confidentiality agreements with 39 interested parties. A&M Securities requested non-binding Letters of Intent (LOIs).

[32] By July 15, 2020, A&M Securities had received nine LOIs and reviewed and conducted due diligence on each of them. On July 16, 2020, A&M Securities presented the LOIs to the Special Committee for its consideration and later provided its recommendations with respect to having bidders move into "Phase 2" of the SISP process. On July 24, 2020, MEC's Board considered the Special Committee's recommendation with respect to the LOIs.

[33] On August 6, 2020, Phase 2 of the SISP process began with five recommended bidders who had submitted LOIs. The Phase 2 process established a final bid deadline of August 28, 2020. Four bids were received by that deadline, as were later reviewed by A&M Securities and the Special Committee.

[34] On September 4, 2020, MEC's Board, with the input of their advisors, identified Kingswood Capital Management LP ("Kingswood"), a US based private investment firm, as the successful bidder and negotiations began to finalize a purchase and sale agreement.

[35] As with many retailers, by mid-September 2020, the impact of the pandemic, which only exacerbated MEC's pre-existing difficulties, remained very relevant. In the months leading to September 2020, MEC realized a considerable increase in online sales, however, it still experienced a substantial reduction in sales compared to last year for that period ($98 million). By mid-September 2020, MEC has re-

opened many of its stores, however, five remain closed because of the pandemic. The stores that had re-opened were operating at a reduced sales volume.

[36] As of September 4, 2020, and primarily due to the pandemic, MEC owed approximately $4.6 million in rent deferrals or arrears in respect of its leases, and MEC had agreed to rent deferral plans with some of its landlords to repay these arrears by late 2021. Further, MEC had significant past due amounts owed to merchandise suppliers and other vendors.

[37] As of September 11, 2020, MEC owed approximately $74 million under the Credit Facility, leaving approximately $19 million available under the borrowing base. At that time, MEC was unable to repay the Credit Facility by the maturity date of September 30, 2020.

[38] All of these factors, together with MEC's ongoing lease, contractual and trade creditor obligations, led MEC to decide that it had no alternative but to seek a formal restructuring of its affairs in court proceedings and seek to conclude the Kingswood sale in those proceedings.

[39] On September 11, 2020, MEC and Kingswood entered into an asset purchase and sale agreement (the "Sale Agreement"). Under the Sale Agreement, Kingswood, through a Canadian-based subsidiary, agreed to purchase substantially all of MEC's assets. The Sale Agreement is conditional on MEC obtaining court approval through this *CCAA* proceeding.

[40] By the date of the filing (September 14, 2020), RBC had formally notified MEC of defaults under the Credit Facility. Despite MEC's challenging financial affairs, the Lenders confirmed their support for MEC in this *CCAA* proceeding and they continue to support MEC in terms of the relief presently sought.

GERM OF THE PLAN

[41] When I granted the Initial Order, MEC had outlined a restructuring plan. During the course of these proceedings, MEC indicated its intention to:

a) Immediately stabilize its cash flows and operations;

b) Develop a strategy that would address its liquidity issues and generate sufficient revenue to sustain operations through the *CCAA* process, including by streamlining operations;

c) Apply for the SAVO to approve the transaction with Kingswood, which would allow repayment to the Lenders and also allow MEC's business to emerge as a better capitalized operation with as little disruption as practicable; and

d) Establish and complete a claims process toward formulating a plan of compromise and arrangement for presentation to its creditors. The intention is to fund a plan from the proceeds arising from the Kingswood sale.

FUTHER *CCAA* RELIEF SOUGHT

[42] As stated above, MEC seeks to continue the relief sought in the Initial Order, with additional relief relating to: full approval of draws under the Interim Financing, approval of a KERP, extending the stay to November 3, 2020 and granting the SAVO.

[43] MEC's application is supported by the Monitor's First Report dated September 24, 2020 (the "First Report").

Interim Financing

[44] At the commencement of these proceedings, MEC indicated that it required the Interim Financing to support its operations and restructuring efforts. It was and is very apparent that MEC needs the Interim Financing for those purposes.

[45] MEC secured a financing commitment from the Lenders pursuant to a restructuring support agreement dated September 11, 2020 (the "Restructuring Support Agreement"). It was a condition of the Lenders' support under the Restructuring Support Agreement that they obtain a court-ordered security interest,

lien and charge over all of MEC's assets. One of the key financial terms of the Interim Financing was that it was subject to a calculation of borrowing availability, with a maximum principal amount of $100 million under the combined Credit Facility and the Interim Financing, funded in progressive advances on an as-needed basis.

[46] Pursuant to the Initial Order, I approved the Interim Financing, with draws limited to $15 million to the time of the comeback hearing, and approved the Interim Financing Charge. During the course of this hearing, I increased the draw limit to $23 million.

[47] Firstly, I was satisfied that the Interim Financing Charge complied with s. 11.2(1) of the *CCAA* in that it did not secure any of MEC's pre-filing obligations to the Lenders, as prohibited by that provision.

[48] The Interim Financing agreements are amendments to the Credit Facility, pursuant to which the Lenders will provide further liquidity to MEC despite any defaults under the Credit Facility. It is an express term of the Interim Financing that advances made under the Interim Financing cannot be used to satisfy pre-filing obligations under the Credit Facility or any other pre-filing debt. In addition, the Interim Financing Charge does not secure any of MEC's pre-filing obligations and includes a "carve out" to ensure that other secured creditors (such as those with Purchase Money Security Interests (PMSIs)) are not primed by the Charge.

[49] While the terms of the Interim Financing provide that post-filing receipts collected by MEC will be applied to pay down MEC's pre-filing debt under the Credit Facility, I agreed with MEC that mechanisms in interim financing agreements by which pre-filing obligations are paid from proceeds derived by post-filing operations do not contravene s. 11.2(1) of the *CCAA*.

[50] In *Performance Sports Group Ltd. (Re*), 2016 ONSC 6800, Justice Newbould concluded that a similarly crafted interim lending facility did not offend s. 11.2(1):

> [22] Section 11.2(1) of the *CCAA* provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP

> facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[51] Similar conclusions were reached in *Comark Inc. (Re)*, 2015 ONSC 2010 at paras. 17-29. Regional Senior Justice Morawetz (as he then was) accepted that the proposed interim financing facility would not result in a greater level of secured debt than was contemplated under the pre-filing facilities and would not prime PMSIs. Effectively, the court found that, since the proposed charge would increase while the pre-filing facility would be paid down by the use of the debtor's cash generated from its business, the proposed charge only secured post-filing advances made under the interim facility in compliance with s. 11.2(1) of the *CCAA*.

[52] In May 2020, Justice Romaine reached the same conclusion in a recent *CCAA* proceeding involving ENTREC Corporation (Alta QB, Calgary Judicial Centre; File No. 2001 06423).

[53] Secondly, I was satisfied that a consideration of the factors set out in s. 11.2(4) of the *CCAA* supported that the Interim Financing (then with limited draws) was appropriate. Those factors are:

> a) the period during which the company is expected to be subject to proceedings under this Act;
>
> b) how the company's business and financial affairs are to be managed during the proceedings;
>
> c) whether the company's management has the confidence of its major creditors;
>
> d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> e) the nature and value of the company's property;

f) whether any creditor would be materially prejudiced as a result of the security or charge; and

g) the monitor's report referred to in paragraph 23(1)(b), if any.

[54] The governing factors at the time of the granting of the Initial Order were:

a) MEC anticipated that it would seek an extension of the stay of proceedings at the comeback hearing for a further amount of time to allow it to complete the sale process without having to seek a further extension;

b) MEC's business and financial affairs were to be managed by MEC's Board and key management employees in consultation with the (then) proposed Monitor;

c) MEC had the confidence of the Lenders, its senior secured creditors and the proposed Interim Lenders. The Lenders supported the approval of the Interim Financing and the granting of the Interim Financing Charge;

d) Without the Interim Financing, MEC was not able to fund its operations and continue its restructuring efforts, and the value of its assets would have diminished as a result. In fact, the Credit Facility matured on September 30, 2020;

e) I was satisfied that no secured creditor would be materially prejudiced by the Interim Financing Charge, as the charge includes the carve out and preserved the pre-filing status *quo*; and

f) The proposed Monitor supported the approval of the Interim Financing and granting of the Interim Financing Charge.

[55] Finally, in light of s. 11.2(5) of the *CCAA*, I was satisfied that the terms of the financing were limited to those reasonably necessary for MEC's continued operations in the ordinary course of business during the period to the comeback

hearing. In addition, I was satisfied that the terms of the Interim Financing were consistent with ordinary commercial transactions of this nature, as also confirmed by the proposed Monitor. See *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234 at paras 79-90.

[56] The Interim Financing provides for a maturity date that is the earlier of a) November 30, 2020; b) the completion of a "Transaction" in relation to all or substantially all of MEC's assets, and sufficient to repay the Lenders in full, and is approved by the Court; and c) at the Lenders' option, the occurrence of any Event of Default (other than the commencement of the *CCAA* proceedings).

[57] MEC now seeks approval of the Interim Financing generally, which would allow it to request subsequent advances up to the $100 million limit until the next extension period on November 3, 2020.

[58] No creditor or stakeholder objects to the Interim Financing sought by MEC.

[59] The Cash Flow Forecast prepared in mid-September 2020 readily supported that MEC is in urgent need of interim funding during the restructuring. In the First Report, the Monitor noted that the Lenders had already advanced $9.4 million under the Interim Facility and confirmed that the full amount of the funding under the Interim Financing was required. No other source of financing was available; the Credit Facility expired on September 30, 2020. No creditor will be prejudiced, let alone materially prejudiced, by this funding.

[60] MEC's financial circumstances continue to be very challenging, even in the short term. Ongoing weekly losses of approximately $1.1-1.6 million are being incurred. In October 2020 alone, MEC projects losses of over $15 million.

[61] Having considered all of the factors in s. 11.2(4) of the *CCAA*, I have no hesitation concluding that approval of the full amount of the Interim Financing is appropriate. Without the Interim Financing, MEC is unable to continue its operations, a result that would have disastrous consequences to the larger stakeholder group, whether or not the SAVO is granted.

The KERP

[62] MEC seeks approval of a KERP. To secure obligations under the proposed KERP, MEC also seeks the granting of a third-priority court-ordered charge on MEC's assets in priority to all other charges, other than the Administration Charge and the D&O Charge (the "KERP Charge").

[63] MEC asserts that the KERP is necessary to allow it to maintain its business operations, complete the restructuring, including completing the sale to Kingswood and preserve asset value. MEC says that, without a KERP, its efforts would be seriously compromised.

[64] In July and September 2020, MEC's Board approved retention agreements (the "Retention Agreements") for eight key senior managers for total compensation of $778,000. The Retention Agreements were filed under seal in these proceedings, as summarized in Appendix E to the First Report.

[65] The Retention Agreements include provision for payment of compensation upon the earlier of certain dates, including a sale of all or substantially all of MEC's assets (or the merger, amalgamation or consolidation of MEC with another entity), the employee's termination without cause or, by certain dates in December 2020, depending on the employee. It is not certain that all executives offered Retention Agreements will remain with MEC through to conclusion of the restructuring.

[66] The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the *CCAA* to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 27.

[67] Courts across Canada have approved key employee incentive plans in numerous *CCAA* proceedings: for example, *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J.) and *U.S. Steel Canada*. In *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, this Court stated:

> [58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for

example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and U.S. Steel Canada at paras. 28-33.

[68] In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

> a) Is this employee important to the restructuring process?
>
> b) Does the employee have specialized knowledge that cannot be easily replaced?
>
> c) Will the employee consider other employment options if the KERP is not approved?
>
> d) Was the KERP developed through a consultative process involving the Monitor and other professionals?; and
>
> e) Does the Monitor support the KERP and a charge?

[69] In *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as discussed in the relevant case law: a) arm's length safeguards, b) necessity, and c) reasonableness of design.

[70] The Monitor has reviewed the terms of the Retention Agreements and has concluded that the terms of the proposed KERP Charge are reasonable in the circumstances and customary in similar *CCAA* proceedings. The Monitor has also confirmed that the KERP will provide stability for MEC's business operations, particularly in the critical time period when MEC is attempting to stabilize its operations and, if the SAVO is granted, working to finalize the final negotiations with Kingswood, leading to a closing of that transaction. The Lenders have confirmed they are agreeable to the KERP and the KERP Charge as well.

[71] I accept the Monitor's assessment and conclusions with respect to the KERP. I conclude that the KERP is reasonable and necessary in the circumstances and I exercise my discretion to approve the KERP and grant the KERP Charge.

The Stay

[72] Clearly, an extension of the stay is necessary to allow MEC's restructuring efforts to continue, whether the SAVO is granted or not.

[73] No stakeholder objects to MEC's application for the ARIO, including an extension of the stay of proceedings. The Monitor confirms its view that MEC is acting in good faith and with due diligence.

[74] I am satisfied that an extension of the stay is appropriate until November 3, 2020, in accordance with s. 11.02 of the *CCAA*.

SISP/SAVO

[75] The main focus on this application has been in relation to MEC's application for the granting of the SAVO in favour of Kingswood, pursuant to s. 36(1) of the *CCAA*. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[76] Mr. Harding, Plateau and Midtown all seek an adjournment of MEC's application for the SAVO for "at least" two weeks. Plateau and Midtown also seek orders that would allow them to obtain further document discovery and cross-examine MEC's deponents, including Mr. Arrata and Mr. Robert Wallis. The parties seeking an adjournment are supported by the BC Co-op Association and Cooperatives and Mutuals Canada (the "Co-op Associations").

[77] I address the arguments advanced against MEC's application for the SAVO below. There is considerable overlap and interrelationship between the various categories below, so they should be read as a whole.

i) The Kingswood Sale Agreement

[78] MEC describes the key aims and elements of the Sale Agreement as:

a) Kingswood will continue to operate the business as a going concern under a similar name to MEC and will maintain the goodwill of the retail business;

b) the purchased assets comprise almost all of the assets currently used by MEC for the business;

c) Kingswood will retain at least 75% of the active employees of MEC;

d) Kingswood will acquire, or assume, the leases for at least 17 of MEC's retail locations. For those leases not being acquired or assumed, MEC has already or will provide disclaimers to the landlords;

e) Kingswood will assume liabilities including with respect to warranties, existing gift cards (estimated $13.2 million) and employees who accept offers of employment (estimated $2 million);

f) In order to protect goodwill with existing suppliers and contractors, Kingswood will assume liability for payments to certain inventory and other key vendors and suppliers (estimated $25 million) and will seek assignment of certain contracts; and

g) The Sale Agreement is not conditional on any financing or third-party approvals.

[79] The Court has had the benefit of reviewing certain confidential documents arising from the SISP, including the unredacted Sale Agreement and Confidential Appendix C to the First Report that were both filed under seal in this proceeding.

[80] Significantly, the Sale Agreement provides for a sale price (base amount of $120 million, subject to certain adjustments) that will repay the Lenders in full, maximize the ongoing number of operating stores and retention of a majority number of employees, and leave MEC with additional funds to support a *CCAA* plan that would see a distribution to unsecured creditors. The Board and Special Committee consider that the Kingswood offer was consistent with the guiding principles of the SISP as had been earlier established.

[81] I have reviewed the details of the other three bids received and reviewed by the Special Committee and MEC's Board prior to acceptance of Kingswood's offer. I agree that the Kingswood offer is clearly the most advantageous one, both in terms of price, continuity of business operations, retention of stores, retention of employees and assumed liabilities.

ii) The Monitor Issue

[82] As part of Plateau's objection to the SAVO, it seeks an order replacing A&M as Monitor with Ernst & Young Inc., pursuant to s. 11.7(3) of the *CCAA*.

[83] Plateau argues that, since A&M Securities, A&M's affiliate, was involved in the SISP, A&M is not appropriate to continue as Monitor in these proceedings. Plateau argues that, in the circumstances, the Monitor cannot opine on the adequacy of the SISP as required under s. 36(3)(b) of the *CCAA*.

[84] I will note at the outset that no one on this application, let alone Plateau, questions the professionalism of A&M. Rather, Plateau asserts that there is a perception of bias in respect of the Monitor's views of the SISP, which cannot stand in the face of the clear requirement that a monitor be independent and impartial while exercising its fiduciary obligations to all stakeholders. Plateau cites various authorities including: *United Used Auto & Truck Parts Ltd. (Re)*, [1999] B.C.J. No. 2754 at para. 20 (S.C.); *Winalta Inc. (Re)*, 2011 ABQB 399; *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760; and *Walter Energy Canada Holdings Inc. (Re)*, 2017 BCSC 53 at paras. 24-25.

[85] I have reviewed the terms of A&M Securities' engagements with MEC. As counsel note, s. 11.7(2) of the *CCAA* provides restrictions on who may be a monitor. A&M clearly did not fall within that restricted list and was able to accept an appointment as Monitor when the Initial Order was granted.

[86] Under the February 10, 2020 engagement, A&M Securities was providing consulting services with respect to identifying potential financing. A&M Securities' compensation was a fixed fee with hourly rates after a certain time period. I am unable to discern any conflict between that engagement and A&M's current one as Monitor that causes any concern.

[87] Similarly, the A&M Securities' June 10, 2020 engagement with MEC also provided for consulting services in respect of the SISP, also on an hourly basis.

[88] It is apparent that, by June 2020, MEC foresaw that it may be necessary to file under the *CCAA* in order to resolve the significant financial difficulties it faced. In the second engagement with A&M Securities, MEC specifically addressed that potential step. Paragraph 4 of the June 10, 2020 engagement agreement provided that MEC could choose to put A&M forward as the Monitor. MEC and A&M expressly agreed that no conflict would arise between the second engagement and that potential appointment. As the Monitor notes, this type of pre-planning for a potential monitor appointment is typically undertaken since it allows a debtor to seamless and efficiently transition into the restructuring process while taking advantage of efforts begun even prior to that time.

[89] Plateau places great emphasis on the reasoning and result found in *Nelson Education Ltd. (Re)*, 2015 ONSC 3580. In that case, Newbould J. considered an application to replace the monitor where the monitor was recommending a sale. The monitor had been a financial advisor to the company for two years prior to its appointment, and it had conducted a SISP prior to the *CCAA* filing that involved dealings with the second lien holders. Almost immediately after the filing, the debtor sought approval to sell the assets to the first lien holders, leaving nothing for the second lien holders.

