

**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  
ARRANGEMENT OF FORME DEVELOPMENT GROUP INC.  
AND THE OTHER COMPANIES LISTED ON SCHEDULE "A"  
HERETO (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

**BRIEF OF AUTHORITIES  
OF THE APPLICANTS  
(Initial Application)**

November 6, 2018

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Fax: 416-597-6477

**Mario Forte (LSUC#: 27293F)**  
Tel: 416.597.6477  
Email: [forte@gsnh.com](mailto:forte@gsnh.com)

**Jennifer Stam (LSUC#: 46735J)**  
Tel: 416.597.5017  
Email: [stam@gsnh.com](mailto:stam@gsnh.com)

Lawyers for the Applicants

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# TAB 1

2004 CarswellOnt 1211  
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Stelco Inc., Re

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

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

Farley J.

Heard: March 5, 2004  
Judgment: March 22, 2004  
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants  
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers  
of America

Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America

Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych for Informal Committee of Stelco Bondholders

David R. Byers for CIT

Kevin McElcheran for GE

Murray Gold, 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.

Subject: Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

## XIX Companies' Creditors Arrangement Act

### XIX.1 General principles

#### XIX.1.b Qualifying company

#### Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further outside funding — S Inc. had negative equity of \$647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

#### Table of Authorities

##### Cases considered by *Farley J.*:

*A Debtor (No. 64 of 1992), Re* (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) — considered  
*Anvil Range Mining Corp., Re* (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

*Bank of Montreal v. I.M. Krisp Foods Ltd.* (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) — considered

*Barsi v. Farcas* (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) — referred to

*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

*Challmie, Re* (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) — considered

*Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) — considered

*Consolidated Seed Exports Ltd., Re* (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) — considered

*Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

*Davidson v. Douglas* (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) — considered

*Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) — referred to

*Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) — considered

*Gagnier, Re* (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) — considered

*Gardner v. Newton* (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

*Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

*Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bkcty.) — considered

*King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

*Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) — considered

*Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 101 Nfld. & P.E.I.R. 73, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) — referred to

*MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bkcty.) — considered

*New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — referred to

*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

*Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) — considered

*Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.*) 180 O.A.C. 158 (Ont. C.A.) — considered

*Optical Recording Laboratories Inc., Re* (1990), 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, (sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.*) 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) — referred to

*Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (C.S. Que.) — referred to

*PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) — considered

*PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) — referred to

*R. v. Proulx* (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

*Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — considered

*Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) — considered

*TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) — referred to

*Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) — referred to

*Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) — referred to

*633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) — considered

#### **Statutes considered:**

*Bankruptcy Act*, R.S.C. 1970, c. B-3

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*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

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s. 2(1) "insolvent person" — referred to

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s. 2(1) "insolvent person" (c) — considered

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s. 121(1) — referred to

s. 121(2) — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

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- s. 2 "debtor company" — referred to
- s. 2 "debtor company" (a) — considered
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- s. 12 — referred to
- s. 12(1) "claim" — referred to

*Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11

Generally — referred to

**Words and phrases considered:**

**debtor company**

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (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.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

**Farley J.:**

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 *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bkcty.) 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 *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bkcty.) 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 *TDM Software Systems Inc., Re* (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 *Inducon Development Corp., Re* (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 throee.

14 It seems to me that the phrase "death throee" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), 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) 289 (Ont. 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. [Commercial List]) 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 *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) 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 *Anvil Range Mining Corp., Re* (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-Pepler 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 Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) 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 [(1993), 49 C.P.R. (3d) ix (S.C.C.)] 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 *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (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 (S.C.C.) 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 *King Petroleum Ltd., Re* (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 Petroleum Ltd.* 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 pre-filing 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 *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) 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 Range Mining Corp.*, *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 (Ont. 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 Petroleum Ltd.* 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 stay 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 Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) 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 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. 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 (Ont. Ch.) 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 (Ont. C.P.) 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 (Sask. 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, 3<sup>rd</sup> 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 garnished. (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 its text *Creditor-Debtor Law in Canada*, 2<sup>nd</sup> ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) 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 Ontario 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 Petroleum Ltd.*, *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 *Gardner 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 *A Debtor (No. 64 of 1992)*, Re, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) 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 *Gagnier, Re* (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 Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (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 Foods Inc. (Trustee of)*, 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 Management Inc.*, *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 Natural Foods Ltd.* 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 Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, 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 10<sup>th</sup> 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 Exports Ltd.* 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 capitalized 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.

*Motion dismissed.*

## **APPENDIX**



2004 CarswellOnt 2936  
Ontario Court of Appeal

Stelco Inc., Re

2004 CarswellOnt 2936, [2004] O.J. No. 1903

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, As Amended**

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect  
to Stelco Inc. and the other Applicants Listed on Schedule "A" Application under  
the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

Doherty J.A., Laskin J.A., Moldaver J.A.

Judgment: May 5, 2004

Docket: CA M31129

Counsel: David P. Jacobs, for Moving Party  
Michael E. Barrack, for Responding Party

Subject: Insolvency; Civil Practice and Procedure

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.1](#) General principles

[XIX.1.b](#) Qualifying company

**Headnote**

Bankruptcy and insolvency

**Per Curiam:**

1 Leave to appeal refused. Costs to the respondents Stelco in the amount by \$2,000 and to the "primary lender" in the amount of \$1000.

2004 CarswellOnt 5200  
Supreme Court of Canada

Stelco Inc., Re

2004 CarswellOnt 5200, 2004 CarswellOnt 5201,  
[2004] S.C.C.A. No. 336, 338 N.R. 196 (note)

**Local Union No. 1005 United Steelworkers of America,  
Local Union No. 5328 United Steelworkers of America,  
Local Union No. 8782 United Steelworkers of America v.  
Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire  
Ltd., and Welland Pipe Ltd. (collectively "STELCO"), CIT  
Business Credit Canada Inc., GE Commercial Finance,  
Fleet Capital Canada (collectively the "Senior Lenders")**

Binnie J., Charron J., McLachlin C.J.C.

Judgment: December 9, 2004

Docket: 30447

[Proceedings: Leave to appeal refused, 2004 CarswellOnt 2936](#) (Ont. C.A.); Leave to appeal refused, 48 [C.B.R. \(4th\) 299, 2004 CarswellOnt 1211](#) (Ont. S.C.J. [Commercial List])

Counsel: None given

Subject: Insolvency; Civil Practice and Procedure

**Headnote**

Bankruptcy and insolvency

**Per Curiam:**

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number M31129, dated May 5, 2004, is dismissed with costs.

# TAB 2



SUPERIOR COURT OF JUSTICE  
COUR SUPÉRIEURE DE JUSTICE

Commercial List Office

Telephone: (416) 327-5043 Fax: (416) 327-6228

FAX COVER SHEET

Date: Dec 15  
2016

TO: MR. EDWARD  
LOVETT

FAX NO.:  
(416) 365-1876

FROM: Commercial List Office

TOTAL PAGES (INCLUDING COVER PAGE):

MESSAGE: 14 pages including cover

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Original will NOT follow. If you do not receive all pages, please telephone us immediately at the above number.

Court File Number: CV-16-1162-002L

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

CCAA

Re Textbook (525 Princess Street) Inc.

Plaintiff(s)

AND

et al.

Defendant(s)

Case Management  Yes  No by Judge: \_\_\_\_\_

Counsel	Telephone No:	Facsimile No:

- Order  Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: \_\_\_\_\_
- Time Table approved (as follows): \_\_\_\_\_

As time is of the essence, I have chosen to issue my decision in this brief handwritten endorsement which focuses on the critical issue raised in opposition to the Application.

This is an application for an initial order under <sup>the</sup> CCAA.

The Applicants are single purpose real estate developers. The projects involve housing for students and the like. The applicants have no employees. They have no ongoing or active business.

December 15, 2016  
Date

Perry J.  
Judge's Signature

Additional Pages 13

Court File Number: \_\_\_\_\_

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

Although, in some cases, substantial preparatory costs (zoning, planning ~~at~~ and the like) beyond the acquisition value of the land have been incurred, none of the applicants have projects that are actually under construction. There are nine properties in all.

In October, the Superintendent of Financial Institutions, became concerned with the manner in which funds for these projects ~~was~~ being raised and administered.

About 1600 "investors" advanced various sums (minimum \$25,000) to finance the land acquisition and soft costs.

In respect of the six properties which represent ~~the~~ <sup>the</sup> focal point of this application (because it is vigorously opposed by first mortgagees) the syndicated mortgage investors have

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Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

Judges Endorsment Continued

advanced about \$65 M. ~~\_\_\_\_\_~~

The Superintendent took the view that the so called Trustee Corporations, holding and administering the SMI funds were unlicensed mortgage lenders such that their activities were illegal. They were also in conflict of interest.

A Trustee of these companies (one for each project) was appointed by order of Newbould J. on October 27, 2016.

A member of the Developer Corporation (applicant) in this Application sought a stay of the Newbould J. order. That motion was dismissed on November 14, 2016 by the Div. Ct.

The Applicants, supported by the Trustee, seek an initial order under the CCAA. They seek time, and a first charge over financing necessary, to

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Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

conduct an analysis of the nine projects to determine what the best course of action is - sell, develop, or something else.

It should be noted that the mandate of the Trustee is the protection of the 1600 SMLs who have in excess of \$65M invested in these projects.

Given the history of this matter and questions raised about the bona fides of the developers, John Davis and others, the proposed initial order would grant extraordinary powers to the Monitor. The Applicants, and their officers and directors would simply provide information and their expenses to date to the Monitor. The Monitor would effectively run everything.



Court File Number: \_\_\_\_\_

Superior Court of Justice  
Commercial List

**FILE/DIRECTION/ORDER**

Judges Endorsement Continued

As noted, six of the Applicants granted first mortgages over the land in their project. In all cases, the SMLs are in second position.

Vector Financial has a \$5.7 M first mortgage.

2377358 Ontario has a \$3.5 M first mortgage.

2174217 Ontario has three first mortgages of about \$3.5 M in total.

First Capital has a \$2.35 M first mortgage.

While the First Mortgages have many complaints about the Application, their critical issue is with the super-priority charges that are sought.

The Applicants seek an Administration Charge of \$500,000 to secure the fees of the Monitor and its counsel,

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Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

Judges Endorsment Continued

as well as The Trustee and its counsel.

The Applicants seek a Directors Charge of \$100,000 to protect Mr. Davie, and others.

The Applicants seek a DIP Lenders Charge up to a maximum of \$6.75M (The forecast initial advances are about \$1.4 M for the first 30 days).

All of these charges would "prime" the First Mortgage loans.

The Applicants also seek a stay. At least one of the Mortgage ~~loans~~ is in default, having come to maturity in October 2016. It has not been, nor is it contemplated in the foreseeable future that it will be, paid or assumed by

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Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

The DIP Lender.

First Capital's mortgage it is contemplated will be taken out by The DIP Lender.

The DIP Lender is prepared to take out this particular mortgage because there is a reasonable prospect that it will be able to re finance promptly with construction financing due to the particular stage of development of the property involved with The First Capital mortgage.

None of the other projects are in a like position. There is no prospect of immediate re financing for any of the other projects.

Most of the DIP funds will be used to conduct the analysis of the projects to see how best to maximize

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Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

value for the SMLs. It is common ground that the DIP funding offers no real benefit to the First Mortgages at all.

The First Mortgages argue that they ought not to be forced to bear the risk that there will be a shortfall due to the accumulation of the requested charges. That is not what they bargained for. To the contrary, they advanced funds on the strength of their primary secured position.

The First Mortgages therefore argue that they will be "paying" for the professional analysis meant only to benefit the SMLs, in the end.

The Applicants and Trustee argue that the First Mortgages are well secured. Under no circumstances, they say, will the First Mortgages be prejudiced.

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Superior Court of Justice  
Commercial List

**FILE/DIRECTION/ORDER**

**Judges Endorsment Continued**

The factors to be considered in whether to grant super priority charges vary to some extent with the particular charge in issue.

S. 11.2(4) of the CCAA, for example, sets out a number of factors to be considered in respect of DIP financing and whether to grant a super priority.

The period of time during which the debtor company will be subject to proceedings, whether the company's management has the confidence of the major creditors, the nature and value of the company's property and whether any creditor would be materially prejudiced are all relevant considerations.

~~with the DIP financing~~

~~with the DIP financing~~

Court File Number: \_\_\_\_\_

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

Judges Endorsment Continued

~~\_\_\_\_\_~~

I am not prepared to authorize a  
super priority for the sought after  
charges, including the DIP lender.

The initial investigation, analysis and  
report on the various projects to the  
court ( hoped to take place by mid-February )  
is only the beginning. Assuming some  
of the projects, or all of them, are to  
be pursued in hopes of increasing  
realization (eventually) for the SMEs, there  
will still have to be more time to bring  
the projects to a construction-ready  
state and try to find, negotiate and  
close construction finance loans.

The First Mortgages would, in these  
circumstances be held hostage, on  
the current model, until some time

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Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

as take out financing can be found.

There is good reason to be suspicious of the appraisals brought forward by Mr. Davies. They are heavily qualified.

There has been because they were filed at the 11th hour, no opportunity to respond or cross examine on them.

~~The~~ The Trustee's Second Report of November 28, 2016, recounts the Superintendent's concern "That the appraisal value provided to the investors did not reflect the value of the real property, such that the true values may be inadequate to cover the respective SMLs." That parenthetically appears to ~~be~~ have been proven true.

That report also makes address serious criticism of Mr. Davies and his timeliness and forthrightness in

Court File Number: \_\_\_\_\_

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

The production of information.

I do not think the appraisal evidence is an adequate answer to the First Mortgagee's concerns.

If there is no question that adequate value is there, the DIP Lender, Monitor, Directors and Trustee would presumably not be insisting on a Superpriority charge.

For an exercise that is quite explicitly designed to benefit only the SMs (for whom I have great sympathy), it is, in my view, unreasonable to expect the First Mortgagee to take all the risk.

If the SMs were being pursued by the Charges, that would make sense because they are the ones benefitting. The DIP Lender, apparently, will not advance funds on that basis, however.



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Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

Although I have misgivings about whether protection under the CCAA is the appropriate avenue in this case (see Cliffover Maple 2008 BCCA 327; Rompage Investment 2014 ONSC 2781) had the Applicants been able to propose a means of financing the next steps without impairing the security of the First mortgages (and honoring maturities and monthly servicing costs) I might have been inclined to entertain the proposal.

In the circumstances, however, the application for a super priority charge for Administration costs, Directors indemnity costs and DIP Lending is dismissed.

Given the critical nature of the DIP financing and the changes sought to the application for an initial order, the application as structured is dismissed.

# TAB 3

**CITATION:** Hush Homes Inc. (Re), 2015 ONSC 370  
**COURT FILE NO.:** CV-14-10800-00CL  
**DATE:** 20150119

**SUPERIOR COURT OF JUSTICE - ONTARIO**

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  
OF HUSH HOMES INC., HUSH INC., 2122763 ONTARIO INC. and 2142301 ONTARIO  
INC.

**BEFORE:** Penny J.

**COUNSEL:** *Kyla Mahar and Asim Iqbal* for the Applicants

*Kyle Peterson* for MarshallZehr

*Robin Dodokin and David Fenig* for Diversified Capital Inc.

*Sanja Sopic* for VS Capital

*Brian Empey* for CVC Ardellini Investments

*G. Benchentrif* for the proposed Monitor

*Leonard Loewith* for the City of Mississauga

**HEARD:** January 15, 2015

**ENDORSEMENT**

[1] This is an application for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The application seeks an order:

- (a) appointing the Fuller Landau group as Monitor of the applicants in these proceedings;
- (b) staying all proceedings and remedies in respect of the applicants or any of their property, except as otherwise prescribed;

- (c) authorizing the applicants to enter into a debtor in possession credit facility of up to \$3 million and granting a DIP lender's charge over the applicants' assets;
- (d) granting an administrative charge and directors' charge over the applicants' assets; and
- (e) authorizing the applicants to prepare a plan of compromise and arrangement for the consideration of the creditors of the applicants.

[2] Each of the applicants is an Ontario incorporated company. Each is wholly owned and controlled by Naheel Suleman.

[3] Each of the applicants, except Hush Inc., which is a bare trustee, owns a residential development project in Mississauga or Oakville. I shall, where necessary, collectively refer to all three of these developments as the Projects.

[4] Each of Hush Homes Inc., 2122763 Ontario Inc. (Thornyco) and 2142301 Ontario Inc. (Silverthornco) has liabilities in excess of \$5 million, with total liabilities of \$64.9 million, including \$46.9 million of current mortgage debt against the projects. The liabilities of each of these applicants exceed the realizable value of their assets, worth approximately \$25.2 million in the aggregate on an "as is" liquidation basis and they are each unable to meet their liabilities as they become due.

[5] Hush Homes is the owner of the Coronation project in Oakville. It is a 14 lot housing development, partially developed. Some homes have been sold, others are in development and awaiting sale. The applicants' evidence is that this project can be completed within 12 months. Hush Homes has liabilities of approximately \$38.7 million.

[6] Silverthornco owns a 13 lot housing development in Mississauga. It is partially developed. The applicants' evidence is that this project can also be completed within approximately 12 months. Silverthornco has liabilities of approximately \$13.6 million.

[7] Thornyco owns a third property in Mississauga. The original proposal was for the development of a high rise condominium and townhouses. It is raw land, not yet even zoned for the proposed housing uses. The applicants say they have downsized this project to a 45 lot housing development. At best, however, it will still take 2 to 3 years to develop this project. Thornyco has liabilities of approximately \$12.3 million.

[8] Hush Inc. is a bare trustee with no assets but has liabilities owing to the landlord of the head offices of the Hush organization and is unable to meet its obligations as they become due.

[9] All of the mortgages secured against the Projects are currently in default and numerous creditors have initiated enforcement steps in respect of the applicants. In addition to several pending claims and enforcement actions, the landlord of the Hush group's offices has taken legal action and issued a distress warrant. The applicants say that, absent the protection of the court

afforded under the CCAA, it will be impossible for the applicants to proceed with any form of restructuring for the benefit of their creditors.

[10] I am satisfied that the preconditions for the exercise of the court's jurisdiction under s. 3 of the CCAA are met. The applicants are each a "debtor company" as defined in s. 2. They are affiliated companies and all but the bare trustee have claims against them in excess of \$5 million.

***Thornyco – Receivership or CCAA?***

[11] The only contentious issue on the return of the application for the initial order is whether the Thornyco project should be carved out of the CCAA proceedings and subject to disposition by a receiver whose appointment by the court is sought by the first mortgagee of the Thornyco property, Diversified Capital Inc.

[12] Since the applicants have said that they will not proceed with the application under the CCAA without the Thornyco project, I will deal with that issue first, and return to other aspects of the application once the threshold Thornyco issue is resolved.

[13] Diversified has four mortgages on the Thornyco property:

- (i) a first mortgage and the principal amount of \$6,950,000
- (ii) a second mortgage in the face amount of \$1,500,000
- (iii) third mortgage in the face amount of \$2 million; and
- (iv) a sixth mortgage in the face amount of \$2,532,000.

[14] The evidence does not permit the determination of the total amount actually secured under Diversified's mortgages because some of the mortgages are said to be restricted to collateral security for possible deficiencies on the realization of mortgage amounts owing on other properties. A full accounting of realization on these other properties was not before the Court.

[15] According to Diversified, however, \$9,078,675.35, as of December 1, 2014, is secured under its first mortgage. This quantification of the amount of the first mortgage is in dispute, which will be discussed below.

[16] Diversified's first mortgage has been in default for over a year and a half. A notice of sale was issued by Diversified in May 2013. Diversified recently entered into an agreement of purchase and sale with an arm's length third party to sell the Thornyco property under power of sale for \$9.3 million. Diversified's evidence is that after paying arrears of taxes, this price would result in a modest shortfall in the recovery of Diversified's first mortgage debt (and, obviously, no recovery under any subsequent mortgages).

[17] At the initial return of this application (which was adjourned to permit the parties to discuss the matter) Diversified sought to have the Thornyco property carved out of the CCAA proceedings and to be permitted to carry on with its power sale.

[18] By the time of the return of the application, however, a good deal of additional evidence had been filed dealing with the nature and amount of Diversified's mortgages, the validity of the notice of sale and the validity of Diversified's purported exercise of its power of sale.

[19] Both the notice of sale and the process followed by Diversified in the power of sale are under attack in these proceedings. Recognizing the potential for risky litigation over various issues relating to the notice of sale, the validity of the sale process and possible claims for improvident realization, Diversified, during oral argument of the application, abandoned its initial proposal to proceed with the power of sale and now wishes to proceed by way of court appointed receiver to sell the Thornyco property. At the time of oral argument, there was no notice of application for that appointment before the court but Diversified has now served an application record for the purpose of seeking the appointment of a receiver to market and sell the Thornyco property.

[20] Both an order appointing a receiver and an initial order under the CCAA are highly discretionary in nature, requiring the court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented, *Romspen Investment Corp. v. 6711162 Canada Inc.* 2014 CarswellOnt 5836 (S.C.J.) at para. 61.

[21] In the case of land development companies, some courts have identified several factors which might influence a decision about whether to grant an initial order under the CCAA. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, [2008] CarswellBC 1758 for example, the B.C.C.A. said that 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 exercising 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 etc.

[22] In *Encore Developments Ltd. v. Patton Construction (2002) Ltd.*, 2009 CarswellBC 84, D. Brenner C.J.S.C. found, in a case where the "project" was raw land, there was no project development work in progress, no business activity being carried out, no equity in the project and likely a substantial shortfall to secured lenders, that there was no principled basis for putting in place or maintaining a stay that would prevent the real estate lenders from enforcing their security in the conventional manner should they choose to do so.

[23] It is nevertheless clear, as D. Brown J. found in *Romspen, supra*, that there is no "generic" prohibition against a land development business being subject to a CCAA process. Both the receivership and CCAA processes are highly discretionary and require the court to

consider and balance competing interests of various economic stakeholders in coming to a conclusion about which remedial process is more appropriate.

[24] Diversified argues that real estate development projects are not well suited to CCAA proceedings. This is especially so when raw land is involved as is the case with the Thornyco project. There are few employees, no active business and there is no immediate prospect of an improved return without the expenditure of very significant additional money and after taking on the risk of a long-term development. The “build-out” of the Thornyco property, Diversified submits, is in reality a risky long-term real estate play that will take at least two to three years to come to fruition.

[25] If the applicants’ proposal was that Diversified would have to sit on its hands for two to three years with its capital tied up while the applicant and its new financial backer undertake the Thornyco development in the hope that there would be a sufficient return after payment of contractors, trades, taxes, super-priorities and the like to pay back the full amount of what is owed, I would entirely agree with Diversified’s position. Such a proposal would be doomed to fail as unfair and prejudicial to Diversified. That, however, is not the proposal being made by the applicants in this case.

[26] MarshallZehr Group Inc. is the first secured creditor on the Coronation and Silverthornco projects. In preparation for these proceedings, the applicants negotiated a restructuring agreement with MarshallZehr which provides the framework for what the applicants and MarshallZehr hope will be a viable CCAA plan for the applicants to put forward to their creditors.

[27] If implemented, the applicants (and MarshallZehr) maintain that the restructuring agreement will provide the financial and other means to enable the applicants to avoid an “as is” liquidation and proceed with an orderly “build-out” of the Projects with a view to maximizing value for the benefit of all the applicants’ creditors. They estimate that an incremental \$10 million can be generated for creditors under this scenario.

[28] MarshallZehr has agreed to provide the applicants with a DIP loan facility in the amount of \$3 million subject to obtaining a DIP lenders charge in priority to other security interests.

[29] Importantly, however, the DIP lender’s charge along with the other charges sought to be given a super-priority secured against the applicants’ assets, will be secured on a Project-specific basis, based, in the case of the DIP financing at least, on where the funds, or the benefits of the expenditure of the funds, go. The restructuring agreement governing the DIP financing provides that:

each of the Thorny, Silverthorn and Coronation property shall be security for amounts advanced, including interest accrued and accruing thereon, on account of professional fees, developer’s working capital, financing fees and closing costs *in such manner and to such extent as is recommended by the Monitor and approved and allocated by the Court.* [emphasis added]

[30] The vast majority of the DIP financing is forecast to be spent on the Coronation and Silverthornco projects, not the Thornyco project. Further, the applicants agreed during oral argument that the amount of DIP financing secured against the Thornyco property would be capped at \$500,000 in any event.

[31] Even more importantly, MarshallZehr also proposes to pay out Diversified's first mortgage in full (in an amount determined by the Court) and assume the first mortgagee position on Thornyco. The proposal is that a claims process will be established promptly which will be used to determine the amount properly secured under Diversified's first mortgage. MarshallZehr has undertaken to the Court that it will pay whatever amount is found to be owed under Diversified's first mortgage.