[90] Justice Newbould found that replacement of the monitor was necessary since firstly, the monitor was in no position to comment independently on the validity of the SISP and, secondly, there was an appearance of a lack of impartiality:

> [30] The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the *CCAA* proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:
>
> > The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;
>
> [31] Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this *CCAA* proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

[91] A&M Securities' involvement with MEC was clearly in the context of finding a solution to MEC's financial difficulties in the short term. It is common ground that MEC could most likely have obtained *CCAA* protection in early 2020 and then conducted the search for financing and/or the SISP within those proceedings. MEC states that it had good reason not to obtain court protection at that time, as I will discuss later in these reasons. This is a distinguishing factor from *Nelson Education*, where the monitor had a much more extensive and historical relationship with the debtor and other stakeholders.

[92] Further, I can discern no conflict, whether real or apparent, arising from A&M Securities' previous involvement. Importantly, there is no success fee or compensation built into the second engagement that could possibly stand as an incentive for the Monitor to recommend the Kingswood sale (or any other sale) for

approval. Unlike *Nelson Education*, this is not a case where only one secured creditor is apparently benefitting from the proposed transaction. The Sale Agreement will benefit all the stakeholders generally, although in different degrees given their different priorities. Although clearly hindsight, I note that Newbould J. later approved the proposed transaction (*Nelson Education Ltd. (Re)*, 2015 ONSC 5557), about two-and-a-half months later, at no doubt considerable cost to the estate.

[93] In addition, as I will discuss in more detail below, there would be considerable cost and delay in replacing the Monitor at this time. The monitor engagement for MEC is not a simple affair and any new firm would take some time to fully assume that role and prepare a report – likely not even within "at least" two weeks, the delay sought by the objecting parties. Time is not on MEC's side in these urgent circumstances. See *Can-Pacific Farms* at para. 26.

[94] Finally, the s. 36(3)(b) factor – the monitor's approval of the process – is only one of the relevant factors that the court is to consider, among others. None of the s. 36(3) factors have primacy in respect of the court's consideration as to whether a sale should be approved. The previous involvement of the Monitor with MEC is a consideration, however, not a controlling one.

[95] Every sale approval application will be fact intensive toward ensuring that any proposed sale is fair and reasonable, after an appropriate sales process.

[96] I have no concerns arising from A&M's affiliate acting as MEC's financial advisor in the months leading to this proceeding. I decline to exercise my discretion to replace A&M as Monitor in these proceedings.

iii) The SISP

[97] Plateau and Midtown question the appropriateness of MEC filing for *CCAA* protection after having conducted the SISP. They say that the *CCAA* is being improperly used to approve a "quick slip sale" arising from a process that took place outside of the Court's supervision, without the Court's approval and without consultation with MEC's stakeholders.

[98] MEC began taking steps toward finding a solution to its financial difficulties many months before the *CCAA* filing. MEC asserts that, while the Court did not pre-approve the SISP, the SISP was extensive and properly canvassed the market to identify the best and highest value for its business.

[99] As the parties note, this is a classic “pre-packaged” proceeding, or “pre-pack”, as it is colloquially known. As in many previous *CCAA* proceedings, most of MEC’s restructuring efforts have taken place before the filing of the court proceeding, and the most obvious restructuring path presented now by MEC is the sale to Kingswood arising from the SISP.

[100] There is nothing inherently flawed in a “pre-pack” approach. There are often good reasons why a debtor company may choose such a course of action, more often than not arising from the real or perceived threats or disruptions to a business by pursuing options within a proceeding. The Monitor confirms its own experience and views in that respect, particularly relating to retail operations where it is critical to preserve going concern value.

[101] Here, MEC contends it ran the SISP prior to any *CCAA* proceedings to maintain stability in its business and to promote a going concern solution, all as supported by the Lenders, who were increasingly concerned about their credit exposure in light of the financial crisis faced by MEC. I readily accept that running a retail operation within *CCAA* proceedings, particularly with the uncertainty in the marketplace, both from a general economic view and by reason of the pandemic, would give rise to risk and potential disruption to future operations. I also accept that MEC had good reason to seek to avoid further risks and disruptions to its operations, given its already fragile economic state.

[102] Similar circumstances were considered in *Sanjel Corp. (Re)*, 2016 ABQB 257, where a SISP conducted outside of the proceedings was challenged. In that case, the SISP was conducted by a financial advisor for about four months prior to the *CCAA* filing. At that time, the accounting firm was identified as the potential monitor

and, when later appointed as monitor, recommended court approval of the sale that arose through the SISP.

[103] Justice Romaine discussed the concerns that arise where a court is presented with a "pre-pack" where court approval of a sale that arose from a pre-filing SISP is sought. Her comments are apt here and I would adopt them:

> [70] A pre-filing SISP is not of itself abusive of the *CCAA*. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the *CCAA* and must be considered against the *Soundair* principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.
>
> [71] Without prior court approval of the process, conducting a SISP outside of the *CCAA* means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

[104] Justice Romaine's reasoning was followed by this Court in *Feronia Inc. (Re)*, 2020 BCSC 1372 where Justice Milman accepted the proposal trustee's recommendation in support of a sale achieved through a pre-filing sales process (paras. 50-57). The proposal trustee's affiliate firm had been engaged to assist with that sales process.

[105] The court's comments in *Sanjel* about a pre-filing SISP being more open to attack is certainly evident here.

[106] I will now address the actual financing and SISP process in more detail. Evidence of MEC and A&M Securities' efforts is found in Mr. Arrata's evidence as was supplemented by Mr. Wallis' evidence. Mr. Wallis is a MEC director and Chair of the Special Committee. The Monitor also addresses the financing and SISP process in its First Report.

[107] A&M Securities was engaged to secure new financing in February 2020, principally to replace the Credit Facility which was approaching maturity. Unfortunately, the pandemic wrought havoc with those efforts and MEC quickly moved to form a committee to address those issues. That informal committee was formally constituted as the Special Committee on March 27, 2020 with its mandate to pursue a broad range of strategic alternatives.

[108] Although the financing options being pursued were not successful, it was not for want of effort. The steps that A&M Securities designed to seek the financing, as listed above, can only be described as typical. Government aid programs were considered. Approximately 66 lenders were contacted; the listing of those lenders indicates a broad range of lending institutions, including two co-operatives. A May 12, 2020 term sheet provided to RBC by one lender was considerably below what the Lenders were owed and required first priority security that was not a realistic request from the Lenders' point of view given the financing amount.

[109] Mr. Harding, supported by the Co-op Associations, asserts that MEC could have asked its members for the necessary funding. Mr. Wallis addresses that matter, stating that the Special Committee considered but then rejected that option as impractical. In my view, his reasons are amply supportable and are reasonable in the circumstances: a public plea for such funding was unlikely to garner the very substantial amounts needed to repay the Lenders, even if it could be achieved, which was questionable, while creating negative impacts on MEC's business in the meantime.

[110] Finally, the Special Committee considered that the Lenders were very unlikely to grant an extension of the Credit Facility, without significant improvement in MEC's financial performance that, in the teeth of the pandemic, appeared also very unlikely.

[111] Having exhausted refinancing efforts, the Special Committee and the Board had no choice but to then consider a sale. After interviewing other financial advisors, the Special Committee decided that it was in MEC's best interests to continue with A&M Securities under the SISP, given its expertise and experience with MEC.

[112] Again, the Special Committee and the Board expressly considered whether the SISP should be conducted prior to any *CCAA* proceeding. They decided to do so in order to avoid the likelihood of a distressed-assets sale situation and to preserve MEC's relationships with vendors, customers and service providers with respect to its ongoing business operations in order to preserve going concern value.

[113] As with the refinancing efforts, A&M Securities' design of the SISP included the usual features (as listed above), in that it was structured and implemented in the same or similar manner as is typically done in a SISP in the course of *CCAA* proceedings. No party appearing on this application contended that the SISP steps were inappropriate or lacking, resting on the contention only that they weren't consulted in its implementation.

[114] The list of persons contacted was extensive, including Canadian and US private investment firms, retail conglomerates and even REI, a US co-operative that was in fact the inspiration for MEC in the first place. As stated above, Kingswood's bid was clearly the best bid of the four that MEC received.

[115] The Lenders' support, including under the Interim Financing, is premised on MEC seeking approval of the Kingswood transaction. I note this as a factor, although the Lenders' support is not surprising since the proposed transaction will generate sufficient funds to pay the Lenders in full. The Monitor's liquidation analysis would also suggest that the Lenders would be paid in full under that scenario.

[116] Another relevant factor in the Court's consideration of the adequacy of the SISP is the level of oversight throughout the process.

[117] The Special Committee and MEC's Board, both comprised of well-qualified and experienced business professionals, oversaw A&M Securities' efforts. Both Mr. Arrata and Mr. Wallis fully endorse those efforts as having produced the very best alternative for MEC in the circumstances. I have no reason to question their commercial and business judgment: *AbitibiBowater Inc.*, 2010 QCCS 1742 at para. 71. Mr. Wallis confirms that, despite rumours in the community, no MEC Board

members are receiving any incentives or compensation in respect of the Kingswood transaction. Further, the process was reviewed by the Lenders and their experienced professional advisors, again without objection.

[118] In my view, it is not surprising in the circumstances that the Monitor supports the SISP efforts as being sufficiently robust in the circumstances, particularly with its usual features and oversight. The Monitor states that the SISP is likely consistent with what the Monitor would have recommended in a court-supervised process, with which I agree. It is also worth emphasizing that the entire SISP process from June-September 2020 ran over a 100 day period, hardly a rushed process (i.e., even well beyond the "aggressive timelines" approved in *Sanjel* at paras. 75-77).

[119] I conclude that the SISP was a competitive process, was conducted in a fair and reasonable manner and adequately canvassed the market for options available to MEC.

iv) Harding / Co-Operative Association Issues

[120] Mr. Harding is the spokesperson for the steering committee of the "SaveMEC" campaign, involving who he describes as a "highly motivated, well organized group of Members, seeking to preserve MEC's status as a cooperative association with an operating business". They have been assisted through various online efforts, suggesting support from some 140,000 individuals, and contributions from 2,500 persons toward a legal fund of over $100,000. As I noted on October 2, 2020, the passion of the "SaveMEC" group members is evident, as it was with MEC's original founders.

[121] Like Plateau and Midtown, Mr. Harding seeks an adjournment of "at least" two weeks. He suggests that his group would like to explore opportunities to address MEC's liquidity crisis in the short term. He says that the very short notice given to MEC members in respect of these proceedings is challenging in terms of identifying alternatives; MEC gave notice to its members of this proceeding on September 14, 2020. Mr. Harding is supported in his submissions by the Co-op Associations' counsel.

[122] Mr. Harding indicates some “definitive” sources of funding have already been identified by his group. Unfortunately, none even come close to resolving the very significant financial issues faced by MEC, particularly given the amounts owing to the ever increasingly concerned Lenders who are owed in excess of $80 million in a very uncertain retail environment, MEC’s ongoing losses and MEC’s required working capital.

[123] Mr. Harding’s most significant complaint against the SAVO is that the members will “lose” their substantial financial interest in MEC through their membership. He points to MEC’s February 2020 balance sheet that indicated the book value of members’ shares was in excess of $192 million.

[124] In my view, this argument has little merit. Each MEC member only stands to “lose” their $5 investment, although I appreciate that collectively, the investment is significant. Based on the evidence presented on this application, the best bid which was received from Kingswood is not sufficient to repay the unsecured creditors in full, let alone provide for any return to MEC’s members. Accordingly, assuming the SISP has produced the best financial result in the circumstances, which I accept, MEC members have no real financial interest at this time.

[125] I appreciate that Mr. Harding only seeks a short period of time to confirm whether other more advantageous options are available. This argument also is not persuasive. I consider that the chances of SaveMEC coming up with an option within two weeks to stave off the Lenders, secure funding the cover the losses and necessary working capital and pay the unpaid creditors to be an extremely outside one, however sincere that intention and those efforts may be.

[126] I completely disagree with Mr. Harding that there is no prejudice to MEC, Kingswood or the Lenders if the sale is delayed until his group has a chance to investigate other options. As Mr. Wallis states in his Affidavit, set out below, there is significant prejudice to MEC and its stakeholders in terms of delay, cost, ongoing losses and deal risk. Mr. Harding’s group is risking nothing at this point; to the contrary, other broad stakeholder interests are very much “in the money” under the

Kingswood transaction in the sense of it providing recovery to creditors and preserving jobs and business relationships.

[127] I note that the broad stakeholder group who Mr. Harding seeks to represent includes many MEC members who stand to preserve their jobs and redeem the significant value in gift certificates, all by reason of the Kingswood sale.

[128] Mr. Harding also asserts that these *CCAA* proceedings must be conducted in a manner that respects the fundamental freedom of MEC members, namely the "freedom of association", that arises under s. 2(d) of the *Charter of Rights and Freedoms* (the "*Charter*").

[129] It is unusual to face *Charter* arguments in commercial matters or even *CCAA* proceedings. That said, I accept Mr. Harding's submissions that co-operatives provide important social and community benefits and that the right to join a co-operative and exercise collective rights through that means goes to the root of the protection offered by s. 2(d): *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 54, citing *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313. MEC is clearly an example of the exercise of that right, leading to it being, as Mr. Harding asserts, the largest co-operative in Canada.

[130] I cannot see, however, that MEC seeking court protection in its present circumstances offends any rights arising under s. 2(d) of the *Charter*. As MEC's counsel states, the *Charter* does not protect against an organization incurring losses and finding itself in insolvent circumstances, even if the organization is a co-operative.

[131] No one, including Mr. Harding, disputes that MEC qualified to seek court protection under the *CCAA*. Rather, he asserts that MEC members must be able to exercise their democratic right to shape the future of MEC, and particularly, he argues that any decision to sell MEC's assets cannot be made without the approval of MEC's members. The *Co-op Act*, s. 71(2), and MEC's Rules of Co-operation

(8.11) both provide that a sale of the whole or substantially the whole of the co-operative's undertaking requires a special resolution of the members.

[132] Mr. Harding's complaint that the members have been unfairly and oppressively denied participation in this important decision to sell MEC's assets is understandable; however, it but does not change the fact that such participation is a very unwieldly step, particularly with the pandemic, it would delay matters where urgency is required, and its relevance is questionable in any event given that the best evidence is that the members have no financial interest in MEC.

[133] I disagree with counsel for the Co-op Associations that the application of the *CCAA* in the face of the *Co-op Act* is an "unsettled area of law". Cooperatives are able to avail themselves of the *CCAA* if they are insolvent and they otherwise meet the statutory requirements.

[134] The *CCAA* expressly recognizes that participation by corporate shareholders (the equivalent of MEC's members here) toward approving a sale of the assets, is not a requirement before the court can exercise its jurisdiction under s. 36(1):

> 36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> [Emphasis added.]

[135] Mr. Harding suggests that MEC's affairs are being conducted in an oppressive manner by this attempt to sell MEC's assets without member approval. I see no utility in embarking upon an analysis of the oppression remedy under s. 156 of the *Co-op Act* in the present circumstances, although I would hasten to add that no such court ordered relief has been formally sought. Mr. Harding refers to the comments of this Court in *Radford v. MacMillan*, 2017 BCSC 1168, aff'd 2018 BCCA 335, concerning the assessment of reasonable expectations in the oppression analysis. In this Court in *Radford*, Justice Masuhara stated that expectations must be "realistic": para. 119.

[136] I hardly think the MEC members could conceivably realistically consider that they, and they alone, would dictate whether a sale would occur, when the co-operative is insolvent and their memberships presently have no value.

[137] It is unfortunate that Mr. Harding appears to be singularly focussed on preserving MEC as a co-operative entity to continue its business. Given the co-operative principle of "concern for community" embraced by MEC as part of its DNA, the "SaveMEC" campaign group and the Co-op Associations might have given some consideration to the fact that the Kingswood sale will benefit many persons in the community. The sale will ensure ongoing employment to most MEC employees, the maintenance of business relationships which support other jobs and repayment of at least some portion of the debt that MEC owes to its many unsecured creditors.

[138] Mr. Harding's application for an adjournment is dismissed.

v) Disclaimed Lease Issues

[139] Plateau and Midtown both seek an adjournment of MEC's application for the SAVO for "at least" two weeks. In addition, both seek an order that MEC produce substantial further documents in relation to the refinancing and sale efforts. Finally, they seek to cross-examine Mr. Arrata and Mr. Wallis on their affidavits.

[140] Plateau and Midtown's objection to the SAVO derives from the extremely unfortunate circumstances that arise from MEC's disclaimer of their store leases (in Calgary North West and Saskatoon respectively).

[141] In its petition materials, MEC has earlier identified that the Sale Agreement with Kingswood did not include an assignment of three leases, including those for the Saskatoon and Calgary North West stores. The Saint-Denis store had already been permanently closed; the Saskatoon and Calgary North West stores had not yet opened.

[142] In Mr. Arrata's Affidavit #1 sworn September 13, 2020, he stated that MEC expected to be disclaiming those leases, with the approval of the Monitor, in accordance with s. 32(1) of the *CCAA*.

[143] As forecast, after the Initial Order was granted, on September 15, 2020, MEC issued notices of intention to disclaim or resiliate all three leases. The Monitor approved these disclaimers in order to "reduce costs and downsize redundant operations". On September 22, 2020, MEC provided its reason for the disclaimer of Plateau's lease, citing its liquidity crisis, that Kingswood had decided not to acquire the leases and that the disclaimer was necessary to enhance the prospects of a viable compromise. The same considerations apply to Midtown's lease.

[144] In the First Report, the Monitor stated that it is also of the view that the disclaimers will enhance the prospect of a viable arrangement and further the restructuring of MEC, as contemplated by the Kingswood Sale Agreement.

[145] On September 30, 2020, Plateau filed a Notice of Application to prohibit the disclaimer of its lease by the deadline, and I assume that Midtown has done likewise.

[146] I agree that both Plateau and Midtown face challenging economic circumstances themselves by reason of the disclaimers. Both landlords have expended substantial sums of money in outfitting their developments for MEC, who was to have been the anchor tenant. Both landlords will suffer significant losses in respect of lost rental revenue and any indirect benefits that might have been derived by MEC's presence in their developments.

[147] Based on my conclusions that the SISP was fair and reasonable in the circumstances, I reject these landlords' request for any delay in approving the Kingswood sale and decline to exercise my discretion to do so. I see no reasonable prospect that these landlords will be in any better position after a delay of two weeks. I also see no need for further document production beyond the

documentation that MEC provided on September 26, 2020 in response to Plateau and Midtown's applications.

[148] Kingswood's decision not to take up these leases was made independently of MEC and, on the face of things, aligns with what Kingswood envisions by way of its future operations. The Sale Agreement provides for a *contraction* of MEC's operating stores to at least 17 locations; in that event, it hardly makes business sense that, at the same time, Kingswood would also agree to incur the considerable expense of fixturing, outfitting, staffing and supplying one or two *new* locations. None of the other three bidders expressed any interest in these locations either.

[149] As with Mr. Harding's argument, I also reject Plateau and Midtown's assertions that little or no prejudice arises from any adjournment. To the contrary, the unsecured creditor pool will be enhanced by an expeditious sale which obviates any further weekly losses being incurred by MEC. These landlords stand to gain by that enhanced pool of money in respect of their claims that will no doubt be filed, claims that will not increase whether or not the SAVO is granted. Plateau and Midtown have solely focussed on process issues, to the exclusion of other interests at play. They have failed to justify their position.

[150] Plateau and Midtown's arguments appear to conflate MEC's application for the SAVO with their right to contest the disclaimers. They suggest that, effectively, no sale can be considered by the court until the disclaimer issue is determined. No authority was cited in support for this proposition. Indeed, the sale application might just as easily have been considered and the Kingswood sale approved even before any disclaimer notice was issued.

[151] As MEC's counsel notes, MEC decided to be forthright from the outset in signalling this very bad news to these landlords.

[152] I appreciate that granting the SAVO to allow a sale of substantially all of MEC's assets to Kingswood can be interpreted as effectively determining the disclaimer issue. It will be difficult for the landlords to argue that the disclaimer

should be prohibited so as to allow MEC, which no longer operates its business, to take up the lease.

[153] However, this ignores the simple reality of the situation. MEC cannot force a buyer to take up these leases. In addition, MEC's dire financial circumstances, as revealed on this application, would hardly have supported a business decision to start up these stores even if the SAVO is not granted. There is no realistic chance that the Lenders would support such an endeavour under the Credit Agreement. Further, I see no basis upon which this Court would effectively require MEC to spend millions of dollars on these new stores under its *CCAA* jurisdiction. It is difficult to imagine that this Court would, in balancing the various interests at play in relation to the benefits of the Kingswood sale, require such a result to the detriment of the many stakeholders other than these two landlords.

[154] I would add that five other MEC landlords also appeared on this application. They indicated that they were not opposed to the granting of the SAVO or were not taking any position. I suspect that they are all hoping that their store locations will be viewed favourably by Kingswood when the at least 17 store "winners" are chosen to continue operations. If any of them are not in the "winner" category, any losses will be added to the unsecured creditor group to share in the net recovery under the Kingswood sale.

[155] Plateau and Midtown's applications for an adjournment, document discovery and cross-examination of Mr. Arrata and Mr. Wallis are dismissed.

vi) Should the Kingswood Transaction be Approved?

[156] The Court's approach in considering a proposed sale under s. 36 of the *CCAA* is informed by the *CCAA*'s statutory objectives, as was discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.

[157] The main objective is to avoid, if possible, the devastating social and economic costs of a liquidation of a debtor's assets: *Century Services* at para. 15. In achieving these remedial goals, the court must be cognizant of the various interests

at stake, including the debtor, the creditors, employees, counterparties, directors and shareholders: *Century Services* at paras. 59-60. As evident from my discussion above, many of those stakeholder interests were represented on this application and expressed their views. However, the court must also recognize and give effect to, to the extent possible, all stakeholder interests whether present on this application or not.

[158] As with many applications for relief under the *CCAA*, the Court must strive to balance what are often competing interests and objectives. That exercise is often within the rubric of the need to conclude that the relief is "appropriate". Appropriateness is assessed by inquiring whether the purpose of the order sought and the means it employs advances the statutory objectives or remedial purpose of the *CCAA*. As Justice Deschamps stated in *Century Services* at para. 70, the chance of achieving that goal is enhanced when "all stakeholders are treated as advantageously and fairly as the circumstances permit" [Emphasis added.]

[159] The relevant factors to be balanced and considered under s. 36(3) are reflective of a consideration of what can be, and is on this application, a broad range of interests.

[160] I have concluded that the refinancing efforts and the SISP were conducted in a fair and reasonable manner. There is no basis upon which to second guess the adequacy of the substantial efforts that were made by the Board, the Special Committee and A&M Securities in that respect.

[161] The Kingswood transaction that arose from that competitive process was clearly the best from the few bids that were received. All other bids paled in comparison, particularly in relation to the purchase price and commitments to ongoing store operations and employee retention. As noted in the Monitor's First Report, the consideration that MEC will receive is substantial. While the base purchase price is $120 million, the total indicative purchase price is actually $150 million, after accounting for the substantial liabilities that Kingswood will

assume in respect of vendor trade payables, employee obligations and gift card obligations.

[162] The process conducted outside of this *CCAA* proceeding was not a rushed affair. I accept that many of the stakeholders on this application consider that they have been ignored or disadvantaged by reason of the lack of prior consultation and the short notice given to them to respond to this application. In my view, MEC has provided reasonable and understandable explanations for proceeding in that manner. The Monitor provides further support in the First Report in stating that to proceed otherwise would have created significant uncertainty and disruption in MEC's day to day business and put MEC's business operations and a potential going concern sale at unnecessary risk.

[163] As the Monitor notes, the perfect financial storm faced by MEC, still exacerbated by the risks posed by the ongoing pandemic, does not give MEC the luxury of time here. What is needed is a timely solution, after, of course, the Court has fully reviewed the evidence and is satisfied that the requested relief is appropriate. There is no evidence to suggest that MEC's Board or Kingswood have manufactured the need for what is described as urgent relief by approval of the SAVO.

[164] I have also concluded that, although some minor delay could be accommodated with the time limits under the Restructuring Agreement and the Sale Agreement, the perceived benefits do not outweigh the risks that follow. I accept the evidence of Mr. Wallis as to why it is urgent to approve the Sale Agreement as soon as possible. He states:

> 45. [MEC] believe[s] that the approval of the Sale Agreement is a matter of urgency. Any extension or delay in obtaining Court approval and Closing may have serious and detrimental consequences for its business and stakeholders, including, but not limited to, its employees, members and suppliers. This is particularly the case given the extent of [MEC's] ongoing weekly operating losses, as shown in [MEC's] Cash Flow Forecast, and the importance that any potential purchaser of the Business would have to close this transaction in sufficient time to take advantage of the coming holiday sales period.

> 46. The projections reflect an erosion of the borrowing base under the Interim Financing Facility and cash availability becomes very tight under the borrowing base calculation towards the end of October. It is therefore imperative that matters progress as quickly as possible so that MEC's customers, suppliers, landlords and employees have confidence that MEC will continue as a successful going concern.
>
> 47. Given the recent rise in COVID-19 transmissions across Canada, there is also a real and unpredictable risk that increased COVID-19 rates and/or restrictions would result in further deterioration in sales below those set out in the Updated Cash Flow Forecast provided by the Monitor, which would in turn jeopardize the availability of the Interim Financing Facility or ability to meet the closing condition of requiring repayment of the Credit Facility. The Lenders have confirmed they require a timely completion of the Transaction.

[165] The work to be done to conclude all matters under the Sale Agreement and move toward a closing of the transaction will no doubt be complex and take some time. Many contractual matters need to be concluded by Kingswood with stakeholders, such as employees, landlords and suppliers, in advance of the closing. As noted by MEC and the Monitor, it is critical to the success of the ongoing business that the transaction close as soon as possible so that Kingswood can order additional inventory in advance of the "Black Friday" and holiday shopping season. Kingswood is able to close the transaction by mid-late October 2020.

[166] The Monitor has also conducted a liquidation analysis to compare the results of the Kingswood sale to that which might be achieved by an orderly liquidation of MEC's assets through a bankruptcy and/or receivership. Under the Kingswood sale, estimated recovery to unsecured creditors is between $0.30-50 on the dollar; in a liquidation, estimated recovery to unsecured creditors is between $0.30-60 on the dollar. What is significant as between these two scenarios, however, is that in a liquidation, there would be far greater creditor claims.

[167] The Kingswood sale avoids the devastating impact of a liquidation on employee's jobs, preserves many of the leases, trade supply agreements and service agreements, and provides value to many unsecured creditors by Kingswood's full assumption of liabilities. These latter considerations figure greatly in the Court's decision as to whether a sale should be approved. That decision is made

toward achieving the main statutory objectives under the *CCAA* which are to allow the business to continue, with all the economic, societal and community benefits that that option affords. Many of the indirect benefits are unquantifiable.

[168] I agree with the Monitor that, in all the circumstances, the Kingswood sale is commercially reasonable and, on balance, is more beneficial to MEC's stakeholders, and particularly its creditors, than any other alternative. I grant the SAVO on the terms sought.

Representative Counsel

[169] Mr. Harding also sought an order under s. 11 of the *CCAA* that Victory Square Law Office be appointed as representative counsel for MEC's members. He also sought a charge of $100,000 under s. 11.52 of the *CCAA* to secure anticipated fees in respect of participation, ranking behind the four court-ordered charges but ahead of the Lenders' security.

[170] I conclude that this relief might have been more seriously considered if there was any indicative value held by the MEC members and, if these proceedings had taken a different path where the members' interests were in play.

[171] Having concluded that the Kingswood sale should be approved, which will divest MEC of substantially all of its assets in the short term, I see little utility in granting this relief. As I discuss above, this sale will garner some net proceeds for the unsecured creditors, leaving no recovery for MEC's members.

[172] I would add that the Kingswood sale does not mean that MEC will cease to exist as a co-operative. It may be that MEC's members can still consider whether any options remain for them in that respect, particularly if a plan is approved and successfully executed to leave the co-operative intact in a legal sense but without the burden of any debt and, of course, with few assets.

[173] Mr. Harding is, of course, welcome to continue to participate in these proceedings on behalf of the "SaveMEC" group, as he wishes, which I assume can be done with counsel given the funds already raised.

[174] Mr. Harding's application for appointment of representative counsel and a related charge is dismissed.

FINAL THOUGHTS

[175] I accept that this decision is a disappointing conclusion to the fate of what was an iconic Canadian retailer who has inspired the passion and commitment of many Canadians for outdoor activity. Like many Canadian retailers, MEC has fallen victim to economic forces, and perhaps questionable business judgments made years ago, all exacerbated by the cataclysmic and unprecedented impact of the COVID-19 pandemic throughout most of 2020.

[176] This result, however, will ensure the continuation of MEC's business, albeit in another organization. While this sale transaction is not wrapped in the Canadian flag, the best evidence is that Kingswood will continue to support MEC's core values and principles, being community engagement and promotion of a healthy outdoor lifestyle. More importantly, the ongoing operations will support Canadian individuals and their families and also businesses where jobs are disappearing quickly given ongoing economic disruptions. Creditors will be paid, or paid a substantial portion of what they are owed, no doubt to the relief of many.

[177] This is the core objective under a *CCAA* proceeding, and while that objective was not achieved here in a perfect manner, it was still achieved in a reasonable manner. That is all that anyone can ask.

"Fitzpatrick J."

TAB 17

CITATION: Nordstrom Canada Retail, Inc., 2023 ONSC 1422
COURT FILE NO.: CV-23-00695619-00CL
DATE: 2023-03-03

SUPERIOR COURT OF JUSTICE – ONTARIO2023-03-01

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORDSTROM CANADA RETAIL INC., NORDSTROM CANADA HOLDINGS INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Jeremy Dacks, Tracy Sandler, Martino Calvaruso and Marleigh Dick*, for the Applicants

Susan Ursel, Karen Ensslen, for the Proposed Employee Representative Counsel

Brendan O'Neill and Brad Wiffen, for the Proposed Monitor

George Benchetrit, for the Directors and Officers of the Nordstrom Canada Entities

Aubrey Kauffman, for Nordstrom, Inc. (U.S.)

HEARD and DETERMINED: March 2, 2023

REASONS: March 3, 2023

ENDORSEMENT

Background

[1] At the conclusion of the hearing on March 2, 2023, I granted the requested relief, with reasons to follows. These are the reasons.

[2] Nordstrom Canada Retail, Inc. ("Nordstrom Canada"), together with the other applicants listed above (collectively, the "Applicants"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants seek a stay of proceedings (the "Stay") for the initial ten-day period (the "Initial Stay Period") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. The Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP ("Canada Leasing LP") and, for limited purposes, to Nordstrom,

Inc. ("Nordstrom US"). The Applicants and Canada Leasing LP are referred to collectively below as the "Nordstrom Canada Entities."

[3] Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, and administrative services.

[4] Given Nordstrom Canada's financial performance and after considering available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business in the US. Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities and replaced them with a Wind-Down Agreement (described further below).

[5] The Applicants contend that without support from Nordstrom US, the Nordstrom Canada Entities are insolvent and require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations.

[6] The Applicants further contend that the requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA.

[7] The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, Court-ordered Administration and D&O charges in an amount required for the Initial Stay Period, as well as a Co-tenancy Stay of proceedings (the "Co-tenancy Stay") and a stay in favour of Nordstrom US.

[8] At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed Monitor"), also plan to solicit bids from a number of professional third-party liquidators and to seek court approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process.

[9] The facts have been set out in an affidavit of Misti Heckel, President of Nordstrom Canada Retail, Inc., and President and Treasurer of Nordstrom Canada Holdings, LLC and Nordstrom Canada Holdings II LLC. In addition, the Proposed Monitor has filed a pre-filing report.

[10] The Proposed Monitor supports the position of the Applicants.

The Nordstrom Canada Entities

[11] Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited ("NIL"). NIL is a wholly-owned subsidiary of Nordstrom US, a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.

[12] As of January 28, 2023, Nordstrom Canada employed approximately 1925 full-time and 575 part-time employees. Of these, 2,047 are full-line store and 310 are Rack store employees.

[13] Nordstrom Canada Holdings, LLC ("NCH") is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC ("NCHII") is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.

[14] Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, and subleasing the retail space to Nordstrom Canada.

Business of the Applicants

[15] Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia. These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the "Landlords") pursuant to leases (the "Leases") and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the "Subleases").

[16] Ms. Heckel contends that Nordstrom Canada Entities' business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing, payroll, human resources, merchandising, strategy, and information technology project support (the "Shared Services"). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the "Licence and Services Agreement").

[17] On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the "Wind-Down Agreement") for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.

Financial Position of the Nordstrom Canada Entities

[18] As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately $500,784,000 and total liabilities of approximately $561,024,000.

[19] Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of $515,046,000. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023, was negative $34,563,000, prior to taking into account intercompany payments.

[20] Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through intercompany payments. However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.

[21] The Nordstrom Canada Entities do not owe any secured indebtedness. Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guarantee obligations in relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released. Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.

[22] Ms. Heckel states that since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD $950 million. Taking into account the distributions of USD $175.6 million made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD $775 million.

[23] Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. The Applicants contend that due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP.

[24] The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.

Requested Relief

[25] Having reviewed the record and hearing submissions, I am satisfied that the Applicants are all affiliated debtor companies with total claims against them in excess of $5 million. I am also satisfied that Nordstrom Canada and the other Applicants are each a "company" for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.

[26] I accept that without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities' assets will be insufficient to satisfy all of their obligations to their creditors. I am satisfied that the Applicants in these proceedings are either currently insolvent under the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

B-3 (“BIA”) or the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, 2004 CanLII 24933 (Ont. Sup. Ct.).

[27] I am also satisfied that this Court has jurisdiction over the proceedings. The chief place of business of the Nordstrom Canada Entities is Ontario: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada’s 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta .

[28] There are a number of examples of CCAA proceedings that have been commenced for the purpose of winding down a business. Recent examples include *Target Canada Co. (Re)*, 2015 ONSC 303*, Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014, and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1230.

[29] Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. Under section 11.001, other relief granted pursuant to this Court’s powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited “to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period.” In my view, the relief requested in this first-day application meets these criteria.

[30] Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. (See: *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42 and 43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014, at para. 28).

[31] The Applicants submit that it is appropriate to extend the Stay to Canada Leasing LP. As the lessor of Nordstrom Canada’s retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.

[32] I accept this submission. In my view, the proposed extension of the Stay is appropriate in the circumstances.

[33] Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant’s (such as Nordstrom Canada’s) insolvency or cessation of operations. In order to alleviate potential prejudice, the Applicants request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada’s stores, offices or

warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.

[34] The Court's authority to grant the Co-tenancy Stay flows from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that may impose." The Applicants submit that a Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these "co-tenancy" rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company and that such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

[35] I have been persuaded that the Co-tenancy Stay should be granted in the circumstances.

[36] The Applicants also request that the Stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the "Parent Stay"). The Applicants submit that, among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada. The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.

[37] The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes.

[38] The Court recently granted similar relief during the initial stay period in *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014. I note that it is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

[39] I note that the Applicants submit that section 11.04 of the CCAA does not prohibit this relief. Firstly, the Indemnities are not "guarantees." Secondly, even if the Indemnities could be characterized as "guarantees", the opening words of section. 11.04 do not oust the Court's jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances.

[40] The Applicant submits that the Court has jurisdiction under section 11 to grant a third party stay and references *Target Canada* at para. 50, *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30–33 and *Lydian*

International Limited, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the Court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[41] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[42] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicants and the various landlords, I am prepared to grant the Parent Stay for the initial 10-day period prior to the comeback hearing.

[43] Ms. Heckel states that it is expected that the vast majority of Nordstrom Canada's employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA proceedings.

[44] Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US. The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process.

[45] The Applicants submit that the Court in *Target Canada* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.