[32] Thus, if Diversified is right that it is owed \$9,078,675.35 on its first mortgage (plus additional accrued interest since December 1, 2014), it would be in a better position under the applicants' CCAA proposal than it would have been if it had gone through with its power of sale (the power of sale process involved an offer that Diversified was prepared to, and did, accept which would have resulted in a *shortfall* on the amount it says it is owed under the first mortgage). In the former scenario, Diversified would not be "dragged into" a CCAA proceeding and would not, presumably, have any obvious reason to vote against a plan of compromise since any amount it might receive on its subsequent mortgages would be a "windfall" compared to what Diversified was willing to accept on its proposed power of sale of the Thornyco property.

[33] Ultimately, Diversified's complaint about being drawn into the CCAA process, as opposed to asserting its own rights through a receivership process, is that the Court may find in the CCAA claims process that Diversified's first mortgage is not \$9,078,675.35 but some lesser amount. Diversified's concern is that if the "difference" is allocated to its second, third or even sixth mortgages, it will be paid out the amount of its first mortgage but amounts found to be secured by subsequent mortgages will be tied up indefinitely in the CCAA proceedings.

[34] The problem with this argument is that the issues which have been raised about the calculation of Diversified's first mortgage debt will be raised in whatever process is adopted to realize on the value of its first mortgage.

[35] The disputes over the calculation of the amount of Diversified's mortgage entitlements appear to involve four issues:

- (i) whether a \$1.4 million increase to the first mortgage was, in fact, advanced;
- (ii) whether a deficiency resulting from a 2013 refinancing of a first mortgage Diversified formally held on the Silverthornco property was secured under its first mortgage on Thornyco;
- (iii) whether there is a shortfall resulting from realization on another property, Langston Hall, for which Diversified's first, second or third Thornyco mortgages are collateral security; and



- (iv) whether certain payments made in 2013 totaling about \$700,000 were “advances” under the first mortgage made with knowledge of the subsequent fourth and fifth mortgages (and therefore subordinate to those mortgages) or whether they qualify as amounts secured by the Thornyco mortgages at all.

[36] The Diversified first mortgage is a conventional charge for monies actually advanced to the borrower, rather than a collateral charge. The applicants take the position that under an August 2012 mortgage amending agreement which increased the first mortgage by \$1.4 million, Diversified did not “advance” \$1.4 million to Thornyco. Rather, they argue, this increase in the amount of the Diversified first mortgage was intended as collateral security given in consideration for the discharge of Diversified’s mortgages over certain Silverthornco properties. Diversified takes the position that valuable consideration was provided for this mortgage.

[37] In June 2013, MarshallZehr refinanced Diversified’s Silverthornco mortgage, repaying the loan that Diversified argues was collaterally secured by Diversified’s first mortgage on Thornyco. This refinancing left a shortfall of approximately \$600,000 which was only then crystallized and allegedly transferred to the Thornyco first mortgage to be secured on the Thornyco property. The applicants again argue that no portion of this \$600,000 was “advanced” to Thornyco.

[38] Finally, there were payments made to Thornyco on June 4 and June 25, 2013 in the amounts of \$450,000 and \$250,000 respectively. Diversified’s mortgage summaries and Acknowledgment at the time characterized these payments a “advances.” At the time of these advances, Diversified had actual knowledge of the subsequent fourth and fifth mortgages on the Thornyco property.

[39] Initially, Diversified took the position that all of its advances were secured under its first Thornyco mortgage and that it could not advance funds under the second or third mortgages because those mortgages were collateral security for a mortgage Diversified held on another property, Langston Hall. In a subsequent affidavit, Diversified took the position that these amounts were not “advances” under the first mortgage after all but repayments of an overpayment credit owed to Thornyco. Diversified says that its second and third mortgages nevertheless “secured” the \$450,000 repayment on June 4, 2013 and the \$250,000 repayment on June 25, 2013. Diversified also still maintains that the second and third mortgages represent collateral security for a mortgage loan made on the other property, Langston Hall.

[40] There is a potential swing of roughly \$2 million in the calculation of Diversified’s first mortgage security as a result of these issues.

[41] I am not being asked, nor would it be possible on the record before me, to resolve the question of which of these amounts in dispute represent proper and valid amounts due and owing under Diversified’s first mortgage on Thornyco and which do not. But it is clear that they are issues that will have to be resolved by the court in the event of either a receivership or a CCAA claims process.

[42] If Diversified is right about the amount secured under its first mortgage, it will be paid ought its first mortgage obligation accordingly. If it is wrong, some amounts may not be secured by the first mortgage or at all. Either way, the “disallowed” portion of Diversified’s first mortgage claim will not be available to it. And, under either process, Diversified will receive what it is entitled to receive under its first mortgage. This is because, in a CCAA process, MarshallZehr has undertaken to the court that it will take out Diversified’s first mortgage for the amount the court says is properly secured. And in a receivership process, likewise, the court will award Diversified the amount of any sale proceeds to which it is entitled under its first mortgage in priority to other creditors.

[43] Although it is theoretically possible that amounts “disallowed” as not being secured under Diversified’s first mortgage could slide seamlessly into a secured position under Diversified’s second or third mortgages, it is by no means clear on the present record how that could necessarily be so.

[44] In short, it is difficult to see how Diversified would be worse off in a claims process under the CCAA (in which MarshallZehr has undertaken to pay out Diversified on its first mortgage at full value, as found by the court) than it would in a receivership process, especially when compared to the amount Diversified was prepared to accept under its power of sale.

[45] Diversified also complains that under a CCAA order, it claims will be subordinated to the DIP lender’s and other charges sought in these proceedings. The concern is lessened, however, by the manner in which the proposal has been structured. First, I was advised during oral argument that MarshallZehr will pay out to Diversified its first mortgage, in the full amount found by the court to be properly secured by that mortgage, without adjustment for DIP financing priority.

[46] Second, and in any event, the super-priority charges that will be secured against the applicants’ assets will be allocated between Projects subject to court approval. Thus, to the extent Diversified has concerns about the allocation of these charges between Projects, it will have the opportunity to address this issue at a future court proceeding.

[47] It must also be noted that the appointment of a receiver by the court now being sought by Diversified, will come with its own set of significant costs.

[48] Finally, I am prepared to order (to the extent that this right would not already exist) that Diversified is at liberty to return to court at a future juncture, for example, when the proposed claims process has run its course, prior to a vote on the applicants’ proposed plan of compromise or arrangement to renew its request if any new or additional prejudice has been identified.

[49] In conclusion, I find that the concerns which led other courts to dismiss some CCAA applications concerned with land development businesses are not present here. I find, on the unique facts of this case, that the “prejudice” to Diversified, that is the risks it faces in seeking recovery on its mortgage security, is roughly the same whether realization takes place in the receivership scenario or the CCAA scenario.

[50] For this reason, I find that Diversified's concerns are not sufficient, at this initial stage, to warrant carving the Thornyco project out of the CCAA application and denying the stay in respect of that Project.

### ***The Stay***

[51] The CCAA is remedial legislation. It is intended to provide a structured environment for the negotiation of compromises between the debtor company and creditors for the benefit of both. Where a debtor company realistically plans to continue to deal with its assets so as to benefit creditors but requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA, *Re Lehndorff General Partners Ltd.*, 1993 CarswellOnt 183 (Gen. Div.) at para. 6.

[52] Section 11.02 of the CCAA provides that a court may, on the initial application, make an order staying all proceedings in respect of the debtor company for a period of 30 days, provided the court is satisfied that circumstances exist that make the order appropriate.

[53] The applicants require a stay of proceedings in order to stay the enforcement actions that have been initiated against the applicants and their property. Absent the protection of the court afforded under the CCAA, it would be impossible for the applicants to proceed with any form of restructuring. The stay of proceedings will allow the applicants to refine and implement a restructuring plan, including a claims process as discussed above, based on the restructuring agreement with MarshallZehr that could, realistically, result in more value for all creditors.

### ***Prefiling Obligations***

[54] The proposed initial order does not seek to designate critical suppliers but proposes to grant to the applicants' the power, with the approval of the Monitor or by order of the court, to determine if payments of certain prefiling expenses are necessary to the continued operations of the applicants. In granting the authority to permit payments of this kind, the courts have considered factors such as:

- (a) whether the supply of goods or services is integral to the business;
- (b) the dependency of the business on the uninterrupted supply of the goods or services;
- (c) the fact that no payments would be made without the consent of the Monitor or the court; and
- (d) the effect on the ongoing operations of the business and the applicants' ability to restructure if were unable to make prefiling payments to critical suppliers.

[55] In this case, the continued supply of materials and services to the Coronation and Silverthornco projects to undertake restructuring efforts is absolutely critical. The Monitor is

supportive of the grant of this authority and has undertaken to work with the applicants to minimize payments of prefiling liabilities.

[56] In the circumstances, I am prepared to grant the order sought.

***The Monitor***

[57] Section 11.7 of the CCAA requires that the Monitor be a trustee within the meaning of ss. 2(1) of the BIA. There are also certain restrictions on who may be a Monitor set out in ss. 11.7(2) of the CCAA. Gary Abrahamson of the Fuller Landau group is a trustee and is not subject to any of the restrictions. Fuller Landau has consented to its appointment as Monitor. Their appointment is approved.

***The DIP Financing and Charge***

[58] The authority to grant this order is set out in s. 11.2 of the CCAA. The listed factors include:

- (a) the period during which the applicants are expected to be subject to CCAA proceedings;
- (b) how the applicants' business and financial affairs are to be managed during the proceedings;
- (c) whether the applicants' management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made;
- (e) the nature and value of the property involved; and
- (f) the views of the proposed monitor contained in its prefiling report.

[59] In this case, the DIP lender's charge does not purport to rank in priority over any secured creditor that has not received notice of this application. The amount to be advanced under the DIP facility is appropriate and required, having regard to the debtors' cash flow statement as reviewed by the proposed Monitor and, the charge does not secure any obligation which existed before the order was made, *Canwest Global Communications Corp., Re*, 2009 Carswell Ont 618 (S.C.J. [Comm. List]) at paras. 31 – 35.

[60] It is true that Diversified has advanced a strongly held view that it has no confidence in the applicants' management. However, as discussed above, very little of the DIP facility is going to be spent on the Thornyco project, so that any charge on the Thornyco property will be limited and, in any event, shall not exceed \$500,000.

[61] It is clear that the DIP facility is needed to enhance the prospects of any viable compromise or arrangement. It will, among other things, enable all restructuring costs including fees and disbursements to be paid. It is also necessary to unlock the value which resides in the Coronation and Silverthornco projects which are relatively close to completion.

[62] Finally, there is no evidence of any other immediate sources of interim financing available on better terms.

[63] Accordingly, the request for an order approving the DIP facility in the maximum principal amount of \$3 million, in accordance with the terms and conditions of the relevant agreements and as specified in this endorsement, is approved.

***Administrative and Directors' Charge***

[64] It is clear that the applicants' legal advisers and the proposed Monitor must have a secure source of payment in order to perform their functions. The court has jurisdiction to make this order under section 11.52 of the CCAA. Having regard to the factors outlined in *Canwest Publishing Inc., Re*, 2010 ONSC 222 at paras. 42 – 45 (Comm. List), I find the amount is proportional to the size and complexity of the business being restructured and there is no apparent duplication of roles. The only objecting secured creditor, Diversified, will be minimally affected by these charges because, again, they will have to be allocated on a Project-specific basis.

***Conclusion***

[65] In conclusion the application for an initial order under the CCAA is granted. I am prepared to sign the Initial Order submitted subject to counsels' confirmation (or upon a further submissions if necessary) that the Order reflects the guidance of this endorsements in all material respects.

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Penny J.

**Date:** January 19, 2015

# TAB 4

CITATION: Urbancorp Inc. (Re) 2016 ONSC 3288  
COURT FILE NO.: CV-16-11389-00CL  
CV-16-11392-00CL  
DATE: 20160525

**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 URBANCORP TORONTO  
MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE)  
INC., URBANCORP (PATRICIA) INC., URBANCORP  
(MALLOW) INC., URBANCORP (LAWRENCE) INC.,  
URBANCORP DOWNSVIEW PARK DEVELOPMENT INC.,  
URBANCORP RESIDENTIAL INC., URBANCORP (952 QUEEN  
WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST.  
CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC.  
(Collectively the "Applicants") AND THE AFFILIATED  
ENTITIES LISTED IN SCHEDULE "A" HERETO**

**AND IN THE MATTER OF URBANCORP INC.**

**APPLICATION OF GUY GISSIN, THE FOREIGN  
REPRESENTATIVE OF URBANCORP INC., UNDER SECTION  
46 OF THE *COMPANIES' CREDITORS ARRANGEMENTS ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED**

**HEARD:** May 18, 2016

**COUNSEL:** *Edmund F.B. Lamek and Rachael Belanger*, for the Applicants

*L. Joseph Latham and Tamryn Jacobson*, for Guy Gissin, the Foreign  
Representative of Urbancorp Inc.