[46] The Applicants submit that the Employee Trust is intended to ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner. Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.

[47] I am satisfied that the creation of an Employee Trust is fair and appropriate in the circumstances. The Employee Trust is approved.

[48] The Applicants seek the appointment of Ursel Phillips Fellows Hopkinson LLP as Employee Representative Counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust.

[49] I am satisfied that the appointment of Employee Representative Counsel is appropriate in these circumstances. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.

[50] The Applicants also seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers; (ii) providers of information, internet, telecommunications and other technology; and (iii) providers of payment, credit, debit and gift card processing related services. The Applicants believe that categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.

[51] For third-party suppliers or service providers other than those listed above, the Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of $1,000,000 with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business.

[52] The Applicants submit that the Court has exercised its jurisdiction on multiple occasions to grant similar relief (See: *Target Canada* at paras. 62-65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753, at paras. 72-74; *Boreal Capital Partners Ltd et al. (Re),* 2021 ONSC 7802, at paras. 20-22). The Court in *Index Energy Mills Road Corporation (Re),* 2017 ONSC 4944 at para. 31 outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.

[53] In my view, a consideration of these factors leads to the conclusion that this requested relief should be granted.

[54] Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of $750,000 (the "Administration Charge"), which amount covers the time period until the comeback hearing. The Applicants anticipate requesting an increase to $1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.

[55] In my view, the requested Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222, at para. 39. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured. In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period. This relief is granted.

[56] In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the "Directors' Charge") in the amount of $10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to $13.25 million at the Comeback

Hearing. The Applicants submit that the quantum of the Director's Charge was arrived at in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.

[57] In light of the potential liabilities, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. I am satisfied that the Directors' Charge is necessary in the circumstances.

Disposition

[58] In summary, the Applicants' request for the relief set out in the proposed Order is granted and Alvarez & Marsal Canada Inc. is appointed as Monitor. The Comeback Hearing is scheduled for March 10, 2023.

Chief Justice G.B. Morawetz

Date: March 3, 2023

TAB 18

CITATION: In the Matter of the *Companies' Creditors Arrangement Act*
and
In the Matter of a Plan of Compromise or
Arrangement of Original Traders Energy Ltd.
and 2496750 Ontario Inc., 2023 ONSC 753
COURT FILE NO.: CV-23-693758-00CL
DATE: 20230130

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: In the Matter of the *Companies' Creditors Arrangement Act*

AND

In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.

BEFORE: Osborne J.

COUNSEL: Stephen Graff, for the Applicants
Miranda Spence, for the Applicants
Tamie Dolny, for the Applicants
Samantha Hans, for the Applicants
Raj Sahni, KPMG Inc. Proposed Monitor
Roger Jaipargas for RBC

HEARD: January 30, 2023

ENDORSEMENT

[1] This is an application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. It is made by Original Traders Energy Ltd. ("OTE GP") and 2496750 Ontario Ltd. ("249"), (collectively the "Applicants" or the "Companies"). Together with Original Traders Energy LP ("OTE LP") and OTE Logistics LP ("OTE Logistics"), the Applicants comprise the "OTE Group".

[2] Following the hearing, I granted the initial order with reasons to follow. These are those reasons. Defined terms have the meaning given to them in the Application materials unless otherwise indicated.

[3] The OTE Group is a wholesale fuel supplier which services mainly First Nations petroleum stations and communities across Ontario. It has been in this business since 2018. It services over

30 gas stations, the majority of which are situated on nine different First Nations reserves in southern Ontario.

[4] The OTE Group purchases bulk or blended fuel, blends fuel where required and with and without local sourcing and then supplies and distributes gasoline diesel and other fuel products. It has four Operating Locations and the fifth location, the Couchiching Location, is only partially constructed. Its head office and one blending centre are in the Six Nations of the Grand River Territory of Scotland, Ontario. It has additional blending centres in Tyendinaga Mohawks of Bay of Quinte of Shannonville, Ontario and Atikameksheng Anishnawbek Territory of Naughton, Ontario as well as the partially constructed blending centre in Couchiching First Nation Territory of Fort Frances, Ontario.

[5] I observe, however, that the partially constructed Couchiching blending centre is, according to the materials of the Applicants, neither an asset nor a property of the OTE Group, but is said to be effectively a trespass on reserve lands that was constructed to partial completion, and which is apparently the subject of ongoing disputes.

[6] The OTE Group has 58 full-time employees and one part-time employee and holds five fuel and gas licenses which it requires to conduct business.

[7] The Applicants are insolvent. Absent protection under the CCAA, the Applicants lack sufficient cash to meet their obligations as they come due, and their liabilities exceed the value of their assets.

[8] The Applicants seek protection from their creditors while they continue as a going concern to allow time to explore various restructuring options for the benefit of stakeholders.

[9] The relief sought by the Applicants today is fully supported and recommended by the Proposed Monitor as well as by RBC, the senior secured creditor.

[10] As against this background, the issues on this Application are:

a. Does the Court have jurisdiction to grant the relief requested under the CCAA and should a stay of proceedings be granted, including the requested stay of rights and remedies of the relevant regulators?

b. Should the protections of the initial order, if granted, apply to the OTE Group, including the Limited Partnerships?

c. Should the Court grant the Charges sought?

d. Should KPMG be appointed as Monitor with the additional investigatory powers?

e. Should payments to critical suppliers be authorized for pre-filing expenses? and

f. Should the second affidavit of Scott Hill sworn January 27, 2023 (the "Confidential Affidavit") be sealed as requested?

Jurisdiction

[11] The Applicants rely on the Affidavit of Scott Hill sworn January 27, 2023 together with the exhibits thereto, the Confidential Affidavit and the pre-filing report of the Proposed Monitor together with exhibits thereto. Defined terms have the meaning given to them in the Application materials and pre-filing report of the Proposed Monitor unless otherwise indicated.

[12] OTE GP is the general partner of OTE LP and was incorporated under the OBCA.

[13] OTE LP was created under the *Limited Partnership Act* (Ontario).

[14] OTE Logistics is also an Ontario Limited partnership originally established under the name Gen 7 Fuel Management Services LP.

[15] 249 is also an OBCA corporation.

[16] As stated above, these entities together comprise the OTE Group. The group, including for greater certainty OTE LP and OTE Logistics, are highly integrated in operations and management.

[17] The OTE Group is balance sheet insolvent and is facing a looming liquidity crisis as it is unable to meet liabilities anticipated to come due during the first quarter of this year. It is anticipated that the OTE Group will have sufficient cash to sustain operations throughout the proposed CCAA proceeding, but will lack sufficient funds to cover outstanding liabilities. These are further described below.

[18] The challenges are compounded by the fact that the liabilities faced by the OTE Group were precipitated by alleged executive misconduct related primarily to the actions of the former president of OTE GP, Mr. Glenn Page ("Page"), said to have been acting together with associates and other entities. The OTE Group is missing material portions of its books and records with the result that, among other things, financial information and records for the period January 2021 through August 2022 inclusive, are unreliable and incomplete. There are no completed financial statements subsequent to fiscal 2020, and even those statements are questionable as to their accuracy and completeness.

[19] It is anticipated that the role of the Proposed Monitor will include recovering and then analyzing to the extent possible the financial records.

[20] Litigation against Page and associates is pending in Ontario and in another jurisdiction. Allegations made in that litigation include the allegations that the defendants used company funds to the extent of several million dollars to pay for inappropriate expenses, including the purchase of a large yacht (and caused the OTE Group or entities within it to guarantee a chattel mortgage secured by the vessel) and that the defendants gave preferred pricing for fuel and gasoline to certain retail gas station businesses on First Nations reserves controlled by them. Additional

litigation and demands for payment against the OTE Group are anticipated. At the same time, the OTE Group is also subject to litigation by former executives and their associates.

[21] The OTE Group owes material amounts to provincial and federal regulators and tax authorities with the result that the required licences, if it is to continue to operate, are in jeopardy. Revocation of those licences would jeopardize if not defeat entirely, the proposed restructuring efforts.

[22] As of November 1, 2022, OTE LP was in default of fuel and gas filings due in July, August and September, 2022. It had prior amounts outstanding to the Ministry of Finance ("MOF") inclusive of penalties and interest in the following amounts: gas licences - $27,856,055.71; and fuel licences - $6,885,045.70.

[23] The OTE Group received a security cancellation notice from the MOF on or about December 6, 2022 advising that the MOF, had in turn received on December 2, 2022, a 60-day cancellation notice from Zürich Insurance Company Ltd. in respect of a surety bond issued as security for the amounts owing to the MOF in connection with the gas and fuel licenses. That notice required replacement security to be put in place by January 30, 2023.

[24] Notwithstanding that the MOF was provided with a copy of a reinstatement email confirmation from Zürich to the effect that a standard reinstatement notice would be provided by Zürich to the MOF, the MOF called on and redeemed the Zürich surety bond on January 24, 2023.

[25] As of January 26, 2023, the MOF confirmed that the gas licences and fuel licences would be extended until March 31, 2023. The OTE Group seeks a stay of the revocation of those licences during the CCAA proceedings. Absent that, the Applicants submit, there would be a functional halt to the entire operations of the OTE Group and jeopardize any restructuring efforts.

[26] The secured debt of the OTE Group consists primarily of debt owed to the Royal Bank of Canada ("RBC"), and various equipment lessors.

[27] OTE LP and OTE Logistics are parties to loan agreements with RBC that are in default for a total amount of $4,558,280.88 as at January 19, 2023. Those obligations are secured pursuant to GSAs, assignments, lease arrangements and guarantees.

[28] Those obligations are also secured by an account performance security guarantee certificate of cover executed by Export Development Canada ("EDC") to secure petroleum product purchases. EDC has received a claim application from RBC due to a call on the standby letter of credit in respect of which the performance guarantee was issued. The OTE Group take the position that the letter of credit may have been obtained under false pretenses and is the subject of the ongoing litigation referred to above.

[29] OTE LP and OTE Logistics have entered into a forbearance agreement with RBC pursuant to the terms of which, in exchange for RBC refraining from exercising its rights pursuant to its security during this CCAA proceeding, no charge granted by way of an initial order or otherwise during these proceedings shall prime the RBC security without its consent, the stay will not apply

to RBC, and RBC will be an unaffected creditor in any plan of arrangement. The Proposed Monitor supports the forbearance agreement, without which RBC is likely to demand on its security which would hinder the restructuring prospects of the OTE Group.

[30] None of the equipment leases are in default although if the initial order is not granted, they may become subject to acceleration and default which would further hinder the restructuring projects of the OTE Group.

[31] Beyond that, the Applicants are not certain as to the financial state of affairs of the OTE Group due to the alleged misconduct of past executives and the missing books and records. Whether and the extent to which additional liabilities exist is as yet unknown. This includes liabilities to regulatory and taxing authorities.

[32] The OTE Group has pursued a number of strategic initiatives to stabilize financial functions and operations, obtain, update and analyze books and records, and impose appropriate controls. At this point, however, it seeks protection pursuant to this proceeding to explore potential restructuring options for the benefit of stakeholders while preserving the value of the business.

[33] The evidence satisfies me that relief under the CCAA is required to stabilize the integrated enterprise and preserve the value of the business for the benefit of the stakeholders of the OTE Group. Most fundamentally, absent protection being granted today, the operations of the Applicants and the OTE Group, and therefore the uninterrupted supply of fuel to First Nations communities throughout Ontario and during the winter months, is at risk.

[34] The Applicants are corporations that collectively owe over $5 million in outstanding liabilities. They have delivered the documents and financial statements required under s. 10(2) of the CCAA. The CCAA applies to a “debtor company” or an “affiliated debtor company”. The CCAA defines a “debtor company” as, among other things, any company that is insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* (“BIA”).

[35] This Court considered the circumstances in which a debtor company was insolvent in *Stelco Inc. Re*, [2004] 48 C.B.R. (4th) 299 (“*Stelco*”), and held that in order to give effect to the CCAA objectives of allowing a debtor company breathing room to restructure, a debtor is insolvent if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured.

[36] As noted, and while the Applicants presently have sufficient cash for the CCAA proceedings and to fund future obligations, their cash flow is not sufficient to provide for the payment of all due and owing obligations.

[37] Moreover, they are balance sheet insolvent. As confirmed by the Applicants and the Proposed Monitor, total assets are estimated to be $67,523,927 as against total liabilities of $95,392,669.

[38] The Applicants therefore meet the test under the BIA and as contemplated by the Court in *Stelco*, discussed above.

[39] The terms “insolvency” or “insolvent” are not defined in the CCAA, but “insolvent person” is defined in the BIA (s.2.1). In the BIA definition, it includes a person whose liability to creditors provable as claims under [the BIA] amount to $1000, and who is for any reason unable to meet his obligations as they generally become due, who has ceased paying his current obligations in the ordinary course of business as they generally become due, or the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all of his obligations, due and accruing due.

[40] I observe, as did Farley, J. In *Stelco*, that the BIA tests are disjunctive so that at debtor company meeting any one of the tests is determined to be insolvent (*Stelco*, at para. 28, quoting with authority from *Re Optical Recording Laboratories Inc.*, (1990) 1990 CanLII 6672 (ONCA), 75 D.L.R. (4th) 747 at pg. 756). Moreover, and also as observed by Farley, J., the phrase “accruing due” has been interpreted by the courts as broadly identifying all obligations that will “become due” at some point in the future (*Stelco*, at para. 59).

[41] In *Stelco*, Farley, J. considered the test set out in s.2.1 of the BIA as informed by what he described as “the expanded CCAA test” such as was necessary to give effect to the intention of Parliament in enacting the CCAA to achieve its stated objectives. Since the term “insolvent” is not defined in that statute, it should be given the meaning that the overall context of the CCAA requires. Farley, J. referenced with approval what he called “the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII) [2002] S.C.R. 559 at 580: “today, there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”” (*Stelco*, para. 23).

[42] It is the position of the Applicants that the present financial structure is sustainable only if they can negotiate pricing changes for OTE GP with certain suppliers, restructure operations and implement cost-cutting, and determine the quantum in nature of outstanding liabilities to creditors including regulatory and taxation authorities, all for the purpose of developing a plan to satisfy those obligations.

[43] Having considered the evidence in the record, I am satisfied that the Applicants meet the test for protection under the CCAA, in addition to which I note that a number of creditors of the OTE Group have demanded payment and have threatened to or have already commence proceedings.

[44] Moreover, and while the CCAA applies by its express terms to debtor companies, it is well-established that this Court has the jurisdiction to extend the protection of the stay of proceedings to partnerships, where the operations of that partnership or those partnerships are integral and closely related to the operations of the Applicant, all to ensure that the purposes of the CCAA can be achieved (*See Lehndorff General Partner Ltd., Re*, [1993] 17 CBR (3d) 24, 9 BLR (2d) 275 (Ont Gen Div [Commercial List]) at para 21; *Target Canada Co., Re*, 2015 ONSC 303 at paras 42–43 [Target]; and *4519922 Canada Inc. Re*, 2015 ONSC 124 at para 37).

Stay

[45] Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

[46] A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The relief sought today is limited to what is reasonably necessary, and the stay is granted.

[47] The issue is then whether, as requested, that stay should extend to relevant regulatory authorities in respect of any rights and remedies they may have. Specifically, the Applicants seek an order that all rights and remedies of provincial and federal regulators and/or border authorities that have authority with respect to the importation and exportation of fuel, petroleum, diesel and/or gasoline in respect of the OTE Group or their respective employees and representatives, or affecting the Business Or property, our state except with the written consent of the OTE Group and the Monitor, or leave of this Court sought on notice to the Service List.

[48] Section 11.1 of the CCAA provides that if such relief is sought on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) [i.e., the stay] not apply in respect of one or more of the actions, suits or proceedings taken bio before the regulatory body if in the court's opinion a viable compromise or arrangement could not be made in respect of the [Applicant] if that subsection were to apply; and it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[49] The Applicants submit that the MOF and/or other regulatory bodies or taxation authorities, may seek to enforce certain of their rights and remedies, including to revoke the gas and fuel licences and today, there is no certainty they will not act to do so. Any such enforcement particularly by the MOF with respect to the fuel licences would have material adverse consequences for the OTE Group likely shutting down existing operations which in turn will materially impair the ability of the OTE group to continue as a going concern and likely impair any restructuring efforts. The MOF was on notice of today's hearing.

[50] The Proposed Monitor supports the relief sought and observes in the pre-filing report that notwithstanding ongoing constructive discussions with the MOF, the unique circumstances here are such that it should be temporarily stayed from exercising rights and remedies, provided the MOF is paid amounts owing to it in the ordinary course post-filing all with a view to providing the OTE Group with a stable environment in which it can seek to restructure.

Appointment of KPMG as Monitor

[51] The Applicants propose to have KPMG appointed as the Monitor. KPMG is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented

to act as Monitor. The involvement of KPMG as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. KPMG is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA, has consented to act as Monitor and has prepared a 13-week cash flow forecast.

[52] I am satisfied that KPMG should be appointed as Monitor in these CCAA Proceedings.

[53] Moreover, I am satisfied in the circumstances that, as requested, the Monitor should have additional investigatory powers including the power to compel production of books and records relating to the OTE Group and conduct investigations including examinations under oath of any person reasonably thought to have knowledge relating to the information requested, as set out in the draft initial order sought.

[54] One of the material factors leading to the circumstances that bring the Applicants to this Court today seeking protection is the fact that they are unable to locate all books and records, said to be as a result of the alleged misconduct of certain former executives, with the result that they cannot discern with certainty, for example the precise extent of all liabilities as to the identity of creditors or quantum.

[55] I am satisfied that it is to the benefit of all stakeholders that these investigative powers be granted and that they be granted to the Court-appointed Monitor. As set out in the draft initial order, those investigative powers are generally consistent with such powers given to Court-appointed Monitors in situations where the books and records of an applicant are deficient, the historical financial information is unreliable and there are matters requiring further investigation, as I am satisfied is the case here.

Sealing Order

[56] The Applicants seek a sealing order with respect to the Confidential Affidavit and exhibits thereto. It is sought on the basis that it is necessary to honour and give effect to an existing sealing order made by a court in another jurisdiction.