*Robin B. Schwill and Jay Swartz*, for KSV Kofman Inc.

*Jane Dietrich*, for Mattany (Downsview) Inc.

*Scott Bomhof*, for King Liberty North Corporation

*Adam Slavens*, for Tarion Warranty Corporation

*Heather Meredith*, for Bank of Nova Scotia

*Clifton P. Prophet and Frank Lamie*, for Canadian Imperial Bank of Commerce

*John Paul Ventrella*, for Atrium Mortgage Investment Mortgage

*Aubrey E. Kauffman*, for Travelers Guarantee Company of Canada

*Brian Empey*, for Parc Downsview Park Inc.

**NEWBOULD J.**

[1] A number of Urbancorp Inc. (“UC Inc.”) subsidiaries applied on May 18, 2016 for relief under the CCAA, including relief in respect of a number of non-applicant affiliated limited partnerships which may not be insolvent.<sup>1</sup> Some of the applicants earlier filed a notice of intent to make a proposal under section 50.4(1) of the BIA. These applicants apply to continue the NOI proceedings in this CCAA proceeding.

[2] UC Inc. is not an applicant in this CCAA proceeding. However, it issued debentures which traded on the Tel Aviv Stock Exchange. The trustee of those bonds alleged default by UC Inc. and, after the NOI proceedings were started in Canada, initiated a claim for relief in the District Court of Tel Aviv-Yafo, Israel (the “Israeli Court”). Orders were made granting relief to the trustee and Mr. Guy Gissin was appointed by the Israeli Court as the functionary officer and foreign representative of UC Inc. He has brought proceedings under Part IV of the CCAA for an initial recognition order and a supplemental order recognizing orders made by the Israeli Court.

[3] It is evident that these two competing applications, if not resolved in some consensual way, would cause great difficulty in any restructuring of the Urbancorp Group. Fortunately, due to the efforts of Mr. Gissin and KSV, the proposal trustee and now the proposed Monitor, and their counsel, an agreement in principle to co-operate on a process to realize upon the assets of

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<sup>1</sup> Urbancorp New Kings Inc. was inadvertently included as an applicant when this proceeding was first commenced. It has been removed as an applicant as it is not an insolvent corporation.



the Urbancorp Group has been reached and is contained in a Co-operation Protocol signed by Mr. Gissin and KSV.

[4] At the conclusion of the hearing, I granted the Initial Order and the recognition and supplemental orders sought by Mr. Gissin as the foreign representative, including the approval of the Co-Operation Protocol, for reasons to follow. These are my reasons.

### **Factual background**

[5] The Urbancorp Group was founded in 1991 by Alan Saskin. As is typical in the real estate development industry, the Urbancorp Group generally uses single purpose project specific corporations to engage in the development, construction and sale of residential properties in the greater Toronto area. Since 2015, the Urbancorp Group has essentially been organized into two branches – the corporations which are owned directly or indirectly by Mr. Saskin or members of his family, which includes UTMI, and the entities that, as of December 2015, became UC Inc. subsidiaries. The majority of the Urbancorp corporations that are applicants in this proceeding have been formed as single purposes entities in connection with the construction and ownership of specific development projects.

[6] The Urbancorp Group has redeveloped over 100 acres of former industrial lands in the GTA, turning them into downtown neighbourhoods. The Urbancorp Group was the first developer in the King West village area of Toronto and created the neighbourhood named “King West Village”. In the West Queen West Triangle area of Toronto, across from the Drake hotel, the Urbancorp Group developed most of the homes, over 1,600 in that neighbourhood. In partnership with Artscape, a nonprofit provider of affordable artist housing, the Urbancorp Group developed 72 units of affordable artist housing in West Queen West. The Urbancorp Group has donated land and paid for public parks in the City of Toronto, including four public parks in the King and Queen West areas.

[7] The Urbancorp Group has built over 5500 homes. It delivered 1,028 homes in the past two years, and currently has 1,058 additional homes under construction.

[8] However, as a result of the recent lack of liquidity described in detail in the affidavit of Mr. Siskin, the applicants are insolvent and cannot meet their liabilities generally as they become due, and as a result, the operations of all of the Urbancorp applicants and related entities has been put at risk.

[9] Mr. Saskin in his affidavit states that the primary financial challenge facing the Urbancorp applicants and related entities at this time, particularly the entities that filed NOI proceedings, is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion Warranty Corporation to revoke certain Tarion registration certificates, and events relating to UC Inc. and its issuance of debentures in Israel. These events and the publicity and press surrounding them have materially threatened the ability of the non-applicant UC entities to carry on business in the ordinary course.

[10] UC Inc. is an Ontario company created for the purpose of issuing debentures to the Israeli public on the Tel Aviv Stock Exchange. Prior to listing the debentures Mr. Saskin and his family members agreed to transfer into UC Inc. their interests in five corporations within the Urbancorp Group that directly or indirectly held interests in several investment properties, rental properties and geothermal assets in Toronto

[11] UC Inc. issued NIS 180,583,000 (approx. \$64 million based on the exchange rate at that time) par value of debentures which traded on the Tel Aviv Stock Exchange. The terms of the debentures contemplate UC Inc. repaying the debentures in five unequal installments on December 31, 2017, June 30, 2018, December 31, 2018, June 30, 2019 and December 31, 2019. The exclusive jurisdiction to determine all matters related to the debentures lies with a competent court in the State of Israel and pursuant to the governing laws of Israel.

[12] On March 31, 2015, Tarion Warranty Corporation, which provides warranties on new residential builds in Ontario for registered builders, issued a notice of proposal to revoke 17 of the Urbancorp Group's registrations as a result of concerns about the Urbancorp Group's financial position and the high number of warranty claims made against two non UC Inc. entities. The Urbancorp Group has since appealed Tarion's decision for 11 of the 17 registrations, and allowed the balance to expire. No decision has been rendered in connection with the appeal as of this date.

[13] The indenture trustee of the Israeli debentures alleged that UC Inc. had defaulted under the terms of the debenture trust. On April 24, 2016, the trustee initiated court proceedings against UC Inc. in the Israeli Court. Prior to those proceedings being initiated, the Urbancorp Group's Israeli auditors, Israeli legal counsel and UC Inc.'s board of directors resigned, leaving Mr. Saskin as the sole director of UC Inc. The trustee's application was initially heard on the morning of Sunday, April 24, 2016, at which time the Vice President of the Israeli Court issued an injunction to prevent UC Inc. or Mr. Saskin from taking any further steps to deal with UC Inc.'s assets.

[14] On Monday, April 25, 2016, the Israeli Court appointed Mr. Gissin as the functionary officer of UC Inc., with full management control and powers over its subsidiaries. The authority granted to Mr. Gissin under the order included the authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control over its subsidiaries and to approach the Canadian court as an authorized representative of UC Inc. The orders of the Israeli Court would clearly have prevented Mr. Siskin from taking steps to cause the subsidiaries of UC Inc. to file for protection under the CCAA and would have permitted Mr. Gissin to take steps to prevent the applicants from doing so.

[15] On May 4, 2016, Mr. Gissin and his counsel met with KSV and its counsel, the result of which was an agreement in principle to co-operate on a process to realize upon the assets of the Urbancorp Group through a CCAA process, with KSV having augmented powers to control management and operations of the Urbancorp Group entities which would be filing, effectively

removing Saskin as a decision-maker for those companies, all as set forth in a Co-operation Protocol finalized on May 13, 2016.

[16] On May 13, 2016, each of the Urbancorp CCAA applicants and related entities, as borrowers, and UC King South, as lender, entered into an intercompany interim credit facility term sheet whereby UC King South agreed to make available to the Urbancorp entities that had filed a NOI proceeding a revolving credit facility in the amount of \$1.9 million to finance their day-to-day operations and ongoing projects. UC King South is not an applicant in this proceeding. All proceeds of the interim loan continue to be held by KSV in its trust account. Based upon the anticipated cash flow needs of the Urbancorp CCAA applicants and related entities during these restructuring proceedings, including professional fees associated with these proceedings, it is likely that the \$1.9 million may not be sufficient to see the restructuring through to its completion. As a result, the applicants intend to commence a process to secure third party debtor-in-possession financing in the near term.

## **Issues and analysis**

### **(1) Recognition of Foreign Proceeding**

[17] Section 46(1) of the CCAA provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to section 47(1) of the CCAA, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding and (ii) the applicant is a foreign representative of that proceeding.

[18] A foreign proceeding is broadly defined in section 47(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

[19] It is clear in this case that the proceeding in the Israeli Court is a foreign proceeding within the meaning of the CCAA. It is a judicial proceeding brought under Israel's regulations relating to requests for compromise or arrangements, and the relief granted by the Israeli Court, including the appointment of a functionary officer, was for the purpose of enhancing creditors' collective interests.

[20] Section 45(1) of the CCAA defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

[21] It is also the case that the Mr. Gissin is a foreign representative in respect of the foreign proceeding. He was appointed to monitor UCI's business and financial affairs and to act as a representative in respect of the foreign proceeding. He was provided with the express authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control of its subsidiaries and to approach the Canadian court as an authorized representative of UC Inc.

[22] Thus the foreign proceeding in the Israeli Court is to be recognized as a foreign proceeding under section 47(1) of the CCAA.

[23] Section 47(2) requires a finding as to whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against law suits concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made under section 49(1) to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. Mr. Gissin in this case has made such a request.

[24] A foreign main proceeding is defined in section 45(1) as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests (COMI). Section 45(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

[25] In this case, UC Inc.'s registered office is in Ontario. Pursuant to the Co-operation Protocol Mr. Gissin as the foreign representative has applied to have the Israeli Court proceeding recognized as a foreign main proceeding.

[26] The Co-operation Protocol sets out in some detail an agreement to work cooperatively to maximize recoveries through an orderly process for the stakeholders of UC Inc. and the applicants. Without such an agreement, there would no doubt have been contentious proceedings between the two spheres, being the Israeli sphere and the Canadian sphere. That has been avoided. The Co-operation Protocol provides that Mr. Gissin will apply under Part IV of the CCAA to be recognized as the foreign representative of a foreign main proceeding. The applicants in the CCAA proceedings will propose that the Monitor have augmented powers to control the ordinary course management and receipt and disbursements of funds for the applicants and acknowledge that Mr. Gissin shall have standing in these proceedings to represent UC Inc. The Monitor and Mr. Gissin shall attempt to agree on the restructuring or sale process but if they cannot agree the decision will be made by this Court on the application of the Monitor. It is agreed that so long as the Monitor acts in good faith and has not engaged in wilful conduct or gross negligence, Mr. Gissin will not take any steps to remove KSV as the Monitor or to suggest that KSV must take instruction from Mr. Gissin or the Israeli Court.

[27] Thus the parties have agreed that while the Israeli proceeding will be considered to be a foreign main proceeding, Mr. Gissin as the foreign representative has agreed that his sole control of UC Inc. and its assets that was granted to him by the Israeli Court will to a large extent be exercised by the Monitor acting under the CCAA so long as the Monitor acts in good faith collaboratively with Mr. Gissin in accordance with the Co-operation Protocol. This is a very unusual situation in that as a practical matter it is not intended that orders will be made in the

future in the foreign main proceeding directing the restructuring of UC Inc. and its subsidiaries with recognition orders being sought in Canada to have such orders carried out in Canada.

[28] It is not clear that the COMI of UC Inc. is in Israeli. The proceedings started in Israel because the Prospectus and the Deed of Trust made clear that Israeli courts were to have exclusive jurisdiction to deal with matters related to UC Inc., and that insolvency proceedings regarding UC Inc. could only be brought in the State of Israel.

[29] I am reluctant however to upset the balance that has been struck in this case by the Co-operation Protocol. Mr. Gissin in his affidavit has emphasized the importance of the proceedings to the stakeholders of UC Inc. in Israel and the importance of the different legal regimes working together. He has stated:

32. This matter is one of incredible significance to stakeholders in the State of Israel, including the real estate capital markets in general. To date, to the best of my knowledge, a total of 17 North American real estate companies have issued over NIS 11 billion of bonds in Israel. UCI [UC Inc.] was the first such North American company to have gone into insolvency proceedings, and that within four months from the issuance of the Debentures. Given the size of this industry in Israel, this case is being watched very carefully to see how the different legal regimes can work together. I am hopeful that the co-operation evidenced to date in this matter, and in particular through the Co-Operation Protocol, can be continued for the benefit of all affected stakeholders.

[30] In this case, so long as the Co-operation Protocol exists, it may not be of much importance in Canada whether the foreign proceeding is a foreign main proceeding, as Mr. Gissin would be entitled as a matter of discretion under a foreign non-main proceeding to a granting of a stay of proceedings against UC Inc. and to an order prohibiting a sale of its property in Canada without leave of the Court. It probably is of more importance in Israel in insuring that if the co-operation between the foreign representative and the Monitor no longer exists and the Monitor acts in bad faith or engages in wilful conduct or gross negligence, the foreign representative will have the ability to go back to the Israeli Court as the court in a foreign main proceeding to seek appropriate relief that could then be sought to be recognized in Canada.

[31] The applicants, the Monitor and the foreign representative are all in agreement that an order be sought declaring the Israeli proceedings as the foreign main proceedings and no one appearing is opposing the order sought. In these unusual circumstances I am prepared to make an order that the proceeding in Israel is a foreign main proceeding. It follows that the initial recognition order is to provide a stay of any proceedings against UC Inc. and prohibit UC Inc. from selling or disposing of property in Canada without leave of the Court.

[32] It would be expected that if the Israeli Court in the future changed Mr. Gissin's mandate to increase or decrease his authorities or functions or provide any additional mandate in respect of UC Inc., such orders would be brought to the attention of this Court and any application made in connection with them would be made in these Part IV proceedings.

[33] It is also appropriate that a supplemental order be made (i) recognizing the decision made in the foreign proceeding by the Israeli Court, (ii) appointing KSV as the information officer, (iii) approving the Co-operation Protocol, (iv) staying any proceedings against or in respect of Mr. Gissin as foreign representative of UC Inc., (v) granting an administration charge of \$400,000 for the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel and (vi) approval of the funding of the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel to be covered by the interim funding charge.

[34] With respect to the administration charge, there are no secured creditors of UC Inc. The principal creditors are the Israeli bondholders under the debentures. The foreign representative and the information officer are important to the process and the quantum of the charge is reasonable.

[35] With respect to the interim financing and the charge for it, KSV presently has the amount of CAD \$1,900,000 in a trust account, which funds KSV received from UC KING SOUTH, and which funds KSV proposes to utilize as a form of interim funding for certain costs in connection with the CCAA proceedings. It is appropriate for this charge to also cover the professional fees



and other reasonable costs incurred by the foreign representative in the CCAA proceedings and of the Information Officer and its counsel.

**(2) Continuation under the CCAA**

[36] Section 11.6(a) provides:

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;

[37] None of the Urbancorp entities that filed a notice of intention under Subsection 50.4(1) of the BIA has filed a proposal.

[38] In *Clothing for Modern Times (Re)*, 2011 ONSC 7522, Brown J. (as he then was) expressed the view that on a motion to continue under the CCAA an applicant company should place before the court evidence that the proposed continuation would be consistent with the purposes of the CCAA. Morawetz J. (as he then was) referred to and adopted the same point of view in *Comstock Canada Ltd. (Re)* (2013), 4 C.B.R. (6th) 47. I take this to be a reflection of the fact that an initial order should be made in a CCAA proceeding only if the purpose of the application is consistent with the purposes of the CCAA.

[39] In my view, the proposed continuation of the NOI proceedings as a CCAA proceeding is in accordance and consistent with the purposes of the CCAA. The purpose here is to attempt a restructuring of the Urbancorp business which is the subject of this application, including those entities which had filed NOI proceedings and other highly interconnected entities. It is under the CCAA and the jurisprudence that has developed that permits protection being provided both to the applicant companies and its related limited partnership entities that may not be insolvent. The continuation also assists in the co-operative proceeding with Mr. Gissin as the foreign representative of UC Inc. who is being recognized under Part IV of the CCAA.

[40] I am satisfied that the NOI proceedings commenced under the BIA should be taken up and continued under the CCAA.

**(3) Protection under the CCAA**

[41] The applicants and their related entities have total claims against them in excess of \$5 million.

[42] I am satisfied that the applicants meet the *Stelco* test of insolvency enunciated by Justice Farley in *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.); leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to SCC refused, [2004] S.C.C.A. No. 336. The applicants are currently unable or will imminently be unable to meet such claims generally as they become due. The primary financial challenge facing the Urbancorp applicants and their related entities is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion to revoke certain Tarion registration certificates, and events relating to UC Inc. and the Israeli debentures. These events and the publicity and press surrounding them have materially threatened the ability of the non-applicant Urbancorp entities to carry on business in the ordinary course.

[43] A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Re Prizm Income Fund* (2011), 75 C.B.R. (5th) 213 per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 and has been followed in several cases, including *Re Camvest Publishing Inc.* (2010) 63 C.B.R.

(5th) 115, *Re Calpine Energy Canada Ltd.* (2006), 19 C.B.R. (5th) 187 and 4519922 *Canada Inc. (Re)* (2015), 22 C.B.R. (6th) 44.

[44] I am satisfied that the stay of proceedings provided for in the Initial Order should extend to the related limited partnerships. Each is significantly interrelated to the business of the insolvent applicants as they and their stakeholders, assets (in many cases beneficial ownership of the assets of applicants), and intercompany payables and receivables in particular, form an integral part of the operations of the Urbancorp Group. Although they are not currently technically insolvent, the evidence is that it was reasonably expected at the time of filing that, without the benefit of a stay of proceedings, they will run out of liquidity before the time that would reasonably be required to implement a restructuring.

[45] The applicants seek an interim lender's charge to secure the interim funding from UC King South. It is to be secured against those Urbancorp entities that utilize any of the funds. The applicants also seek the authority for the Monitor to utilize an aggregate of up to \$1 million of cash which exists within the Urbancorp CCAA entities, to fund the cash flow requirements of other Urbancorp CCAA affiliates on an intercompany basis during these proceedings, secured by an intercompany lender's charge over the borrower entity's assets, properties and undertakings in favour of the lender entity, to rank *pari passu* with the interim lender's charge.

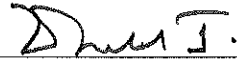
[46] I am satisfied after a consideration of the factors set out in section 11.2(4) of the CCAA that these charges should be granted. The charges will be subordinate to existing secured creditors and lienholders and will not secure any pre-filing obligations<sup>2</sup>. The money is clearly needed for the restructuring process and the charges are supported by the proposed Monitor who will have enhanced powers to operate the business during the restructuring with the authority to approve the advances.

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<sup>2</sup> An exception to the subordination to secured creditors is the Reznick Trust under the Israeli debenture which is to be subordinate to the Charges. Apparently there is still some issue because of the lack of time to deal with it as to what security if any there is to support the Reznick Trust. It may be that some future motion may be necessary to deal with this subordination exception.

[47] Other charges normal in CCAA cases are proposed. They are a director's and officer's charge in the amount of \$300,000 for the sole remaining director of the applicants after Mr. Siskin's retirement as a director and an administrative charge in the amount of \$750,000. These charges are reasonable and supported by the proposed Monitor. They are approved.

[48] At the conclusion of the hearing on May 18, 2016 I signed the Initial Order in the applicants' CCAA application and the Initial Order and supplemental orders on the application of Mr. Gissin under Part IV of the CCAA.



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Newbould J.

**Released:** May 25, 2016

CITATION: Urbancorp Inc. (Re) 2016 ONSC 3288  
COURT FILE NO.: CV-16-11389-00CL  
CV-16-11392-00CL  
DATE: 20160525

**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  
URBANCORP TORONTO MANAGEMENT INC.,  
URBANCORP (ST. CLAIR VILLAGE) INC.,  
URBANCORP (PATRICIA) INC., URBANCORP  
(MALLOW) INC., URBANCORP (LAWRENCE)  
INC., URBANCORP DOWNSVIEW PARK  
DEVELOPMENT INC., URBANCORP  
RESIDENTIAL INC., URBANCORP (952 QUEEN  
WEST) INC., KING RESIDENTIAL INC.,  
URBANCORP 60 ST. CLAIR INC., HIGH RES.  
INC., BRIDGE ON KING INC. (Collectively the  
"Applicants") AND THE AFFILIATED  
ENTITIES LISTED IN SCHEDULE "A" HERETO**

**AND IN THE MATTER OF URBANCORP INC.**

**APPLICATION OF GUY GISSIN, THE FOREIGN  
REPRESENTATIVE OF URBANCORP INC.,  
UNDER SECTION 46 OF THE *COMPANIES'*  
*CREDITORS ARRANGEMENTS ACT*, R.S.C. 1985,  
c. C-36, AS AMENDED**

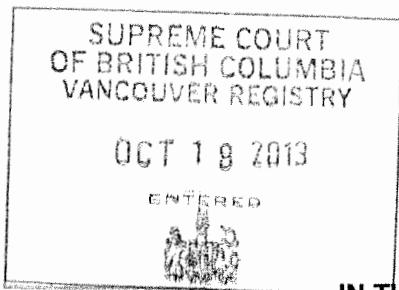
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**REASONS FOR JUDGMENT**

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NEWBOULD J.

# TAB 5



NO. S-137743  
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 THE *CANADA BUSINESS CORPORATIONS ACT*,  
R.S.C. 1985, c. C-44, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF  
LEAGUE ASSETS CORP. AND THOSE PARTIES LISTED ON SCHEDULE "A"

PETITIONERS

**ORDER MADE AFTER APPLICATION**

BEFORE THE HONOURABLE )  
 ) FRIDAY, THE 18<sup>TH</sup> DAY  
MADAM JUSTICE BROWN ) OF OCTOBER, 2013

THE APPLICATION of the Petitioners coming on for hearing at 800 Smithe Street, Vancouver, British Columbia, on the 18th day of October, 2013 (the "**Order Date**"); AND ON HEARING Mary I.A. Buttery and H. Lance Williams, counsel for the Petitioners and those other counsel listed on Schedule "B" hereto; AND UPON READING the material filed, including the first Affidavit of Adam Gant sworn October 16, 2013 and the consent of PricewaterhouseCoopers Inc. to act as Monitor; AND UPON BEING ADVISED that the secured creditors and others 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:

**JURISDICTION**

1. The Petitioners are entities to which the CCAA applies. For greater certainty, League IGW Real Estate Investment Trust and those entities that are limited partnerships (as outlined in Schedule "A" hereto) shall enjoy the benefits of the protections provided herein, and shall be subject to the same restrictions hereunder.

**SUBSEQUENT HEARING DATE**

2. 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 Monday, the 18<sup>th</sup> day of November, 2013, or such other date as this Court may order.

**PLAN OF ARRANGEMENT**

3. 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**

4. 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 (the "**Property**"), and, subject to paragraph 5 hereof, 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 it deems reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.



5. Notwithstanding paragraph 4 hereof, as of the date of this Order, and until further order of this Court, none of the Petitioners shall sell, re-sell or otherwise trade in any securities of or relating to any of the Petitioners.

6. 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**"); and
- (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 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 the Petitioners or any subsidiaries or affiliated companies of the Petitioners are domiciled;
  - (ii) any litigation in which the Petitioners are named as parties or are otherwise involved, whether commenced before or after the Order Date; and
  - (iii) any related corporate matters.

7. Except as otherwise provided herein, 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 \$100,000.00 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 6(b) which may be incurred after the Order Date.

8. 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, (iii) Quebec Pension Plan, and (iv) 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.

9. 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) based on the terms of existing lease arrangements or as otherwise may be negotiated between the Petitioners 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.

10. 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 the Petitioners to any of their 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.

11. Notwithstanding paragraph 10, the Petitioners are permitted, with the consent of the Monitor, to make the following payments:

- (a) regular payments under all mortgages granted by the Petitioners and due after the Order Date;
- (b) amounts that become due and owing in respect of Registered Retirement Income Funds (“RRIFs”) provided that such RRIF payments do not in aggregate exceed \$150,000.00 per month;
- (c) the remaining amount of the Purchase Price in respect of the Share Purchase Agreement between League Capital Markets Ltd. and Forbes & Manhattan Asset Management Corp. dated May 15, 2012; and

- (d) Post-Closing Payments, Capital Compensation Payments and Installment Payments due pursuant to the Agreement of Purchase and Sale dated February 1, 2013 to Ms. Yuen Yee Ng in respect of the share purchase of Harris Fraser Group Limited.

## **RESTRUCTURING**

12. Subject to such requirements as are imposed by the CCAA, 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 \$100,000.00 in any one transaction or \$1,000,000.00 in the aggregate. If the disposition of assets exceeds these quantum, the Petitioners shall seek the approval of the Monitor, and if the Monitor deems appropriate, the approval of the Court for such dispositions;
- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deems 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 any one of 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 November 18, 2013, 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 the Petitioners or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Petitioners and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the 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 the Petitioners or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Petitioners and the Monitor or leave of this Court.