[57] Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.42, provides for the Court's authority to grant a sealing order. It provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not part of the public record.

[58] The Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, recast the test from *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (CanLII):

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to

succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:

a. court openness poses a serious risk to an important public interest;

b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c. as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7 and 22).

[59] Under the first branch of the three-part test, an "important commercial interest" is one that can be expressed in terms of the public interest in confidentiality. The Supreme Court was clear that the interest in question cannot merely be specific to the party requesting the order and must be one which can be expressed in terms of a public interest in confidentiality.

[60] The Supreme Court recognized the potential need for a sealing order where the parties have agreed to a confidentiality provision (See *Bombardier Inc. v. Union Carbide Canada Inc.*, 2014 SCC 35 at para. 49). Here, the parties present today do not oppose the sealing order. Moreover, it is supported and recommended by the Proposed Monitor.

[61] More fundamental, however, is the fact that the material over which the sealing order is sought is already the subject of a sealing order issued by a court in another jurisdiction. That order, which requires that the contents of the case in that jurisdiction remain sealed until further order of that court, was made in a proceeding commenced by a verified Complaint itself filed under seal. I am satisfied that an important public interest includes comity and cooperation between courts in different jurisdictions.

[62] With respect to the second requirement, there are no reasonably alternative measures to address the risk. To decline to grant the sealing order here would be to immediately render moot and ineffective the order already made in the foreign proceeding. Moreover, I am satisfied that to decline to grant the proposed sealing order here would materially impair the maximization of asset value for the benefit of stakeholders.

[63] The third requirement is also met. While the Confidential Affidavit would be sealed, the balance of the materials in the Application (which constitute the overwhelming proportion of the information before the Court today) would not be sealed, and available to the public. The information over which confidentiality is sought to be maintained is discrete, proportional and limited. It is also consistent with the scope of the sealing order made by the foreign court.

[64] Again, I observe that the order sought is supported by the recommendation of the Proposed Monitor.

[65] I am satisfied that the benefits of the proposed sealing order outweigh its negative effects with the result that it should be granted, pending further order of the Court.

[66] In addition to the general comeback provisions applicable for a first day CCAA order, I have required that the sealing order is effective only until the earlier of the vacating of the sealing order of the foreign court appended to the Confidential Affidavit without being replaced by another sealing order of a foreign court, the vacating of any other sealing order granted by a foreign court to replace the existing order, or further order of this Court. It may be varied by the Court on motion of any party brought on notice at any time.

[67] Counsel for the Applicants are directed to file a physical copy of the unredacted Confidential Affidavit with exhibits with the Commercial List Office in a sealed envelope marked: "Confidential and sealed by Court order; not to form part of the public record until further order of the Court".

The Charges

Administration Charge

[68] The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. (See *CanWest Publishing Inc., Re*, 2010 ONSC 222 ("CanWest"), at para. 54).

[69] The administration charge sought for $500,000, subordinate to the security held by RBC discussed above, meets this test and is appropriate. It is supported by the Proposed Monitor and RBC. The amount is limited to the amount reasonably necessary for the initial 10-day stay.

The Directors' and Officers' Charge

[70] The Court has jurisdiction to grant a directors' and officers' (D&O) charge under section 11.51 of the CCAA, provided notice is given to the secured creditors who are likely to be affected by it. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise. They seek a priority D&O charge in favour of the current and future directors and officers in the amount of $200,000, ranking subordinate to the administration charge.

[71] The Monitor supports the Applicants' request for the D&O charge, also subordinate to the security of RBC, who also supports it. I am satisfied it is appropriate here. It is approved in the amount of $250,000.

Payment of Pre-filing Amounts

[72] The Applicants seek authority to pay, with the consent of the Monitor and the OTE Group, amounts owing for goods or services supplied by third parties to any of the OTE Group prior to filing, up to a maximum aggregate amount of $6,375,000, if such third parties are critical to the Business and the ongoing operations of the OTE Group. The Applicants also seek authority to pay amounts owing to the Ministry of Finance pursuant to an agreement reached with the MOF on January 26, 2023 regarding the extension of certain fuel and gas tax licences.

[73] There is no question here that both the ability to continue the supply of fuel and the continuation of the requisite fuel licences are critical to the restructuring efforts of the Applicants and the continued fuel supply to First Nations communities in Ontario through the winter months.

[74] The payment of prefiling amounts are authorized.

Initial Order and Comeback Hearing

[75] The comeback hearing shall take place on Thursday, February 9, 2023 commencing at 9:30 AM via Zoom before me.

[76] The order I have signed is effective immediately and without the necessity of issuing and entering.

Osborne, J.

Date: January 30, 2023

TAB 19

Unofficial English Translation

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-049320-159

DATE: SEPTEMBER 14, 2015

THE HONOURABLE MARTIN CASTONGUAY, J.S.C., PRESIDING

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. (1985), c. C-36, AS AMENDED, AND:

PASCAN AVIATION INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

LES STRUCTURES & COMPOSANTES AVTECH INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

3939421 CANADA INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

8039879 CANADA INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

PASCAN EXPRESS INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

8039895 CANADA INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

LES CARBURANTS AVTECH INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

Debtors

- and -

BUSINESS DEVELOPMENT BANK OF CANADA, a legal person having a place of business at 5 Place Ville-Marie, Montreal, Province of Quebec, H3B 5E7

- and -

INVESTISSEMENT QUÉBEC, a legal person having a place of business at 413 Saint-Jacques Street, Suite 500, Montreal, Province of Quebec, H2Y 1N9

Petitioners

- and -

PRICE WATERHOUSE COOPERS INC., a legal person having a place of business at 1250 René-Lévesque Boulevard, Suite 3500, Montreal, Province of Quebec, H3B 2G4

Impleaded party / Monitor

- and -

ROYAL BANK OF CANADA, a chartered bank
having a place of business at 1 Place Ville-Marie, Ground Floor,
Montreal, Province of Quebec, H3C 3B5

Impleaded party

JUDGMENT

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[1] On August 31, 2015, the Business Development Bank of Canada and Investissement Québec (hereinafter the "Petitioners") asked the Court to make an initial order under the terms of sections 4, 5 and 11 of the *Companies' Creditors Arrangement Act* (hereinafter "the Act")[1] with regard to the following debtors:

- Pascan Aviation Inc.
- Pascan Express Inc.
- 8039879 Canada Inc.
- 3939421 Canada Inc.
- Les Structures & Composantes Avtech Inc.
- 8039895 Canada Inc.
- Les Carburants Avtech Inc.

(hereinafter the "Pascan Group")

[2] The motion for an initial order also sought to set up interim financing of $1,000,000.00, the funds coming from the Petitioners themselves, the whole accompanied by the related fees.

[3] The Petitioners also asked that Dominic Deveaux (hereinafter "Deveaux") be appointed Chief Restructuring Officer (hereinafter "CRO") of the Pascan Group. The Court sees fit to reproduce the allegations in the motion dealing with this point.

[TRANSLATION]

Appointment of the CRO

129. The Petitioners propose that the Court appoint Dominic Deveaux to act as Chief Restructuring Officer of the Pascan Group;

130. The appointment of the CRO is necessary because the Petitioners have lost confidence in the current management and administration of the Pascan Group;

131. The appointment of the CRO is an essential condition for granting the interim financing offered by the Petitioners;

132. The CRO is already familiar with the operations of the Pascan Group given his involvement in recent months, and he, along with the key employees of the Pascan Group, will make it possible to continue its operations.

133. The Petitioners therefore request that the CRO be appointed by the Court to act as Chief Restructuring Officer of the Pascan Group under the terms of an offer of management services made to the Pascan Group and filed as Exhibit **R-24;**

134. The Petitioners further propose that the CRO have all the powers described in the draft initial order and that he enjoy the protections required to maintain the operations of the Pascan Group;

[4] As is usual for such a motion in view of an initial order, a draft order was attached, providing, *inter alia*, the following concerning the powers of the CRO:

[TRANSLATION]

30. - Declares that the CRO may exercise, without the intervention of the directors, all the powers described in the service proposal that are not incompatible with the following powers.

[5] The service proposal was the one prepared by Deveaux.[2] In addition to his emoluments, set at $40,000.00 a month, this document set out the powers and objectives of the CRO. The Court sees fit to reproduce them in their entirety.

[TRANSLATION]

POWERS

In the context of his role referred to hereinabove and in view of promoting the achievement of the objectives described hereinbelow, the Manager shall have all the powers necessary to:

- Conduct, manage, operate and oversee the company, commercial operations and financial affairs of the CLIENT and perform any and all acts in this regard or in connection with the restructuring of the CLIENT.

- Take all measures to maintain control over the receipts and disbursements of the CLIENT including, without limiting the generality of the foregoing, all measures to control and use all the bank accounts of the CLIENT.

- Maintain or terminate, dismiss or lay off, temporarily or permanently, the employees of the CLIENT or of its agents or consultants and take any and all other measures for human resources management and any other administrative decision related thereto.

- Represent the CLIENT in all negotiations with any person whomsoever.

- Communicate with and provide information to the Monitor concerning the business of the CLIENT.

- Take any and all measures, sign any and all documents or agreements and incur any and all expenses and obligations necessary or incident to the powers of the Manager.

OBJECTIVES

The strategic objectives pursued by the Manager are as follows:

1. **Financial restructuring**

   a. File and obtain approval of a plan of arrangement under the *Companies' Creditors Arrangement Act* for the unsecured creditors of the CLIENT.

2. **Operating performance**

   a. Improve the financial performance and profitability of the CLIENT so that the CLIENT can meet its current obligations, provide for the engine reserve and investments in maintenance required for the operating fleet and pay the interest specified in the loan agreements.

   b. Set up a management team to reduce and eventually terminate the Manager's mandate on a monthly basis.

3. **Sale/recapitalization of operating entities**

a. Solicit offers for the operating assets and activities of the CLIENT and interest potential purchasers, partners or investors such that the loans on the operating assets are assumed or repaid to the satisfaction of the lenders.

4. **Sale/disposition of surplus assets**

Solicit offers in order to proceed with the sale of the surplus assets of the CLIENT such that these offers meet the minimum conditions established by the lenders according to the agreements in place with the CLIENT.

[6] The Pascan Group, while theoretically in agreement with an initial order, filed a written opposition in the record with four specific points, although only two were debated before the Court. They were as follows:

- Identity and compensation of the CRO

- Powers of the CRO

[7] For a full understanding of the grounds for the opposition, some background is essential.

[8] The Pascan Group operates in passenger air transportation services, charter freight and certain airport services. Two directors look after its management, namely Serge Charron (hereinafter “Charron”) and Denis Charest (hereinafter “Charest”).

[9] Until very recently, the Pascan Group operated a fleet of twenty-one airplanes and one helicopter, serving some fifteen destinations (Rouyn-Noranda, Val-d'Or, Gatineau, Montreal, Quebec City, Bagotville, Mont-Joli, Bonaventure, Baie-Comeau, Sept-Îles, Havre-Saint-Pierre and the Magdalen Islands), Newfoundland and Labrador (Wabush and Goose Bay) and New Brunswick (Bathurst).[3]

[10] The Pascan Group had experienced a decline of some 50% in its sales in the past two years and as a result has sustained significant losses which it attributes to the following factors:

(a) The slowdown in the Plan Nord which began in May of 2011;

(b) The economic difficulties that have adversely affected companies working in Quebec’s mining industry;

(c) The volatility of oil and iron ore prices in the past two years;

(d) The austerity measures brought in by the Quebec government;

(e) The loss of a number of contracts because of increased competition; and

(f) The erosion of certain sectors of the Quebec economy, more specifically in the north of the province.[4]

[11] Until February of 2015, the Pascan Group had a $1,500,000.00 credit line from Royal Bank of Canada.

[12] Because of the Pascan Group's financial difficulties and following a breakdown in negotiations, Royal Bank of Canada withdrew its financial support from the Pascan Group, and as a result the Pascan Group no longer has the credit line.

[13] In fact, the only institutional creditors are the Petitioners, which have granted credit for the financing of assets and for part of the working capital in the amount of $21,069,903.00 as at August 17, 2015.

[14] The difficulties encountered by the Pascan Group led the Petitioners to designate specialized managers on their staff to take charge of problem accounts, namely Dany Couillard (hereinafter "Couillard").

[15] Couillard testified that during meetings with the Pascan Group in the winter of 2015, Pascan saw only one possible solution to its liquidity problem, and that was to obtain government assistance.

[16] In the spring of 2015, when it became clear that the Pascan Group could not meet its obligations vis-à-vis the Petitioners, the Petitioners required the Pascan Group to retain the services of restructuring consultants, namely PricewaterhouseCoopers (hereinafter "PwC") and Evology Management Inc. (Deveaux).[5]

[17] The uncontradicted evidence reveals that from the very start the Pascan Group was against the level of compensation for Deveaux, which it considered too costly in light of its financial situation.

[18] In any case, as often occurs in such situations, the Pascan Group nonetheless gave Deveaux a mandate.

[19] On arriving at the Pascan Group, Deveaux ordered an evaluation of the airplanes operated by the Pascan Group. The evaluation showed that they had declined considerably in value because of two factors.

- Absence or major deficit in the engine reserve[6]

- Cannibalization of certain aircraft[7]

[20] Naturally, the Petitioners were very dismayed when the situation was revealed to them.

[21] At the same time, beyond the difficulties the Pascan Group was having in meeting its obligations to the Petitioners, it was also late in paying its landing fees at some of the airports it served.

[22] What is more, lawsuits had arisen concerning the aircraft leased and operated by the Pascan Group.

[23] In particular, two lawsuits existed between the Pascan Group and two lessors of the airplanes currently operated or in the possession of the Pascan Group. These involved:

Coast to Coast Helicopter Inc.
and
Danish Air Transport Leasing

This is an important detail in the decision the Court must make.

[24] In short, the situation was catastrophic.

[25] Deveaux, together with Charron and Charest, the directors of the Pascan Group, came up with a program to rationalize the air routes, such that the Pascan Group needed only eight airplanes to operate, with the fourteen others to be sold.

[26] At the same time, Deveaux and the Pascan Group directors were negotiating with some of the Pascan Group's suppliers to spread out the payment of its debts.

[27] After Deveaux's arrival and until the end of May, the parties held discussions and tried to establish debt tolerance conditions that would be acceptable to the Petitioners.

[28] The parties could not come to an agreement, and the fact that Charest, the main spokesman for the Pascan Group, left for two weeks to look after other matters was the straw that broke the camel's back.

[29] In June 2015, tired of fighting, the Petitioners sent a notice to the Pascan Group under section 244 of the BIA[8] indicating that they intended to realize on their security.

[30] On June 12, 2015, the expiry date of the notice under section 244 BIA, the Pascan Group terminated Deveaux's mandate.

[31] On July 19, 2015, Deveaux, without the knowledge of the Pascan Group, gave the Petitioners, PwC and Lavery, counsel for the Petitioners, a document entitled "Memorandum". This document laid out several strategies including having the entities holding the airplanes declare bankruptcy as well as [TRANSLATION] "having the lenders take control of the three (3) entities (the Pascan Group "2.0").

[32] It was not until later that the directors found out about the existence of this "Memorandum".

[33] In spite of the notice under section 244 BIA, the parties continued to talk to each other and at the beginning of July 2015, the Pascan Group submitted a business plan showing a possible return to profitability. Even so, a cash injection of $1,000,000.00 was necessary for this purpose.

[34] Discussions therefore began on this basis between the Petitioners and the directors, including Charest.

[35] It should be mentioned that of the two Pascan Group directors, Charest was the only one who had the financial capacity to inject funds.

[36] Right away, Charest indicated that he had no intention of injecting any new funds and so the solution would be a loan from the Petitioners, and the discussion started moving in that direction.

[37] Thus the Petitioners, persuaded that there was a chance that the Pascan Group could be turned around, were ready to advance $1,000,000.00 on an interim basis, subject to certain conditions, including the involvement of Deveaux and the disengagement of the current directors, who for all intents and purposes would be stripped of their powers. Couillard, an account and restructuring manager at the BDC, invoked the following elements to justify this approach.

- Loss of confidence.

- Management team unable to manage the crisis, notably the Pascan Group's inability to sell five (5) airplanes since January 2014.

- Threats of lawsuits.

[38] While Charron was willing to sign the agreement suggested by the Petitioners, Charest refused.

[39] At that point, the situation began to deteriorate.

[40] The motion for an initial order was served and filed on August 26, 2015.

[41] Part of the motion was addressed on August 31, 2015, such that an initial order was issued without dealing with the issue of appointing a CRO. Here is why.

[42] As we have seen, the Petitioners suggested Deveaux, while the Pascan Group suggested another candidate in its written opposition, namely Hélène Zakaib (hereinafter "Zakaib"), a lawyer by training, former Member of the National Assembly and Deputy Finance Minister responsible for industrial policy and the Banque de développement économique du Québec.

[43] Because of the oppositions from both sides, the Court conducted a brief review of the credentials of Deveaux and Zakaib to find that neither had worked in a highly regulated environment such as civil aviation whether for purposes of restructuring or any other purpose.

[44] Furthermore, in his much talked-about *Memorandum* dated July 19, 2015, Deveaux made a remark, which, although it appears innocuous at first glance , has serious consequences.

> [TRANSLATION]
>
> Transport Canada authorities have already been questioning the Pascan Group officers' compliance with regulations and are closely monitoring the situation.

[45] In addition, the emoluments requested by both, namely $40,000.00 a month for Deveaux and $30,000.00 a month for Zakaib, seem excessive under the circumstances.

[46] In view of the candidates proposed by both sides, who have never worked in such a highly regulated industry and are asking for significant fees, the Court can and must intervene.

[47] The Court therefore suggested to the parties that they try to agree on a candidate with the necessary credentials to carry out a restructuring in the civil aviation industry, as that such a candidate would certainly reassure Transport Canada. The Court also asked the parties to consider a more realistic form of compensation given the circumstances.

[48] This having been done, all that remained for the Court was to determine the scope of the powers to be given to the CRO.

[49] Unfortunately, once again, the parties were unable to agree on the choice of candidate. This disagreement revolved more around the independence that a CRO should have in the performance of his duties.

[50] The Court must make a short digression here. Despite the law, we are all human.

[51] Clearly there is no trust between Charest, who represents the Pascan Group, and Couillard, who acts on behalf of the Petitioners.

[52] Charest has testified twice before the Court. He is an intelligent and accomplished businessman but, above all, he has a strong character.

[53] As a result, chances are that his choice of candidates for the CRO position are people over whom, rightly or wrongly, he thinks he could wield some influence.

[54] On the other hand, the Petitioners are attempting to avoid this problem by asking that the Court confer on the CRO powers that are exceptional for such a position.

[55] Indeed, a spade is a spade even if you call it a pitchfork. The scope of the powers sought by the Petitioners for the CRO is more like the powers of a receiver than those normally vested in a CRO.

[56] Before tackling the profile of the best candidate for the CRO position, it is important to review the Court's basic guiding principles.

[57] The author Janis Sarra perfectly summarizes the circumstances that lead to the appointment of a CRO:

> In the past two decades, there has been the growing use of chief restructuring officers (CRO) in CCAA workouts, frequently appointed in the initial stay order. This development is a governance response to creditor concerns that directors and officers that may have skills appropriate to oversight of financially healthy corporations may not have the skills or expertise to deal with a turnaround situation.

[58] This is the most important criterion that should guide the Court. The existing directors, who are quite knowledgeable about their industry, are normally the best qualified to carry out the restructuring. That being said, however, even the best directors can be overwhelmed by a crisis situation.

[59] In the present case, although Charron and Charest knew how to run their business during the profitable years, the evidence shows that they lost control in a crisis situation. The following points demonstrate this:

- Five unsold airplanes even though they had been declared surplus since January 2014

- Cannibalization of certain aircraft.

- Lack of engine reserve.

[60] Nevertheless, the directors of the Pascan Group showed that with adequate guidance, they were able to make good decisions.

[61] In this particular case, the appointment of a CRO, uncontested the Pascan Group, is advisable.

[62] A court-appointed CRO for a restructuring under the Act is nothing new in law.

[63] It is necessary, however, to recall, if not define the objectives sought when a court-appointed CRO is required.

[64] It goes without saying that the situation or powers of a CRO when a company is being wound up are quite different from those of a CRO who will be involved in working out a plan of arrangement.[9]

[65] In the present case, representations were made to the Court that a plan of arrangement would in fact ultimately be filed, with the result that negotiations have already been initiated with certain creditors.

[66] In such a case, to fulfil his or her mandate, the CRO must identify the action to be taken for the financial turnaround of the company; namely the disposal of assets or the creation of a new business plan, or both. The CRO must then, together with the Monitor and the Board of Directors, prepare a viable plan of arrangement that will be acceptable to all the parties involved, whether they are shareholders or secured or unsecured creditors, and ultimately see to its implementation and completion. Moreover, since the CRO is court-appointed, he or she must report to the Court.

[67] Even though the appointment of a CRO can be reassuring to all stakeholders, the aim of such an appointment is not to look out for the interests of a single category of stakeholders.

[68] Certain qualities are therefore required, including independence vis-à-vis these same parties, in addition to a solid reputation and expertise in the civil aviation industry as well as in restructuring.

[69] Selecting the best possible CRO is vital to a company's restructuring process. When a CRO is court-appointed because of differences between the parties, the guiding criteria are the following:

- A good knowledge of the industry in which the company operates so that the CRO's presence is reassuring to all the industry stakeholders, namely, the creditors, clients and competent authorities.

- Independence.[10]

- Experience in restructuring.

- Reasonable cost.

[70] These criteria are not cumulative, but their analysis can lead to the identification of the ideal candidate from among those proposed.

[71] Now that the selection criteria have been established, what should be determined with respect to the powers requested by the Petitioners?

[72] To justify the powers requested, the Petitioners refer to the breach of trust without taking into consideration that a Monitor has already been appointed.

[73] The Petitioners also cite the order issued by Schrager J. of the Quebec Superior Court, as he then was, in *Aveos Fleet Performance*,[11] by which all the powers of administration were conferred on the CRO, to the exclusion of the existing directors.

[74] There are no reasons provided for this order, as is generally the case for emergency orders issued under the Act.

[75] Counsel for the Pascan Group, judicial officers well informed about the Aveos case, told the Court that the scope of powers conferred on the CRO was prompted by the resignation or absence of Aveos directors.

[76] This same order specifies the degree of collaboration to be shown by shareholders and directors. The Court deems it useful to reproduce it here.

> **ORDER** that the Petitioners and their shareholders, direct and indirect subsidiaries, former and current officers, directors, employees, servants, agents and representatives (the "**Company Persons**") shall cooperate fully with the CRO in the exercise of his powers and the discharge of his obligations. Without limiting the generality of the foregoing, the Company Persons shall provide the CRO with such access to the Petitioners' and their direct and indirect subsidiaries' books, records, assets and premise as the CRO requires to exercise his powers and perform his obligations under this Order.

[77] The Court is of the opinion that, at this stage, collaboration is required, not coercion, especially since the Court will ensure the independence of the candidate selected.

[78] The Court does not challenge the Petitioners' decision to use the mechanisms provided by the Act, especially since the Petitioners firmly believe in the Pascan Group's capacity for financial rehabilitation.

[79] This being the case, the Petitioners must live with the consequences of their choices; stripping the directors of their powers in favour of a CRO, however, is not the standard applied by the courts.

[80] This decision is not set in stone and may be reviewed by the Court if it becomes obvious that the directors are not cooperating with the CRO. In such a scenario, the Court would not hesitate to consent to increased powers for the CRO, as in the form used by Schrager J. in *Aveos*.

[81] Let us now look at the candidates. Each one has filed a résumé, and Messrs. Deveaux, Nice and Simard have testified about their past experiences.

[82] The Court would like to point out that this exercise does not make a value judgment with regard to the candidates not selected but rather consists of the application of the criteria presented earlier.

[83] Deveaux has a great deal of experience in restructuring, but none in the civil aviation industry.

[84] Moreover, his "Memorandum" dated July 19, 2015, which was transmitted to the Petitioners, PwC and counsel for the Petitioners while his fees were being paid by the Pascan Group, raises questions for the Court about his independence. In addition, as a result of the animosity which ensued, the relationship between Deveaux and the directors of the Pascan Group would be dysfunctional.

[85] Therefore, Deveaux cannot be considered for the appointment.

[86] Zakaib also cannot be considered for the position.

[87] Despite impressive academic credentials and a remarkable professional career, Zakaib has no knowledge of the aviation industry and her knowledge of restructuring is quite limited.

[88] Simard's application will also be rejected.

[89] Although his knowledge of the civil aviation industry is impressive, he has never participated in any restructuring under the Act.

[90] What is more, scarcely even a few months ago, he started up a company headed by the same person who is the driving force behind Coast to Coast Helicopters Inc., which is currently involved in a dispute with the Pascan Group. Under the circumstances, the criterion of independence or the appearance of independence is not met.

[91] Derek Nice is selected to perform the duties of CRO for the following reasons:

- Solid experience in civil aviation.

- Participation in restructurings under the Act in the civil aviation industry.

- More than reasonable cost under the circumstances.

[92] Regarding the last point, the Court can only suggest that managers involved in restructurings should show more creativity in their choice of consultants.

[93] The costs related to such external consultants are similar to legal costs much decried by litigants.

[94] In this case, a CRO at almost half the cost[12] of that proposed in the initial motion would have been selected simply through competition.

[95] The Petitioners and the Monitor have ask the Court that it be the Monitor that controls, and not just oversees, the Pascan Group's receipts and disbursements.

[96] Once again, the Court does not see the need for such a measure since no evidence of misappropriation, negligence or incompetence in regard thereto has been presented to the Court.

[97] In closing, the evidence shows that Charron has lost interest in his role as director, giving complete leeway to Charest. Charest, however, may need to be absent because of his other obligations. Therefore, if Charest's absences end up amounting to a lack of collaboration on his part, a motion may be filed with the Court to review the powers of the CRO.

FOR THESE REASONS, THE COURT:

ALLOWS the component regarding the appointment of the Chief Restructuring Officer in the motion for the issue of an initial order dated August 26, 2015.

APPOINTS Derek Nice as Chief Restructuring Officer for all the entities of the Pascan Group on the terms and conditions in his offer dated September 10, 2015, to PricewaterhouseCoopers, reflecting the undertakings to which Nice subscribed during his testimony.

ORDERS the Debtors and their shareholders, directors, employees and/or representatives to collaborate fully with the Chief Restructuring Officer in the performance of his duties and in the exercise of his powers, notably by providing him access to all the books of account and/or financial information as well as to all premises and equipment currently operated and used by the Debtors.

DECLARES that the CRO may exercise all the powers described in the service proposal, the whole subject to the agreement of the director of the Debtors and of the Monitor for any decision or act that may have a major impact on the Debtors, namely:

(a) Represent the Debtors in all negotiations with the parties concerned (whether creditors, suppliers, investors, etc.);

(b) Ensure the transition of the role of accountable executive between Serge Charron and Julian Roberts;

(c) Ensure the proper maintenance of aircraft and passenger security;

(d) Find new clients, maintain relationships with existing clients and promote the services of the Debtors;

(e) Make decisions regarding employee retention, including the continued employment of key employees;

(f) Streamline the operations of one or more operating units of the Debtors, including the sale of the surplus fleet;

(g) Terminate or repudiate any contract, agreement or arrangement pursuant to CCAA terms and conditions;

(h) Communicate with and provide information concerning the Debtors to the Monitor at the request of the latter in the performance of its duties; and

(i) Any other power, responsibility or duty that the CRO may agree to exercise, discharge or perform at the request of the Debtors following an order from this Court.

DECLARES that all the powers exercised by the CRO pursuant to this order and the service proposal shall be deemed to have been exercised by the CRO for and on behalf of the Debtors, and not by the CRO in his own personal capacity.

ORDERS that the CRO shall, in the exercise of his powers, consult and report to the Debtors and their director.

DECLARES that the CRO shall benefit from the indemnification obligation provided for in paragraph 25 of the initial order and from the directors' charge as security for this indemnification obligation with regard to the obligations and liabilities that the CRO may incur when acting in such capacity as of the date of this order.

ORDERS the Debtors to pay the reasonable fees and disbursements of the CRO directly related to these proceedings, the plan and the restructuring that he incurred after the date of this order.

DECLARES that, as security for the professional fees and disbursements of the CRO incurred after the date of this order with regard to these proceedings, the plan and the restructuring, the same shall benefit from the administrative charge determined in paragraph 39 of the initial order in order of the priority determined in paragraphs 40 and 41 of the initial order.

ORDERS that no person shall institute or continue proceedings nor cause proceedings to be instituted against the CRO, in relation to the business or property of the Debtors, without first obtaining the prior permission of the Court by way of a prior written notice of five (5) days to counsel for the Debtors and to all those mentioned in this paragraph who are proposed to be named in these proceedings.

ORDERS that this order and all the provisions thereof take effect at or after 00:01 a.m., Montreal time, Province of Quebec, on the date of this order.

[98] **THE WHOLE,** without costs.

Martin Castonguay, J.S.C.

Mtre Jean Legault
Mtre Mathieu Thibault
LAVERY, DE BILLY
Counsel for Business Development Bank of Canada and Investissement Québec

Mtre Guy P. Martel
Mtre Joseph Reynaud
STIKEMAN ELLIOTT
Counsel for the Pascan Group

Mtre Alain Tardif
McCARTHY TÉTRAULT
Counsel for Fiducie Denis Charest

Mtre Martin Desrosiers
OSLER, HOSKIN & HARCOURT
Counsel for the Monitor, PricewaterhouseCoopers

Date of hearing: September 9, 2015

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[1] *An Act to facilitate compromises and arrangements between companies and their creditors*, R.S.C., 1985, c. C-36.
[2] Exhibit R-24.
[3] Paragraph 22 of the motion.
[4] Paragraph 26 of the written opposition.
[5] Even if the mandate is signed by the Pascan Group and Evology Management Inc./Gestion Evologie inc., because it is a mandate *intuitu personae,* the Court will refer only to Mr. Deveaux.
[6] An engine reserve is required from the lenders and consists of a certain sum of money set aside for every hour of flight time to constitute a reserve that will be used to recondition the engine or engines when their regulatory life has expired.
[7] Cannibalization consists of removing operating parts from one aircraft without replacing them and installing them in another aircraft.
[8] *Bankruptcy and Insolvency Act*, R.S.C. (1985) c. B-3.
[9] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act* (Thomson Carswell) at 160-161.
[10] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act*, "If the CRO is court-appointed, arguably it has obligations to the court and must act neutrally with respect to stakeholders," at 161.
[11] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à*) (20 March 2012) 500-11-042345-120.
[12] Fees of Mr. Nice set at $23,000.00 a month, excluding the addition of certain resource persons and expenses, whereas Mr. Deveaux required $40,000.00 a month, as presented in the initial motion. It should be noted that in the evidence adduced with regard to the choice of CRO, Mr. Deveaux agreed to reduce his emoluments to $32,000.00 a month.

TAB 20

CITATION: Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re) 2019 ONSC 1215
COURT FILE NO.: CV-19-00614629-00CL
DATE: 20190220

RE: SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

Applicants

BEFORE: Regional Senior Justice G. B. Morawetz

COUNSEL: *J. Dietrich and S. Kukulowicz and R. Jacobs,* for the Applicants

S. Zweig and A. Nelms, for FTI Consulting Canada Inc., Proposed Monitor

S. Brotman and D. Chochla, for the Ad Hoc Group of Term Lenders

S. Kour, for Term Loan Agent, Cortland Products Corp.

T. Reyes for Wells Fargo, ABL Agent

HEARD AND ENDORSED: February 19, 2019

REASONS: February 20, 2019

ENDORSEMENT

OVERVIEW

[1] At the conclusion of argument, the record was endorsed as follows:

> CCAA application has been brought by Applicants. Initial Order granted. Order signed. Applicants will serve parties today and return to court for further directions on Thursday, February 21, 2019 at 9:30 a.m. Reasons will follow.

[2] These are the Reasons.

[3] This application is brought by Payless ShoeSource Canada Inc. ("Payless Canada Inc.") and Payless ShoeSource Canada GP Inc. ("Payless Canada GP") for relief under the Companies' Creditors Arrangement Act ("CCAA"), including an initial stay of proceedings. The Applicants also seek to have the stay of proceedings and the other benefits of the Initial Order extended to Payless ShoeSource Canada LP ("Payless Canada LP", together with the Applicants, the "Payless Canada Entities"), a limited partnership which carries on substantially all of the operations of the Payless Canada Entities. The requested relief is not opposed.

[4] The evidence provided in the affidavit of Stephen Marotta, Managing Director at Ankura Consulting Group LLC, the Chief Restructuring Organization ("CRO") establishes that each of the Payless Canada Entities is insolvent and unable to meet its liabilities as they become due. The Applicants seek relief provided by the proposed Initial Order under the CCAA in order to provide a stable environment for the Payless Canada Entities to undertake the Canadian Liquidation.

[5] On February 18, 2019, a number of Payless Entities in the United States (the "U.S. Debtors") (including the Payless Canada Entities) commenced cases under chapter 11 of title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri (the "U.S. Bankruptcy Court") (the "U.S. Proceedings"). The U.S. Debtors' "First Day Motions" are scheduled to be heard by the U.S. Bankruptcy Court on February 19, 2019.

[6] Counsel to the Applicants advises that the orders to be sought by the U.S. Debtors from the U.S. Bankruptcy Court at the First Day Motions contain language providing that if there are inconsistencies between any order made in the U.S. Proceedings and in this court, the orders of this court will govern with respect to the Payless Canada Entities and their business.

FACTS

[7] The Applicants are indirect wholly owned subsidiaries of a U.S. Debtor, Payless Holdings LLC. Both Payless Canada Inc. and Payless Canada GP are governed by the *Canada Business Corporations Act* (the "CBCA").

[8] Payless Canada LP is a limited partnership organized under the laws of Ontario. The general partner and limited partner of Payless Canada LP are Payless Canada GP and Payless Canada Inc., respectively. Payless Canada LP is the primary vehicle conducting the business operations of the Payless Canada Entities.

[9] The Payless Canada Entities operate 248 retail stores in 10 provinces throughout Canada. The retail locations are leased from commercial landlords.

[10] The Payless Canada Entities also have a corporate office at leased premises located in Toronto, Ontario.

[11] There are approximately 2,400 employees in Canada of which 12 are corporate office employees. The remainder work at the retail locations.

[12] The Payless Canada Entities rely on the infrastructure of the U.S. Debtors for substantially all head office functions. These services are provided by certain U.S. Debtors pursuant to intercompany agreements.

[13] The assets of the Payless Canada Entities primarily consist of inventory and an intercompany promissory note receivable which was reported on the balance sheet in the amount of approximately USD $110 million. Given that the issuer of the note is a U.S. Debtor, the Applicants advise that it is doubtful that the full value can be realized.

[14] The liabilities of the consolidated Payless Canada Entities include, among other things, outstanding gift cards, leased payments, trade and other accounts payable, taxes, accrued salary benefits, long term liabilities, and intercompany service payables.

[15] The Payless Canada Entities are also guarantors under two credit facilities, the ABL Credit Facility and the Term Loan Credit Facility. There is approximately USD $156.7 million outstanding under the ABL Credit Facility and USD $277.2 million outstanding under the Term Loan Credit Facility.

[16] The total amount of liabilities of the Payless Canada Entities inclusive of obligations under the guarantees of the ABL Credit Facility and the Term Loan Credit Facility is in excess of USD $500 million.

[17] In December 2018, Payless engaged an investment bank, PJ Solomon L.P., to review strategic alternatives. In consultation with its advisers, the Payless Canada Entities decided to take steps to monetize or preserve its Latin America business and liquidate its North American operations.

[18] The Payless Canada Entities have determined that there is no practical way for the company to operate on a standalone basis. The Payless Canada Entities have decided that it was in their best interest and in the best interest of their stakeholders to complete the Canadian Liquidation.