18. Notwithstanding paragraphs 16 and 17 hereof, nothing contained in this Order shall stay foreclosure proceedings by TCC Mortgage Holdings Ltd. and Quest Capital Corp. (the “**Enforcing Mortgagees**”).

19. Nothing in this Order, including paragraphs 16 and 17, shall: (i) empower the Petitioners to carry on any business which the Petitioners 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 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 Petitioners.

## **NO INTERFERENCE WITH RIGHTS**

20. 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 the Petitioners, except with the written consent of the Petitioners and the Monitor or leave of this Court.

## **CONTINUATION OF SERVICES**

21. During the Stay Period, all Persons having oral or written agreements with the Petitioners or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Petitioners, 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 the Petitioners, and that the Petitioners 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 Petitioners in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners and the Monitor, or as may be ordered by this Court.

## **NON-DEROGATION OF RIGHTS**

22. 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 Petitioners 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**

23. 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 the Petitioners with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Petitioners 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 the Petitioners 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**

24. The Petitioners shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Petitioners 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.

25. The directors and officers of the Petitioners 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 \$500,000.00, as security for the indemnity provided in paragraph 24 of this Order. The Directors' Charge shall have the priority set out in paragraphs 36 and 38 herein.

26. 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 Petitioners' 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 24 of this Order.

#### **APPOINTMENT OF MONITOR**

27. PricewaterhouseCoopers 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.

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



- (a) assist the Petitioners in sourcing debtor-in-possession financing, and advising the Petitioners in relation thereto;
- (b) monitor the Petitioners' receipts and disbursements;
- (c) 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, and such other matters as may be relevant to the proceedings herein;
- (d) advise the Petitioners in their development of the Plan and any amendments to the Plan;
- (e) 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;
- (f) respond on behalf of, and/or in conjunction with, the Petitioners to enquiries made by securities regulators and investors;
- (g) 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;
- (h) 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;
- (i) collect all rents from tenants of the Duncan City Centre mall and the Colwood Corners Shopping Centre with respect to real property charged by mortgages in favour of TCC Mortgage Holdings Inc. and Quest Mortgage Corp., respectively, (each, a "**Mortgagee**") and disburse such rents to pay operating costs with respect to such real property (with the prior consent of the applicable Mortgagee), then property taxes in respect of such real property, and the balance, if any, to the applicable Mortgagee in respect of its mortgage debt claim; and

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

29. 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.

30. 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.

31. The Monitor shall provide any creditor of the Petitioners 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.

32. 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**

33. The Monitor, counsel to the Monitor, if any, 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 in the amounts of \$75,000.00 respectively to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

34. 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 and may be heard on a summary basis.

35. The Monitor, counsel to the Monitor, if any, 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 \$750,000.00, 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 36 and 38 hereof.

### **VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

36. The priorities of the Administration Charge and the Directors' Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$750,000.00);

Second - Directors' Charge (to the maximum amount of \$500,000.00).

37. Any security documentation evidencing, or the filing, registration or perfection of, the Administration Charge and the Directors' Charge (collectively, the "**Charges**") shall not be required,

and that 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.

38. Each of the Administration Charge and the Directors' Charge (all as constituted and defined herein) 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, except the Encumbrances of the Enforcing Mortgagees.

39. 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 and the beneficiaries of the Administration Charge and the Director's Charge.

40. The Administration Charge and the Director'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**") 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; or (d) 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) the creation of the Charges shall create or be deemed to constitute a breach by the Petitioners of any Agreement to which they are 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 the creation of the Charges; and

- (c) the payments made by the Petitioners pursuant to this Order, 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.

41. THIS COURT ORDERS that 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**

42. The Monitor shall (i) without delay, publish in the Vancouver Sun and The Globe and Mail a notice containing the information prescribed under the CCAA, (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 \$1,000.00, 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.

43. 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.

44. 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.pwc.com/car-leagueassets](http://www.pwc.com/car-leagueassets). The Monitor shall also maintain the following for corresponding with creditors:

- (a) by email: [league.inquiries@ca.pwc.com](mailto:league.inquiries@ca.pwc.com);
- (b) by phone: (604) 806-7800; and

(c) by fax (604) 806-7043.

45. 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 counsel's 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.pwc.com/car-leagueassets](http://www.pwc.com/car-leagueassets).

46. Notwithstanding paragraphs 42 and 43 of this Order, service of the Petition, the Notice of Hearing of Petition, the Affidavit #1 of Adam Gant, this Order and any other pleadings in this proceeding (collectively, the "**Materials**"), 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**

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

48. 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.

49. 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 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 Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

50. Each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered 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 Monitor 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 Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

51. 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.

52. 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.

53. 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.

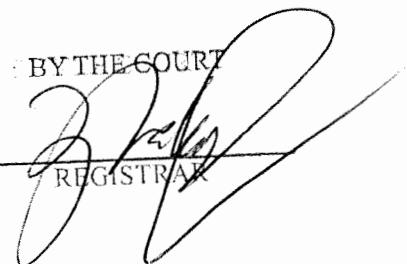
54. Any interested party (including the Petitioners and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to all parties on the Service List and to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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

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

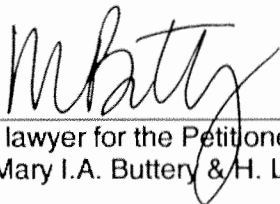


✓kd

BY THE COURT  
  
REGISTRAR

ENDORSEMENTS ATTACHED

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 lawyer for the Petitioners  
Davis LLP (Mary I.A. Buttery & H. Lance Williams)

~~BY THE COURT~~

\_\_\_\_\_  
REGISTRAR



## Schedule "A"

### Corporations

1. 0781591 B.C. Ltd.
2. 0811883 B.C. Ltd.
3. 0812307 B.C. Ltd.
4. 0827524 B.C. Ltd.
5. 0873201 B.C. Ltd.
6. 0891146 B.C. Ltd.
7. 0895249 B.C. Ltd.
8. 0895251 B.C. Ltd.
9. 0908150 B.C. Ltd.
10. 2128273 Ontario Inc.
11. 2146431 Ontario Inc.
12. 2148711 Ontario Inc.
13. 2164613 Ontario Inc.
14. 2164614 Ontario Inc.
15. 2246329 Ontario Limited
16. 2291088 Ontario Inc.
17. 2314845 Ontario Inc.
18. 473 Albert St. Office GP Inc.
19. 7667906 Canada Inc.
20. 8252220 Canada Inc.
21. Arbutus Industrial Park Ltd.
22. Colwood Belmont Developments Ltd.
23. Colwood City Centre Corp.

24. Colwood City Centre GP Inc.
25. Colwood Jerome Developments Ltd.
26. Colwood Sooke Developments Ltd.
27. Colwood's Triumph GP Ltd.
28. Cowichan District Financial Centre GP Inc.
29. Cygnet Apartments GP Inc.
30. Cygnet Properties GP Inc.
31. Duncan City Centre GP Inc.
32. Durham Portfolio GP Inc.
33. Fort St. John Retail GP Inc.
34. Gatineau Centre Development GP Inc.
35. Gatineau Centre Real Estate Development Corporation
36. IGW Cash Management Fund Ltd.
37. IGW Diversified Redevelopment Fund GP Inc.
38. IGW Energy Capital GP Inc.
39. IGW Industrial GP Inc.
40. IGW Mortgage Investment Corporation
41. IGW Properties GP I Inc.
42. IGW Public GP Inc.
43. IGW REIT GP Inc.
44. IGW Residential Capital GP Inc.
45. Jesken Development GP Inc.
46. Jesken Investment GP Inc.
47. LAPP Global Asset Management Corp.
48. League Acquisition Corp.

49. League Assets Corp.
50. League Assets GP Inc.
51. League Assets International Inc.
52. League Capital Markets Ltd.
53. League Capital Partners Ltd.
54. League Debt Corp.
55. League Financial Partners Inc.
56. League Founding Limited Partner Ltd.
57. League Holdings Corp.
58. League Investment Fund Ltd.
59. League Investment Services Inc.
60. League Opportunity Fund Ltd.
61. League Realty Advisory Ltd.
62. League Realty Services Ltd.
63. League REIT Investco Inc.
64. Londondale Shopping Centre GP Inc.
65. Market Square Properties GP Inc.
66. Member-Partners' Consolidated Properties GP Inc.
67. North Vernon Properties Inc.
68. Partners Equity Finance Inc.
69. Residences At Quadra Village GP Inc.
70. Stoney Range Industrial GP Inc.
71. Sundel Square Ltd.
72. Tsawassen Retail Power Centre GP Inc.
73. Tyee Plaza GP Inc.

- 74. Village Green Holdings #2 Ltd.
- 75. Village Green Holdings #3 Ltd.
- 76. Zeus Energy Ltd.

**Limited Partnerships**

- 77. 473 Albert St. Office Limited Partnership
- 78. Colwood City Centre Limited Partnership
- 79. Colwood's Triumph Limited Partnership
- 80. Cowichan District Financial Centre Limited Partnership
- 81. Duncan City Centre Limited Partnership
- 82. Durham Portfolio Limited Partnership
- 83. Fort St. John Retail Limited Partnership
- 84. Gatineau Centre Development Limited Partnership
- 85. IGW Diversified Redevelopment Fund Limited Partnership
- 86. IGW Energy Capital Limited Partnership
- 87. IGW Industrial Limited Partnership
- 88. IGW Properties Limited Partnership I
- 89. IGW Public Limited Partnership
- 90. IGW REIT Limited Partnership
- 91. IGW Residential Capital Limited Partnership
- 92. Jesken Development Limited Partnership
- 93. Jesken Investment Limited Partnership
- 94. League Assets Limited Partnership
- 95. Londondale Shopping Centre Limited Partnership
- 96. Market Square Properties Limited Partnership
- 97. Member-Partners' Consolidated Properties Limited Partnership

- 98. North Vernon Properties Limited Partnership
- 99. Redux Duncan City Centre Limited Partnership
- 100. Residences At Quadra Village Limited Partnership
- 101. Stoney Range Industrial Limited Partnership
- 102. Tsawassen Retail Power Centre Limited Partnership
- 103. Tyee Plaza Limited Partnership
- 104. Village Green Holdings Limited Partnership

**Real Estate Investment Trusts**

- 105. League IGW Real Estate Investment Trust

**Schedule "B"**

**List of Counsel**

Name	Party Represented
Mary I.A. Buttery / H. Lance Williams	PETITIONERS
John Sandrelli	PRICEWATERHOUSECOOPERS INC.
C. Brausson	QUEST CAPITAL MANAGEMENT CORP. QUEST MORTGAGE CORP.
M. Verbrugge	TCC MORTGAGE HOLDINGS INC. CITIZENS BANK OF CANADA FIRM CAPITAL
Scott H. Stephens	ROMSPEN INVESTMENT CORPORATION CANADIAN WESTERN BANK COAST CAPITAL SAVINGS CREDIT UNION

NO. S-137743  
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 THE  
*CANADA BUSINESS CORPORATIONS ACT*,  
R.S.C. 1985, c. C-44, AS AMENDED

AND

IN THE MATTER OF A PLAN OF  
COMPROMISE AND ARRANGEMENT OF  
LEAGUE ASSETS CORP. AND THOSE PARTIES LISTED ON  
SCHEDULE "A"

PETITIONERS

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**ORDER MADE AFTER APPLICATION**

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**DAVIS LLP**  
Barristers & Solicitors  
2800 Park Place  
666 Burrard Street  
Vancouver, BC V6C 2Z7

Tel. No. 604.687.9444  
Fax No. 604.687.1612

Client Matter No. 80299-00013

MUB/sxl

# TAB 6



**CITATION:** (Re) Clothing for Modern Times Ltd., 2011 ONSC 7522  
**COURT FILE NO.:** 31-1513595  
**DATE:** 20111216

2011 ONSC 7522 (CanLII)

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**RE:** IN THE MATTER OF THE Notice of Intention to make a Proposal of Clothing for Modern Times Ltd.

**BEFORE:** D. M. Brown J.

**COUNSEL:** M. Poliak and H. Chaiton, for the Applicant

M. Forte, for A. Farber & Partners Inc., the Proposal Trustee and Proposed Monitor

I. Aversa, for Roynat Asset Finance

D. Bish, for Cadillac Fairview

L. Galessiere, for Ivanhoe Cambridge Inc., Oxford Properties Group Inc., Primaris Retail Estate Investment Trust, Morguard Investment Limited and 20 VIC Management Inc.