ISSUES

[19] Counsel to the Payless Canada Entities state that the issues to be determined on this application are as follows:

(a) Whether the CCAA applies in respect of the Applicants;

(b) Whether a stay of proceedings is appropriate;

(c) Whether the Monitor should be appointed;

(d) Whether the CRO should be appointed;

(e) Whether the Administration Charge should be approved;

(f) Whether the Directors' Charge should be approved;

(g) Whether the Cross-Border Protocol should be approved.

LAW

[20] The CCAA applies to a company where the aggregate claims against it or its affiliated debtor companies are more than five million dollars. I am satisfied that both of the Applicants meet the definition of a "company" under section 2(1) of the CCAA.

[21] The evidence is such that I am able to conclude that the Payless Canada Entities have failed to pay their February rent for a number of Canadian stores. In addition, defaults have occurred under the ABL Credit Facility and the Term Loan Credit Facility, and the ABL Agent has issued a Cash Dominion Direction.

[22] It has been demonstrated that the Payless Canada Entities have insufficient assets to discharge their liabilities and insufficient cash flow to meet their obligations as they come due.

[23] Accordingly, I find that the Applicants are insolvent debtor companies under the CCAA.

[24] Counsel for the Applicants submits that the Payless Canada Entities require a stay of proceedings in order to prevent enforcement actions by various creditors including landlords and other contractual counterparties. I accept this submission and in my view, it is appropriate to grant the requested stay of proceedings.

[25] I am also of the view that it is appropriate that the stay of proceedings apply not only in respect of the Applicants' themselves, but that it extend to the partnership Payless Canada LP.

[26] Although the definition of "debtor company" in the CCAA does not include partnerships, this court has previously held that where a limited partnership is significantly interrelated to the business of the applicants and forms an integral part of its operations, the CCAA Court may extend the stay of proceedings accordingly. (See: *Re Lehndorff General Partner Ltd.*, (1993) 9 BLR (2d) 975 (Ont. S.C); *Re Priszm Income Fund*, 2011 ONSC 2061; *Re Urbancorp Toronto Management Inc.,* 2016 ONSC 3288; and *Re Target Canada Co.,* 2015 ONSC 303).

[27] In these circumstances, and in order to ensure that the objectives of the CCAA are achieved, I am satisfied that it is appropriate to grant the requested stay of proceedings to Payless Canada LP.

[28] In addition, the Payless Canada Entities also seek a stay of proceedings against the Directors and Officers. I am satisfied that the stay against to the Directors and Officers is

appropriate as it will allow such parties to focus their time and energies on maximizing recoveries for the benefit of stakeholders.

[29] The Applicants propose FTI Consulting Canada Inc. as Monitor. I am satisfied that FTI is qualified to act as Monitor in these proceedings.

[30] The proposed Initial Order also provides for the appointment of Ankura as CRO. Counsel to the Applicants submits that the proposed CRO is necessary to assist with the Canadian liquidation and is particularly critical given the number of departures by senior management.

[31] The Proposed CRO Engagement Letter has been heavily negotiated and no parties, including the ABL agent and the term lenders, voice objection to the Engagement Letter.

[32] I am satisfied that the CRO should be appointed and the CRO Engagement Letter should be approved.

[33] I am also satisfied that it is appropriate to grant a charge on the Property in priority to all other charges to protect the CRO, Proposed Monitor, counsel to the Proposed Monitor, and Canadian counsel to the Payless Canada Entities, up to a maximum amount of USD $2 million (the "Administration Charge"). In arriving at this conclusion, I have taken into account the provisions of section 11.52 of the CCAA and the appropriate considerations which include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[34] I am also of the view that the requested Directors' Charge is appropriate in the circumstances and it is approved in the maximum amount of USD $4 million that will reduce to USD $2 million after March 21, 2019. It is noted that the Directors' Charge only applies with respect to amounts not otherwise covered under the Payless Canada Entities directors' and officers' liability insurance policies.

[35] In order to facilitate the orderly administration of the Payless Canada Entities and in recognition of their reliance upon the U.S. Debtors, the Applicants propose that these proceedings be coordinated with the U.S. Proceedings and accordingly the proposed Initial Order includes the approval of a cross-border protocol.

[36] I am satisfied that the proposed cross-border protocol establishes appropriate principles for dealing with international jurisdictional issues and procedures to file materials and conduct joint hearings. It is my understanding that the U.S. Debtors will also be seeking the approval of the proposed protocol by the U.S. Bankruptcy Court as part of their First Day Motions.

[37] Counsel advises that the form of the Cross-Border Protocol is consistent with this court's decision in *Re Aralez* (25 October 2018), Toronto CV-18-603054-00CL (Ont. S.C) which is based on the Judicial Insolvency Network ("JIN Guidelines"). As stated on the JIN website:

> The JIN held its inaugural conference in Singapore on 10 and 11 October 2016 which concluded with the issuance of a set of guidelines titled "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the JIN Guidelines…The JIN Guidelines address key aspects and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.

[38] The JIN Guidelines have been endorsed by the Commercial List Users' Committee of this court.

[39] I also note that the JIN Guidelines have been recognized in a number of jurisdictions globally, including the United Kingdom, United States (New York, Delaware and Florida), Singapore, Bermuda, Australia (New South Wales), Korea (Seoul Bankruptcy Court), and the Cayman Islands.

[40] The JIN Guidelines have received international recognition and acceptance. As noted, the aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs, an objective that all parties should strive to achieve in every insolvency proceeding.

[41] Counsel to the Applicants advised that this application will be served on a number of interested parties, including the landlords of the leased premises.

[42] It is both necessary and appropriate to schedule a Comeback Hearing in order to provide affected parties with the opportunity to respond to this application. Counsel to the Applicants propose that the Comeback Hearing be held on Thursday, February 21, 2019.

[43] It is expected that the following will be considered at the Comeback Hearing:

(a) Whether the Liquidation Consulting Agreement and Sale Guidelines should be approved; and

(b) Whether an extension of the stay of proceedings is appropriate.

[44] I am not certain as to whether this schedule will provide interested parties with adequate time to respond to the issues raised in this application. The Comeback Hearing will proceed on

February 21, 2019 on the understanding that certain matters may not be addressed at that time, if it is determined that parties have not had adequate time to respond to the issues raised in the application.

[45] The Initial Order has been signed by me.

Morawetz R.S.J.

Date: February 20, 2019

TAB 21

CITATION: PT Holdco Inc. (Re) 2016 ONSC 495
COURT FILE NO.: CV-16-11257-00CL
DATE: 20160121

SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS CANADA, INC., PTUS, INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.

BEFORE: Penny J.

COUNSEL: *Maria Konyukhova* and *Vlad Calina* for the Applicants

Linc Rogers and *Aryo Shalviri* for the Monitor

Brendan O'Neill for Birch Telecommunications Inc.

*Natasha MacParlan*d for the Bank of Montreal

Greg Azeff and *Stephanie DeCaria* for Manulife

D. Magisano for Origin Merchant Partners

HEARD: January 19, 2016

REASONS

[1] This is an application for court protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "CCAA"), including authorization to apply for recognition in the United States pursuant to Chapter 15 of the United States Bankruptcy Code, 11 U.S. Code § 1501-1532 (the "Code").

[2] I granted the initial order on January 19, 2016 with reasons to follow. These are those reasons.

[3] The applicants (collectively Primus) offer telecommunications services in Canada and the United States. Primus' principal business is the re-selling of residential and commercial telecommunications services within the United States and Canada.

[4] Primus has been experiencing rapidly declining revenues, its customer base is being lost to lower profit margin services and, yet, its capital costs remain high. As a result, Primus does not have the liquidity to meet its payment obligations as they become due. Primus is unable to

satisfy the financial covenants set out in its secured credit agreements and has defaulted under these credit agreements. If these agreements are enforced, Primus would be unable to satisfy its obligations. Primus has operated under forbearance agreements in respect of these defaults since February 4, 2015. Primus has been unable to successfully restructure its business outside of formal insolvency proceedings.

[5] The Primus North American operations are thoroughly integrated. Internally, Primus shares networks, platforms, infrastructure and personnel (including senior management).

[6] Holdco is the principal holding company of Primus with PTUS and Primus Canada the wholly owned subsidiaries of Holdco. Primus Canada is the Canadian operating company. PTUS is the holding company for PTI and Lingo, which are Primus' U.S. operating companies.

[7] Holdco and Primus Canada are private companies incorporated under the Ontario *Business Corporations Act*, with registered head offices in Toronto, Ontario. PTUS, PTI, and Lingo are private companies incorporated under the laws of Delaware, with registered head offices in Wilmington, Delaware.

[8] Primus Canada does not own sufficient telecommunications network infrastructure to provide telecommunications services without the assistance of a major carrier. Primus Canada's business and operations are heavily dependent on the major carriers. The largest vendors are Bell, Allstream, Rogers and Telus, which collectively account for approximately 50% of supplier obligations. Primus Canada purchases services from major carriers at wholesale rates determined by the CRTC or through negotiated arrangements to re-sell to its own residential and commercial consumers. The majority of Primus Canada's gross revenue is earned by providing these resale services.

[9] Primus Canada is also dependent on its credit card processing service provider. Approximately 30% of Primus Canada's customers pay for their services by credit card. Primus Canada could not process credit card transactions without the continued supply of credit card services.

[10] Primus Canada generates 88% of the Primus gross revenues of which 78% is generated in Ontario with 10% in Quebec, 6% in British Columbia, 4% in Alberta, and 2% in other provinces.

[11] Primus Canada has approximately 204,000 residential accounts and 23,000 commercial accounts. In 2014, approximately 56% of Primus Canada's revenue was generated from residential customers and approximately 44% was generated from commercial customers.

[12] Typical residential agreements are for two years or less. Typical commercial agreements range between two to three years.

[13] The U.S. Primus entities' revenues account for approximately 12% of the Primus gross revenue. U.S. Primus primarily offers digital home phone services and long-distance phone services.

[14] U.S. Primus has about 27,000 residential customers, of which approximately 1,100 are located in Puerto Rico. The balance of the U.S. Primus customers are located in the United States.

[15] Primus Canada employs 502 people and U.S. Primus employs 28 people. Certain of the Primus employees provide services to both the U.S. and Canadian operations. The Primus workforce is non-unionized. Primus does not have a pension plan for its employees.

[16] Primus'gross revenue decreased from $229 in 2012 to $199 million in 2013, to $180 million in 2014. Gross revenue is forecasted to drop to $166 million in 2015. Since 2012, the Primus consolidated revenue has declined an average of 9% per year. During the same period, the Canadian residential business, representing approximately 56% of gross revenue for 2015, has declined an average of 9% year-over-year. At the same time, revenue has declined 18% in Canada and 25% in the United States. Despite these declining revenues, Primus has not been able to reduce capital expenditures due to the capital-intensive nature of its business. Consequently, Primus reported a net loss of $830,000 in 2014 and has forecast a net loss of $13,078,000 for 2015.

[17] As a result of their financial difficulties and resulting defaults with their lenders, the Primus entities are insolvent and unable to meet their obligations as they come due.

[18] Primus elected to pursue a pre-filing sales process out of concern that the extensive period of CCAA protection necessary to implement a post-filing sales process would have a detrimental impact on the Primus business and its customers.

[19] Following a SISP, Primus selected a successful bidder. Subject to obtaining the initial order being sought, Primus intends to return on a motion seeking approval of the asset purchase agreement and associated sale transaction and ancillary relief.

Should the Court grant CCAA Protection to Primus?

[20] Primus Canada and Holdco, as companies incorporated under Ontario legislation meet the CCAA definition of "company" and are therefore eligible for CCAA protection.

[21] PTI, PTUS and Lingo are also "companies" within the definition of the CCAA because they are incorporated companies (under the laws of Delaware) having assets in Canada, being funds held on deposit in Canadian bank accounts, *Re Cinram*, 2012 ONSC 3767 (S.C.J. [Comm. List]).

[22] Although the CCAA does not define the term "insolvent," the definition of "insolvent person" under section 2(1) of the BIA is well-established as the governing definition in applications under the CCAA.

[23] Primus' precarious financial situation, including the defaults under credit agreements, has rendered Primus insolvent within the definition contemplated in both the BIA and the expanded definition set out in *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List]).

None of the Primus entities have sufficient liquidity to satisfy their obligations as they come due. The continued forbearance of Primus' lenders is conditional on the granting of the Initial Order. Without this forbearance, the Primus entities' loans will be immediately due. Primus will not have the funds to satisfy these debts.

[24] Finally, the Primus entities, either individually or as a whole, have debts in excess of $5 million. I find that the Primus entities are "debtor companies" to which the CCAA applies.

[25] Under s. 11.02(3) of the CCAA, on an initial application in respect of a "debtor company", the Court may make an order on any terms that it considers appropriate where the applicant satisfies the Court that circumstances exist to make the order, including, among other things, staying all proceedings that might be taken in respect of the company under the BIA.

[26] A stay of proceedings is appropriate in liquidating CCAA proceedings such as this one, *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]), para. 6.

[27] As a result of the financial difficulties and liquidity issues outlined above, Primus requires CCAA protection to maintain operations while allowing it the time necessary to complete the sales process and thereby to maximize recovery for its stakeholders. Without CCAA protection, a shut-down of operations is inevitable. This would be disruptive to Primus' efforts to maximize recovery.

Should the Court grant the Administration Charge?

[28] Primus seeks a charge on its assets in the maximum amount of $1 million to secure the fees and disbursements incurred in connection with services rendered to Primus both before and after the commencement of the CCAA proceedings by counsel to Primus, the Monitor and the Monitor's counsel (the "Administration Charge").

[29] Primus worked with the proposed monitor to estimate the proposed quantum of the Administration Charge to ensure that it was reasonable and appropriate in the circumstances.

[30] The Administration Charge is proposed to rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise held by persons with notice of this application.

[31] Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge.

[32] In *Re Canwest Publishing Inc.,* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]), in addition to the considerations enumerated in section 11.52, Justice Pepall considered the following factors:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[33] In the present matter, the following factors support the granting of the Administration Charge as requested:

(a) Primus operates a business which is technical in nature, operates across North America, and is subject to regulatory obligations;

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings;

(c) there is no anticipated unwarranted duplication of roles;

(d) the lenders were advised of the anticipated return date of this application, have or will have received copies of the application materials, and have not indicated opposition to the granting of the Administration Charge; and

(e) the proposed Monitor, in its pre-filing report, supports the Administration Charge and its proposed quantum and believes it to be fair and reasonable in view of the complexity of Primus' CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge;.

[34] Each of the proposed beneficiaries of this charge will play a critical role in the Primus restructuring and it is unlikely that these advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. Accordingly, the Administrative Charge is granted.

Should the Court grant the Directors' Charge?

[35] Primus also seeks a charge over its assets in favour of the Primus former and current directors in the amount of $3.1 million (the "D&O Charge") in order to protect the directors and officers from the risk of significant personal exposure. The D&O Charge is proposed to rank immediately behind the Administration Charge but in priority to all other encumbrances held by persons given notice of this application.

[36] Primus maintains directors' and officers' liability insurance for its directors and officers. The current D&O insurance policies provide a total of $15 million in coverage. Under the D&O insurance, there are deductibles for certain claims and a large number of exclusions which create a degree of uncertainty. In addition, contractual indemnities which have been given to the directors and officers cannot be satisfied as Primus does not have sufficient funds to satisfy those

indemnities should their directors and officers be found responsible for the full amount of the potential directors' liabilities. Adequate indemnification insurance is not otherwise available for the directors and officers at reasonable cost.

[37] The CCAA has codified the granting of directors' and officers' charges on a priority basis in section 11.51. The Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings, *Re Canwest Global, supra.*

[38] Primus requires the continued involvement of its directors and officers in order to finalize the sales process already in progress. The directors and officers of Primus have indicated that, due to the significant personal exposure associated with Primus' liabilities, they will resign from their positions with Primus unless the Initial Order grants the D&O Charge.

[39] The D&O Charge will allow Primus to continue to benefit from the expertise and knowledge of its directors and officers. The quantum of the requested D&O Charge is reasonable given the complexity of Primus' business and the potential exposure of the directors and officers to personal liability.

[40] Further, the proposed monitor has advised that it is supportive of the D&O Charge, including the amount.

[41] The D&O Charge is therefore granted.

The Proposed Monitor

[42] FTI Consulting Canada Inc. has consented to act as the court-appointed monitor. FTI is a trustee within the meaning of s. 2 of the BIA and is not subject to any of the restrictions on who may be appointed as a monitor. The monitor has filed a pre-filing report indicating that it is supportive of the relief being sought. The appointment of FTI is granted.

Should the Court Authorize FTI Consulting Canada Inc. to Act as Foreign Representative?

[43] Section 56 of the CCAA grants the court the unfettered authority to appoint "any person or body" to act as a representative for the purpose of having these CCAA proceedings recognized in any jurisdiction outside of Canada, including but not limited to the United States.

[44] In order to enforce the stay of proceedings established under the Initial Order in the United States and to facilitate the contemplated restructuring strategy, it is necessary to seek recognition of the Initial Order by the United States Bankruptcy Court. Accordingly, Primus seeks authorization for FTI, as foreign representative of Primus, to seek recognition of these proceedings in the United States under Chapter 15 of the Code.

[45] Courts have consistently encouraged comity and cooperation between courts in cross-border insolvencies to enable enterprises to restructure on a cross-border basis. To authorize FTI

to act as foreign representative and seek recognition of these proceedings in the United States is consistent with and gives full effect to these principles.

[46] The commencement of proceedings in the United States is necessary and appropriate under the circumstances because, among other things, Primus operates a cross-border business that is operationally and functionally integrated in several significant respects. Among other things, Primus has assets and employees in the United States and many affected creditors are located in the United States. As a result, it is possible that one or more parties in the United States will seek to commence proceedings against one or more of the U.S. Primus entities.

[47] The appointment and authorization of FTI as foreign representative is granted.

[48] For all these reasons, I have granted the initial order in the form sought.

Penny J.

Date: January 21, 2016

TAB 22

COURT FILE NO.: 04-CL-5306
DATE: 20040322

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage* and *Geoff R. Hall*, for the Applicants

David Jacobs and *Michael McCreary*, for Locals 1005, 5328 and 8782 of the United Steel Workers of America

Ken Rosenberg, Lily Harmer and *Rob Centa*, for United Steelworkers of America

Bob Thornton and *Kyla Mahar*, for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych, for the Informal Committee of Stelco Bondholders

David R. Byers, for CIT

Kevin McElcheran, for GE

Murray Gold and *Andrew Hatnay*, for Retired Salaried Beneficiaries

Lewis Gottheil, for CAW Canada and its Local 523

Virginie Gauthier, for Fleet

H. Whiteley, for CIBC

Gail Rubenstein, for FSCO

Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of “insolvent person” in s. 2(1) of the *Bankruptcy and Insolvency Act* ...
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies’ Creditors Arrangement Act (Canada)*, 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)…

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559 at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on “rescues” as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union’s affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil*, *supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:

(a) the ability to meet liabilities as they fall due; and

(b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run…eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.,* [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

> 33…They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

> "11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor (No. 64 of 1992)*, [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King, supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Proviseuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital, supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

> for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

> obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. …
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 – January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

[66] On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 20004

TAB 23

CITATION: Syncreon Group B.V., Re, 2019 ONSC 5774
COURT FILE NO.: CV-19-624659-00CL
DATE: 20191007

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERICAL LIST

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF SYNCREON GROUP B.V. AND SYNCREON AUTOMOTIVE (UK) LTD.

APPLICATION OF CARINE VAN LANDSCHOOT UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

BEFORE: Hainey, J.

COUNSEL: *Linc Rogers, Aryo Shalviri* and *Caitlin McIntyre,* for the Foreign Representative, Carine Van Landschoot

Stuart Brotman and Dylan Chochla for PricewaterhouseCoopers Inc. as Proposed Information Officer

Joseph Pasquariello, for the Ad Hoc Group of Parent Credit Facilities Lenders and Liquidity Facility Lenders

Andriana Georgallas and *Katherine Lewis*, U.S. attorneys for the syncreon Group

Evan Cobb for the Indenture Trustee

Stephen Brown-Okruhlik and *Waël Rostom* for the Exit ABL Agent

HEARD: August 8, 2019

ENDORSEMENT

OVERVIEW

[1] At the conclusion of the argument on this application I granted the Initial Recognition Order sought by the applicant with reasons to follow.

[2] The applicant, Carine Van Landschoot, sought a recognition order under Part IV of the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36, as amended ("*CCAA*"), recognizing scheme of arrangement proceedings commenced in the United Kingdom by syncreon Group B.V. ("synecron B.V.") and syncreon Automotive (UK) Ltd. ("synecron UK") (together the "Scheme Companies"). The Scheme Companies appointed Carine Van Landschoot to act as their foreign representative ("Foreign Representative") in these proceedings.

[3] The Scheme Companies are part of a global group of companies ("syncreon Group"), comprised of over 60 separate legal entities with operations in over 20 different countries, including Canada. The syncreon Group provides specialized logistics, sequencing and technology services.

[4] The syncreon Group is facing significant liquidity issues. Its capital structure includes approximately $1.1 US billion in funded debt. ("Scheme Debt") This highly leveraged position, together with other operational and market factors, have placed significant strain on the syncreon Group's liquidity and has caused concern among certain of its key customers and suppliers.

[5] To address these liquidity concerns, the Scheme Companies commenced scheme of arrangement proceedings ("Scheme Proceedings") before the High Court of Justice of England and Wales ("English Court") under Part 26 of the UK *Companies Act 2006* c. 46 ("*Companies Act*").

[6] The application material before me includes the affidavit of Andrew J. Wilkinson ("Wilkinson Affidavit"), a solicitor licensed to practice in England and Wales. The Wilkinson Affidavit addresses schemes of arrangement under the *Companies Act* generally and explains that Part 26 of the *Companies Act* permits a company to propose a scheme of arrangement to its creditors, which, if approved by the requisite majority, imposes a compromise upon all of its creditors including a restructuring of the company's liabilities.

[7] The syncreon Group is proposing schemes of arrangement in the Scheme Proceedings which, if accepted by its creditors and sanctioned by the English Court, will significantly reduce the groups' overall funded debt, restructure its balance sheet and address its liquidity issues. The proposed schemes of arrangement also provide for releases in favour of certain syncreon Group entities, which are not themselves Scheme Companies, including syncreon Canada Inc. ("syncreon Canada").

[8] The applicant sought an order, among other things, recognizing the English Proceedings as "foreign non-main proceedings" as defined in s. 45 of the *CCAA*.

[9] I granted the order for the following reasons.

FACTS

[10] syncreon B.V., is a private limited liability company incorporated pursuant to the laws of the Netherlands, with its head office in Tilburg, the Netherlands. Primary management and

corporate finance functions for syncreon B.V. are performed in the USA at Auburn Hills, Michigan.

[11] syncreon UK, is a private company incorporated pursuant to the laws of England and Wales, with its head office in Leicertershire, England.

[12] The syncreon Group operates in Canada through syncreon Canada which has its head office in Brampton, Ontario. It has approximately 500 employees in Canada.

[13] syncreon Canada has provided a guarantee of certain of syncreon B.V.'s obligations. This guarantee is to be released under the proposed schemes of arrangement. syncreon Canada has not guaranteed any of syncreon UK's obligations.

[14] On July 25, 2019, the English Court ordered the convening of meetings with the Scheme Companies' creditors for the purpose of considering and voting on the proposed schemes of arrangement ("Convening Order").

[15] In the Convening Order, the English Court declared that Carine Van Landschoot had been validly appointed by the Scheme Companies as their foreign representative to request the relief sought in this application.

[16] The applicant seeks an order that provides as follows:

> (a) Declaring that the Foreign Representative is a "foreign representative" for the purpose of these recognition proceedings;
>
> (b) Recognizing the Scheme Proceedings as "foreign non-main proceedings" as defined in s. 45 of the *CCAA*;
>
> (c) Recognizing and giving effect to the Convening Order;
>
> (d) Appointing PricewaterhouseCoopers Inc. as information officer ("Information Officer") in respect of these recognition proceedings; and
>
> (e) Dispensing with the publication of notice of these proceedings under s. 53(b) of the *CCAA*.

[17] This application is the first step in a proposed two-step process. The purpose of this first step is to establish a forum to which the Foreign Representative may return to seek further relief. If the English Court makes an order sanctioning the proposed schemes of arrangement, the Foreign Representative intends to seek an order from this court recognizing and giving full force and effect to the English Court's order in Canada.

[18] The Scheme Companies have also commenced proceedings in the United States seeking recognition of the English Proceedings in the United States Bankruptcy Court for the District of Delaware ("U.S. Court"). A hearing to recognize the English Proceedings was scheduled in the U.S. Court for September 17, 2019.

ISSUES

[19] I must decide the following issues:

(a) Is the Foreign Representative a "foreign representative" as defined in s. 45 of the *CCAA*?

(b) Should the English Proceedings be recognized as "foreign non-main proceedings"?

(c) Should the Convening Order be recognized and given effect?

(d) Should the Information Officer be appointed?

(e) Should the court dispense with the requirement under s. 53(b) of the *CCAA* to publish notice of these recognition proceedings in one or more Canadian newspapers?

(f) Is a cross-border protocol that complies with the Judicial Insolvency Network guidelines ("JIN Guidelines") necessary in this case?

LAW

Appointment of the Foreign Representative

[20] The evidence establishes that the board of directors of each of the Scheme Companies appointed the Foreign Representative to act as their representative in respect of the Scheme Proceedings and these recognition proceedings.

[21] In the Convening Order, the English Court declared that the Foreign Representative had been validly appointed.

[22] Accordingly, I find that the Foreign Representative meets the definition of a "foreign representative" under s. 45 of the *CCAA*.

Recognition of the English Proceedings

[23] No Canadian court has previously considered whether proceedings under Part 26 of the *Companies Act* constitute "foreign proceedings" under Part IV of the *CCAA*.

[24] Section 47(1) of the *CCAA* requires that the court make an order recognizing a foreign proceeding if it is satisfied that the application relates to a foreign proceeding; and that the applicant is a foreign representative. Having found that the applicant is a "foreign representative"

for purposes of Part IV of the *CCAA* I must determine if the Scheme Proceedings are foreign proceedings under the *CCAA*..

[25] A "foreign proceeding" is defined in s. 45(1) of the *CCAA* as:

> A judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

[26] I am satisfied, based upon the evidence before me, that the Scheme Proceedings are judicial proceedings in a jurisdiction outside Canada and that they deal with creditors' collective interests generally. The Wilkinson Affidavit establishes that the scheme of arrangement provisions of the *Companies Act* permit companies to impose a compromise upon their creditors and are often used to affect a restructuring and a corresponding compromise of their liabilities.

[27] I am also satisfied that the Scheme Companies meet the definition of a "debtor company" under s. 2 of the *CCAA*. Under this section, a "debtor company" includes any "company" that is "insolvent". A "company" includes any incorporated company having assets in Canada. The Scheme Companies are incorporated pursuant to the laws of the Netherlands and the United Kingdom. The evidence establishes that the Scheme Companies have assets in Canada in the form of funds being held on retainer by their legal counsel. Funds provided to counsel on retainer in any amount satisfies the requirement of "having assets in Canada". (see: *Re Global Light Telecommunications Inc.*, 2004 BCSC 745 at para 17; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17, 52 A.C.W.S. (3d) 1034 at para 13).

[28] The evidence establishes that the Scheme Companies are insolvent, as that term was interpreted in *Re Stelco Inc.* (2004), 129 A.C.W.S. (3d) 1065. In *Re Stelco*, Farley, J. found that "insolvency," as used in the *CCAA*, includes a company "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring."

[29] I am satisfied that the Scheme Companies meet this criterion.

[30] I accept the applicant's submissions that schemes of arrangement under the Companies Act have a statutory nexus to insolvency legislation, as they are only available to companies which are liable to be wound-up under the *English Insolvency Act 1986* c. 45.

[31] I am therefore satisfied that the Scheme Proceedings are sufficiently "related to bankruptcy or insolvency" to constitute "foreign proceedings" as defined in s. 45 of the *CCAA*.

The Scheme Proceedings are "Foreign Non-Main Proceedings"

[32] I have concluded that the Scheme Proceedings should be recognized as "foreign non-main proceedings".

[33] Section 45(1) of the *CCAA* defines "foreign main proceeding" as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests ("COMI"). A "foreign non-main proceeding" is defined as a foreign proceeding, other than a foreign main proceeding.

[34] For purposes of these proceedings, I accept that the key Scheme Company is syncreon B.V., which is the issuer and borrower of the Scheme Debt in respect of which syncreon Canada has provided a guarantee.

[35] While syncreon UK has its COMI in the United Kingdom, it is merely another guarantor of certain of the Scheme Debt and syncreon Canada has not guaranteed any of its obligations. It is, therefore, not the primary Scheme Company for the purpose of these recognition proceedings.

[36] Because the key Scheme Company, syncreon B.V., does not have its COMI in the UK, I am prepared to recognize the Scheme Proceedings as foreign non-main proceedings.

Recognition of the Convening Order

[37] Under s. 49 of the *CCAA*, on application of the Foreign Representative, the court make any order it considers appropriate for the protection of the debtor company's property or the interests of its creditors.

[38] The Foreign Representative requests that I recognize the Convening Order. I am satisfied that the recognition of the Convening Order, which establishes the date for the meeting of the Scheme Companies' creditors and declares that the Foreign Representative was duly appointed, is appropriate.

[39] Recognition of the Convening Order is consistent with the spirit and purpose of Part IV of the *CCAA*, which includes the promotion of cooperation between courts and other competent authorities in Canada with those of foreign jurisdictions, and the fair and efficient administration of cross-border insolvencies.

Appointment of the Information Officer

[40] The Foreign Representative proposes that PricewaterhouseCoopers Inc. act as Information Officer in these recognition proceedings. I am satisfied that PricewaterhouseCoopers Inc. is qualified to act as Information Officer.

[41] I have concluded that an Information Officer will assist in disseminating information to this court and to interested parties about these proceedings and the UK and US proceedings.

[42] The court will also benefit from the independent views of the Information Officer on the relief being sought in these recognition proceedings. The appointment of the proposed Information Officer is therefore approved.

Dispensing with Notice Requirements Under Section 53(b) of the CCAA

[43] Section 53(b) of the *CCAA* requires that, upon recognition of foreign proceedings, the Foreign Representative must publish a notice containing certain prescribed information in one or more newspapers in Canada unless otherwise directed by the Court.

[44] The Foreign Representative sought an order dispensing with this publication requirement.

[45] In the circumstances of this case, I am satisfied that affected stakeholders have been provided with ample notice of and information about the Scheme Proceedings and these recognition proceedings and requiring compliance with s. 53(b) of the *CCAA* would serve no valuable purpose and would result in unnecessary costs. Compliance with this section is therefore dispensed with.

Approval of a Cross-Border Protocol is Unnecessary in this Case

[46] In most cross-border insolvency proceedings the adoption of a protocol for court to court communication and cooperation at the outset of the proceedings is warranted. As described by Regional Senior Justice Morawetz (as he then was) in *Re Payless ShoeSource Canada Inc.*, 2019 ONSC 1215, the Commercial List Users' Committee of the Ontario Superior Court of Justice (Commercial List) has adopted the JIN Guidelines as the appropriate guidelines to govern communication and cooperation between courts in cross-border insolvencies and they have been adopted by this court in a number of cases.

[47] However, on the specific facts of this case, adoption of the JIN Guidelines is not necessary. It is not anticipated that court to court communication and cooperation will be required as there will likely only be one more hearing before the English Court for a sanction order, which, if granted, will only require one further hearing before this court and the US court for a recognition order.

[48] I granted the Initial Recognition Order for these reasons.

Hainey, J.

Date: October 9, 2019

TAB 24

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	S. Richard Orzy, Derek J. Bell and Sean H. Zweig, for the Applicants
	)	
	)	Robert J. Chadwick and Logan Willis, for Duff & Phelps Canada Restructuring Inc., the proposed Monitor
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.	)	
	)	Joseph Bellissimo, for Renvest Mercantile Bankcorp Inc.
	)	
	)	
	)	
	)	
	)	
	)	**HEARD:** August 23, 2013

NEWBOULD J.

[1] The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

Tamerlane business

[2] At the time of the application, Tamerlane Ventures Inc. (“Tamerlane”) was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. (“Tamerlane Pine Point”), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

[3] The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

[4] The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

[5] The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

[6] The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

[7] As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of $24,814,433. The assets included consolidated current assets of $2,007,406, and consolidated non-current assets with a net book value of $22,807,027. Non-current assets included primarily the investment in the Pine Point property of $20,729,551 and the Los Pinos property of $1,314,936.

[8] Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of $12 to $15 million using a 0.3% copper cut-off grade, or $17 to $21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of $30 to $56 million based on market comparables, with a value as high as $229 million considering precedent transactions.

Secured and unsecured debt

[9] Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. (“Global Resource Fund” or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD $10,000,000 . The secured indebtedness under the credit agreement is

guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

[10] The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

[11] The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD $850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

[12] Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

[13] It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for $1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

[14] As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

[15] Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a $1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was $11,631,948.90.

[16] On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

[17] On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was $12,100,254.26.

[18] Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

[19] There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the

proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

[20] The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

[21] Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc*. (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.),* 2012 ONSC 3767, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 and *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

[22] Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

[23] The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of $300,000, a financial advisor charge of

$300,000, a directors' charge of $45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

[24] The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

[25] The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net $1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

[26] Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

[27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

[28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

[29] Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

[30] Section 11 of the CCAA authorizes a court to make any order “that it considers appropriate in the circumstances.” In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379:

> 70. …Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

> 71. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

[32] The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

[33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd*. (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to

any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

[34] What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Newbould J.

Released: August 28, 2013

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

REASONS FOR JUDGMENT

Newbould J.

Released: August 28, 2013

TAB 25

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, Melaney Wagner, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4th) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB 26

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107

Date: 20160126
Docket: S1510120
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as Amended

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended

And

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Marc Wasserman Mary I.A. Buttery Tijana Gavric Joshua Hurwitz
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	John Sandrelli Tevia Jeffries
Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.:	Matthew Nied
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	Aaron Welch
Counsel for Morgan Stanley Senior Funding, Inc.:	Kathryn Esaw

Counsel for KPMG Inc., Monitor:	Peter Reardon Wael Rostom Caitlin Fell
Counsel for Canada Revenue Agency:	Neva Beckie
Counsel for the United States Steel Workers, Local 1-424:	Stephanie Drake
Place and Date of Hearing and Ruling given to Parties with Written Reasons to Follow:	Vancouver, B.C. January 5, 2016
Place and Date of Written Reasons:	Vancouver, B.C. January 26, 2016

Introduction and Background

[1] On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

[2] The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

[3] The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd. (Re)* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.); *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 21.

[4] The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of $16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

[5] From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter

Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

[6] The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately $22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of $11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

[7] This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

[8] As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

[9] The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation

process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

[10] For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

[11] The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

[12] Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

[13] The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

[20] Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[21] Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

[22] In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

[23] The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobilicity Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

[35] The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., 2007 SKQB 121 at para. 19.

[36] The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

[37] PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

[38] At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In

addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

[39] To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

[40] The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
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> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[41] In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

[42] In *Canwest Publishing Inc.*, 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining

whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

[43] I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

[44] The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

[45] Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept

the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

[46] The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

[47] Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

[48] In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

[49] The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

[50] The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

[51] I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at

para. 53; *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516 at para. 6. A sealing order was granted on January 5, 2016.

[52] The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

[53] The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

[54] The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

> The combination of the salary increase and proposed retention bonus … were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

[55] I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

[56] The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

[57] As noted by the court in *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[59] I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume

that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

[60] In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at

the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

[61] What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

[62] Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

[63] On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately $22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

[64] The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

[65] Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

[66] No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

[67] In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

Stay Extension

[68] In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

[69] Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

[70] As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

[71] Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

[72] The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code,* R.S.B.C. 1996, c. 224 (the "*Code*"). The Board ordered Wolverine LP to pay $771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

[73] The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961. There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

> [26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:
>
> a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
>
> b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
>
> c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;
>
> d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;
>
> e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and
>
> f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

[74] I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will

inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the $771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

[75] In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring

efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

[76] In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

[77] Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

"Fitzpatrick J."