M. Weinczuk, for 7951388 Canada Inc.

**HEARD:** December 16, 2011

**REASONS FOR DECISION**

**I. Motion to continue *BIA* Part III proposal proceedings under the *CCAA***

[1] Clothing for Modern Times Ltd. (“CMT”), a retailer of fashion apparel, filed a Notice of Intention to Make a Proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, on June 27, 2011. A. Farber & Partners Inc. was appointed CMT’s proposal trustee. At the time of the filing of the NOI CMT operated 116 retail stores from leased locations across Canada. CMT sold fashion apparel under the trade names Urban Behavior, Costa Blanca and Costa Blanca X.

[2] CMT has obtained from this Court several extensions of time to file a proposal. That time will expire on December 22, 2011. Under section 50.4(9) of the *BIA*, no further extensions are possible.

[3] Accordingly, CMT moves under section 11.6(a) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 for an order, effective December 22, 2011, continuing CMT's restructuring proceeding under the *CCAA* and granting an Initial Order, as well as approving a sale process as a going concern for part of CMT's business.

## **II. Key background events**

[4] Following the filing of the NOI, pursuant to orders of this Court, CMT conducted a self-liquidation of underperforming stores across Canada and, as well, a going-concern sale of its Urban Behavior business. The latter transaction is scheduled to close on January 16, 2012.

[5] At the time of the filing of the NOI there were three major secured creditors of CMT: Roynat Asset Finance, CIC Asset Management Inc., and CMT Sourcing. The company's indebtedness to those creditors totaled approximately \$28.3 million. CMT anticipates that the proceeds from the Urban Behavior transaction and the liquidation of under-performing stores will prove sufficient to repay its loan obligations to Roynat in full before the expiration of a forbearance period on January 16, 2012.

[6] When CMT was last in court on November 7, 2011 it stated it intended to make a proposal to its unsecured creditors, an intention supported by the two remaining secured creditors, CIC and CMT Sourcing. Subsequently CMT met with representatives of certain landlords and commenced discussions about its proposed restructuring plan. As a result of those discussions CMT lacks the confidence that its proposal would be approved by the requisite majority of its unsecured creditors, and it does not believe that it can make a viable proposal to its creditors. Instead, CMT thinks that a going-concern sale of its Costa Blanca business would be in the best interests of stakeholders and would preserve employment for about 500 remaining employees, both full-time and hourly retail staff.

[7] In its Sixth Report dated December 14, 2011 Farber agrees that a going concern sale of the Costa Blanca business would be in the best interests of CMT's stakeholders, maximize recoveries to the two secured creditors, CIC and CMT Sourcing, and preserve employment for CMT's remaining employees. Farber supports CMT's request to continue its restructuring under the *CCAA*. Farber consents to act as the Monitor under *CCAA* proceedings and to administer the proposed sale process.

## **III. Continuation under the CCAA**

### **A. Principles governing motions to continue *BIA* Part III proposal proceedings under the *CCAA***

[8] Continuations of *BIA* Part III proposal proceedings under the *CCAA* are governed by section 11.6(a) of that Act which provides:

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.

[9] It strikes me that on a motion to continue under the CCAA an applicant company should place before the court evidence dealing with three issues:

- (i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the CCAA that it has not filed a proposal under the BIA;
- (ii) The proposed continuation would be consistent with the purposes of the CCAA; and,
- (iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the CCAA requires accompany any initial application under the Act.

Let me deal with each in turn

**B. The applicant has not filed a proposal under the BIA**

[10] The evidence shows that CMT has satisfied this statutory condition.

**C. The continuation would be consistent with the purposes of the CCAA**

[11] In *Century Services Inc. v. Canada (Attorney General)*,<sup>1</sup> the Supreme Court of Canada articulated the purpose of the CCAA in several ways:

- (i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;<sup>2</sup>
- (ii) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;<sup>3</sup>
- (iii) To avoid the social and economic losses resulting from liquidation of an insolvent company;<sup>4</sup>

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<sup>1</sup> 2010 SCC 60.

<sup>2</sup> *Century Services*, para. 15.

<sup>3</sup> *Ibid.*, para. 59.

<sup>4</sup> *Ibid.*, para. 70.

- (iv) 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.<sup>5</sup>

As the Supreme Court noted in *Century Services*, proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved “through a rules-based mechanism that offers less flexibility.”<sup>6</sup> In the present case CMT bumped up against one of those less flexible rules – the inability of a court to extend the time to file a proposal beyond six months after the filing of the NOI.

[12] The jurisprudence under the *CCAA* accepts that in appropriate circumstances the purposes of the *CCAA* will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business, as is contemplated in the present case. In *Re Stelco Inc.* Farley J. observed that if a restructuring of a company is not feasible, “then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part”.<sup>7</sup> It also is well-established in the jurisprudence that a court may approve a sale of assets in the course of a *CCAA* proceeding before a plan of arrangement has been approved by creditors.<sup>8</sup> In *Re Nortel Networks Inc.* Morawetz J. set out the rationale for this judicial approach:

The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.<sup>9</sup>

[13] The evidence filed by CMT and Farber supports a finding that a continuation under the *CCAA* to enable a going-concern sale of the Costa Blanca business and assets would be consistent with the purposes of the *CCAA*. Such a sale likely would maximize the recovery for the two remaining secured creditors, CIC and CMT Sourcing, preserve employment for many of the 500 remaining employees, and provide a tenant to the landlords of the 35 remaining Costa Blanca stores. Avoidance of the social and economic losses which would result from a liquidation and the maximization of value would best be achieved outside of a bankruptcy.

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<sup>5</sup> *Ibid.*, para. 77.

<sup>6</sup> *Ibid.*, para. 15.

<sup>7</sup> (2004), 6 C.B.R. (5<sup>th</sup>) 316 (Ont. S.C.J.), para. 1. In *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3482 the Court of Appeal held that a sale of a business as a going concern during a *CCAA* proceeding is consistent with the purposes of that Act.

<sup>8</sup> See the cases collected by Morawetz J. in *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5<sup>th</sup>) 229 (Ont. S.C.J.), paras. 35 to 39. See also section 36 of the *CCAA*.

<sup>9</sup> *Ibid.*, para. 40.

**D. Evidence which serves as a reasonable surrogate for CCAA s. 10(2) information**

[14] As the Supreme Court of Canada observed in *Century Services*, “the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority.”<sup>10</sup> On an initial application under the CCAA a court will have before it the information specified in section 10(2) which assists it in considering the appropriateness, good faith and due diligence of the application. Section 10(2) of the CCAA provides:

10. (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.

[15] Section 11.6 of the CCAA does not stipulate the information which must be filed in support of a continuation motion, but a court should have before it sufficient financial and operating information to assess the viability of a continuation under the CCAA. In the present case CMT has filed, on a confidential basis,<sup>11</sup> cash flows for the period ending January 31, 2012, which show a net positive cash flow for the period and that CMT has sufficient resources to continue operating in the CCAA proceeding, as well as to conduct a sale process without the need for additional financing.

[16] In addition, the Proposal Trustee filed on this motion its Sixth Report in which it reported on its review of the cash flow statements. Although its opinion was expressed in the language of a double negative, I take from its report that it regards the cash flow statements as reasonable.

[17] Finally, the previous extension orders made by this Court under section 50.4(9) of the BIA indicate that CMT satisfied the Court that it has been acting in good faith and with due diligence.

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<sup>10</sup> *Century Services*, para. 70.

<sup>11</sup> CMT has filed evidence explaining that disclosure of the cash flows prior to the closing of the Urban Behavior transaction would make public the proceeds expected from that transaction. I agree that such information should not be made public until the deal has closed. CMT has satisfied the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 and a sealing order should issue.

## E. Conclusion

[18] No interested person opposes CMT's motion to continue under the CCAA. Its two remaining secured creditors, CIC and CMT Sourcing, support the motion. From the evidence filed I am satisfied that CMT has satisfied the statutory condition contained in section 16(a) of the CCAA and that a continuation of its re-structuring under the CCAA would be consistent with the purposes of that Act.

## IV. Sale Process

[19] In *Re Nortel Networks Corp.* Morawetz J. identified the factors which a court should consider when reviewing a proposed sale process under the CCAA in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?<sup>12</sup>

[20] No objection has been taken to CMT's proposed sale of its Costa Blanca business or the proposed sale process under the direction of Farber as Monitor. Chris Johnson, CMT's CFO, deposed that CMT is not in a position to make a viable proposal to its creditors and has concluded that a going-concern sale of the Costa Blanca business would be the most appropriate course of action. The Proposal Trustee concurs with that assessment. In light of those opinions, an immediate sale of the Costa Blanca business would be warranted in order to attract the best bids for that business on a going-concern basis. Such a sale, according to the evidence, stands the best chance of maximizing recovery by the remaining secured creditors and preserving the employment of a large number of people. No better viable alternative has been put forward.

[21] Accordingly, I approve the proposed sale process as described in paragraph 37 of the affidavit of Chris Johnson.

## V. Administration Charges

[22] CMT seeks approval under section 11.52 of the CCAA of an Administration Charge over the assets of CMT to secure the professional fees and disbursements of Farber as Monitor and its counsel, as well as the fees of Ernst & Young Orenda Corporate Finance Inc. ("E&Y"), who has been acting as CMT's financial advisor, together with its counsel. The order sought reflects, in

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<sup>12</sup> *Nortel Networks, supra.*, para. 49. See also *Re Brainhunter Inc.* (2009), 62 C.B.R. (5<sup>th</sup>) 41 (Ont. S.C.J.), para. 13.

large part, the priorities of various charges approved during the *BIA* Part III proposal process. CMT proposes that the Professionals Charge approved under the *BIA* orders and the CCAA Administration Charge rank *pari passu*, and that whereas the *BIA* orders treated as ranking fourth “the balance of any indebtedness under the Professionals Charge”, the CCAA order would place a cap of \$250,000 on such portions of the Professionals and CCAA Administration Charges.

[23] No interested person opposes the charges sought.

[24] I am satisfied that the charge requested is appropriate given the importance of the professional advice to the completion of the Urban Behavior transaction and the sale process for the Costa Blanca business.

## **VI. Order granted**

[25] I have reviewed the draft Initial Order submitted by CMT and am satisfied that an order should issue in that form.

[26] CMT also seeks a variation of paragraph 3 of the Approval and Vesting Order of Morawetz J. made November 7, 2011 in respect of the Urban Behavior transaction to include, in the released claims, the Professionals Charge and the CCAA Administration Charge. None of the secured creditors objects to the variation sought and it is consistent with the intent of the existing language of that order. I therefore grant the variation sought and I have signed the order.

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(original signed by)

D. M. Brown J.

**Date:** December 16, 2011

# TAB 7



**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Canada v. Callidus Capital Corporation](#) | 2017 CAF 162, 2017 FCA 162, 2017 CarswellNat 3599, 2017 CarswellNat 9496, 8 P.P.S.A.C. (4th) 1, 414 D.L.R. (4th) 132, 51 C.B.R. (6th) 15, 37 E.T.R. (4th) 177, 281 A.C.W.S. (3d) 209, [2017] G.S.T.C. 60 | (F.C.A., Jul 27, 2017)

2010 SCC 60  
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

**Century Services Inc. (Appellant) and Attorney  
General of Canada on behalf of Her Majesty  
The Queen in Right of Canada (Respondent)**

Deschamps J., McLachlin C.J.C., Binnie, LeBel,  
Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010

Judgment: December 16, 2010

Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. BATTERY, Owen J. James, Matthew J.G. Curtis for Appellant  
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous;  
Insolvency

**Related Abridgment Classifications**

Tax

## I General principles

### I.5 Priority of tax claims in bankruptcy proceedings

#### Tax

### III Goods and Services Tax

#### III.14 Collection and remittance

##### III.14.b GST held in trust

#### Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST

claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyait que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu

de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the

stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

**Held:** The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA

provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que

l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

**Arrêt:** Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, J.J., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires

étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'étaient les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la préséance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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*Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by creditor from judgment reported at [2009 CarswellBC 1195](#), [2009 BCCA 205](#), [\[2009\] G.S.T.C. 79](#), [98 B.C.L.R. \(4th\) 242](#), [\[2009\] 12 W.W.R. 684](#), [270 B.C.A.C. 167](#), [454 W.A.C. 167](#), [2009 G.T.C. 2020 \(Eng.\)](#) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.:***

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

### 1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("*LeRoy Trucking*") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("*GST*") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.



4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

## 2. Issues

9 This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

### 3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

#### 3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial

supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA's* predecessor

bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. 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. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

### 3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons

of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

**222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.



37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

**18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

**37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

**18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

**18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it

did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

### ***3.3 Discretionary Power of a Court Supervising a CCAA Reorganization***

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of *CCAA* law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can

be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, per Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, per Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, per Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalf & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, per Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, per Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that



it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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 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.

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.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory

scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

### ***3.4 Express Trust***

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal

concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

#### 4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring):***

**I**

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any

suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

## II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

**227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

**(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

**18.3 (1)** Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

**(2)** Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

**67 (2)** Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

**(3)** Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation* of the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

**222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

**(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.



108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

### III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

#### ***Abella J. (dissenting):***

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust

in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11<sup>1</sup> of the *CCAA* stated:

**11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

**222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

**18.3 (1)** ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor

company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were

made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and,

while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,<sup>2</sup> s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37.(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of

a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

**18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

*Appeal allowed.*

*Pourvoi accueilli.*

## Appendix

### ***Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)***

**11. (1) Powers of court** — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

**(3) Initial application court orders** — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

(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 or proceeding with any other action, suit or proceeding against the company.

**(4) Other than initial application court orders** — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

(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 or proceeding with any other action, suit or proceeding against the company.

...



**(6) Burden of proof on application** — The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**11.4 (1) Her Majesty affected** — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement,  
or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

**(2) When order ceases to be in effect** — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for

the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

**(3) Operation of similar legislation** — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

**18.3 (1) Deemed trusts** — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

**(2) Exceptions** — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

**18.4 (1) Status of Crown claims** — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

**(3) Operation of similar legislation** — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

...

**20. [Act to be applied conjointly with other Acts]** — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

*Companies' Creditors Arrangement Act, R.S.C.*

**1985, c. C-36 (as at September 18, 2009)**

**11. General power of court** — 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.

...

**11.02 (1) Stays, etc. — initial application** — 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 30 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.

**(2) Stays, etc. — other than initial application** — 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

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

**(3) Burden of proof on application** — 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.

...

**11.09 (1) Stay — Her Majesty** — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

**(2) When order ceases to be in effect** — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection,



to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

**(3) Operation of similar legislation** — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of

the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

**37. (1) Deemed trusts** — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

**(2) Exceptions** — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

**222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

**(1.1) Amounts collected before bankruptcy** — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy*

*and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

**(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

*Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)*

**67. (1) Property of bankrupt** — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

**(2) Deemed trusts** — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

**(3) Exceptions** — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

**86. (1) Status of Crown claims** — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

**(3) Exceptions** — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

## Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:

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.

2 The amendments did not come into force until September 18, 2009.

# TAB 8

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp.](#) | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183

Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R.  
(3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

**Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))**

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison and Melissa J. Kennedy* , for applicants.

*L. Crozier* , for Royal Bank of Canada.

*R.C. Heintzman* , for Bank of Montreal.

*J. Hodgson, Susan Lundy and James Hilton* , for Canada Trustco Mortgage Corporation.

*Jay Schwartz* , for Citibank Canada.

*Stephen Golick* , for Peat Marwick Thorne<sup>\*</sup> Inc., proposed monitor.

*John Teolis*, for Fuji Bank Canada.

*Robert Thorton*, for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

### **Related Abridgment Classifications**

Bankruptcy and insolvency

**XIX** Companies' Creditors Arrangement Act

**XIX.2** Initial application

**XIX.2.b** Grant of stay

**XIX.2.b.i** General principles

### **Headnote**

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

### **Held:**

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective



against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

## Table of Authorities

### Cases considered:

*Amirault Fish Co., Re*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — referred to  
*Associated Investors of Canada Ltd., Re*, 67 C.B.R. (N.S.) 237, Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — referred to  
*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — referred to  
*Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — referred to  
*Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 [H.C.] — referred to  
*Feifer v. Frame Manufacturing Corp., Re*, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — referred to  
*Fine's Flowers Ltd. v. Fine's Flowers (Creditors of)* (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — referred to  
*Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — referred to  
*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — referred to  
*Inducon Development Corp. Re* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — referred to  
*International Donut Corp. v. 050863 N.B. Ltd.* (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — considered  
*Keppoch Development Ltd., Re* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — referred to  
*Langley's Ltd., Re*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — referred to  
*McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) — referred to

*Meridian Developments Inc. v. Toronto Dominion Bank*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — referred to *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 1 (Q.B.) — referred to *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — referred to *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — referred to *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.), affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.), leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — referred to *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — referred to *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) — referred to *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to *Slavik, Re* (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — considered *Stephanie's Fashions Ltd., Re* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — referred to *Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen. Div.) — referred to *United Maritime Fishermen Co-operative, Re* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (C.A.) — referred to

#### Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — preamble

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43.

Judicature Act, The, R.S.O. 1937, c. 100.

Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

**Rules considered:**

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

**Farley J.:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

- (a) short service of the notice of application;
- (b) a declaration that the applicants were companies to which the CCAA applies;
- (c) authorization for the applicants to file a consolidated plan of compromise;
- (d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;
- (e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and
- (f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership

registered under the *Limited Partnership Act*, R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act*, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately \$370 million, LPC \$45 million and LPC II \$7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately \$543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lender also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

- (a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.
- (b) The restructuring of existing project financing commitments.
- (c) New financing, by way of equity or subordinated debt.
- (d) Elimination or reduction of certain overhead.
- (e) Viability of existing businesses of entities in the Lehndorff Group.
- (f) Restructuring of income flows from the limited partnerships.
- (g) Disposition of further real property assets aside from those disposed of earlier in the process.
- (h) Consolidation of entities in the Group; and
- (i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.), at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.), at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) ; *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.), at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)*, supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R.

(2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 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. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . 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 *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;



(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 320 where Gibbs J.A. for the court stated:

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the

terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

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.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik*, unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.*, unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved

in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

### **The Power to Stay**

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

### **The Power to Stay in the Context of C.C.A.A. Proceedings**

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems*, supra, at pp. 65-66 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, (sub nom. *Lane v. Willis; Lane v. Beach*) [1972] 1 W.L.R. 326 (C.A.).

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In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.*) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:

(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions

of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure*, O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership*, 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam*

*Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners

(and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test*, (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

*Application allowed.*

## Footnotes

\* As amended by the court.



# TAB 9

2009 CarswellOnt 4806  
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

**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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS  
LIMITED, NORTEL NETWORKS GLOBAL CORPORATION,  
NORTEL NETWORKS INTERNATIONAL CORPORATION AND  
NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 16, 2009  
Judgment: August 18, 2009  
Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al  
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel  
Networks Limited

Leanne Williams for Flextronics Inc.

J. Pasquariello for Monitor, Ernst & Young Inc.

B. Wadsworth for CAW-Canada

Thomas McRae for Recently Severed Calgary Employees

A. McKinnon for Former Employees

Mary Arzoymandis for Bell Canada

Alex MacFarlane for Unsecured Creditors' Committee

Gavin Finlayson for Noteholders

Tina Lie for Superintendent of Financial Services of Ontario

Steven Graff, Ian Aversa for Current and Former Employees

Subject: Insolvency

**Related Abridgment Classifications**

Civil practice and procedure

## XVI Disposition without trial

### XVI.3 Stay or dismissal of action

#### XVI.3.f Removal of stay

#### Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Removal of stay

Action was commenced in United States which involved alleged breach by named defendants of their statutory duties under Employee Retirement Income Security Act, 1974 (ERISA) — ERISA litigation was at discovery stage, which entailed review and production of millions of pages of electronic documents and numerous depositions — Stay was contained in Amended and Restated Initial Order (initial order) — Applicants brought motion for order extending stay — Current and former employees of N Inc. who were participants in long-term investment plan sponsored by N Inc. (moving parties) brought motion for order lifting stay of proceedings — Motion by applicants granted — Motion by moving parties dismissed — D&O stay under initial order did cover D&O defendants in ERISA litigation and it was not appropriate to lift stay at this time — Effect of stay would be merely to postpone ERISA litigation — Allegations against named defendants were not restricted to defendants acting in their capacity as fiduciaries — In expanding scope of litigation to include broad allegations as against directors, moving parties had brought ERISA litigation within terms of D&O stay — Restructuring was at critical stage and energies and activities of board should be directed towards restructuring — To permit ERISA litigation to continue at that time would result in significant distraction and diversion of resources at time when that could be least afforded — Further postponement of claim for relatively short period of time would not be unduly prejudicial to moving parties.

#### Table of Authorities

##### Cases considered by *Morawetz J.*:

*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

*Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 2008 CarswellOnt 1427, (sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.*) 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, (sub nom. *Slater Steel Inc. (Re)*) 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

*SNV Group Ltd., Re* (2001), 95 B.C.L.R. (3d) 116, 2001 BCSC 1644, 2001 CarswellBC 2662 (B.C. S.C.) — referred to

*Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

##### Statutes considered:

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.5 [en. 1997, c. 12, s. 124] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(2) [en. 1997, c. 12, s. 124] — referred to

*Employee Retirement Income Security Act, 1974*, 29 U.S.C.

Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 21 — referred to

MOTION by applicants for order extending stay in action; MOTION by moving parties for order lifting stay of proceedings.

***Morawetz J.:***

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

**Background**

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It

is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and>NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

- (a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;
- (b) the bulk of documentary discovery issues have been worked out;
- (c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and
- (d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. \$30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

## **Analysis**

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants 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, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.)) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay



ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against *Morneau* would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

### Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extent that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

*Motion by applicants granted; motion by moving parties dismissed.*

# TAB 10

2012 ONSC 1299

Ontario Superior Court of Justice [Commercial List]

First Leaside Wealth Management Inc., Re

2012 CarswellOnt 2559, 2012 ONSC 1299, 213 A.C.W.S. (3d) 266

**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**

D.M. Brown J.

Heard: February 23, 2012

Judgment: February 26, 2012

Docket: CV-12-9617-00CL

Counsel: J. Birch, D. Ward, for Applicants

P. Huff, C. Burr, for Proposed Monitor, Grant Thornton Limited

D. Bish, for Independent Directors  
B. Empey, for Investment Industry Regulatory Organization of Canada  
J. Grout, for Ontario Securities Commission  
R. Oliver, for Kenaidan Contracting Limited  
J. Dietrich — Proposed Representative Counsel, for the investors  
E. Garbe, for Structform International Limited  
N. Richter, for Gilbert Steel Limited  
M. Sanford, for Janick Electric Limited  
M. Konyukhova, for Midland Loan Services Inc.  
C. Prophet, for Canadian Imperial Bank of Commerce

Subject: Insolvency; Corporate and Commercial

### **Related Abridgment Classifications**

Bankruptcy and insolvency

**X** Priorities of claims

**X.2** Preferred claims

**X.2.c** Costs and expenses of administrators

**X.2.c.ii** Priority over other claims

Bankruptcy and insolvency

**XIX** Companies' Creditors Arrangement Act

**XIX.1** General principles

**XIX.1.b** Qualifying company

Bankruptcy and insolvency

**XIX** Companies' Creditors Arrangement Act

**XIX.1** General principles

**XIX.1.c** Application of Act

**XIX.1.c.iv** Miscellaneous

Bankruptcy and insolvency

**XIX** Companies' Creditors Arrangement Act

**XIX.1** General principles

**XIX.1.d** Constitutional issues

### **Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Applicants qualified for CCAA protection — Applicants were "companies" within meaning of CCAA — Total claims against applicants, as affiliated group of companies, was greater than \$5 million — Some

applicants were "debtor companies" in sense that they were insolvent — It was necessary and appropriate to extend CCAA protection to other applicants, as well as to LPs — Presence of those entities within ambit of initial order was necessary to effect orderly winding-up of FLG — This conclusion was supported by insolvency of overall FLG and high degree of interconnectedness amongst members of FLG — Consequently, whether particular applicant fell under initial order as debtor company, or as necessary party as part of intertwined whole, was distinction without practical difference.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Liquidation under Act — FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — CCAA was available to applicants in circumstances — Both CRO and proposed monitor possessed extensive knowledge about workings of applicants and supported process conducted under CCAA — No party contested availability of CCAA to conduct orderly winding-up, although some parties questioned whether certain entities should be included within scope of initial order — Given that state of affairs, there was no reason not to accept professional judgment of CRO and proposed monitor that liquidation under CCAA was most appropriate route to take — There was no prejudice to claimant creditors by permitting winding-up under CCAA instead of under Bankruptcy and Insolvency Act in view of convergence between these two Acts on issue of priorities.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Constitutional issues

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors —

It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors — It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

## Table of Authorities

### Cases considered by *D.M. Brown J.*:

*Associated Investors of Canada Ltd., Re* (1987), 1987 CarswellAlta 330, 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, 67 C.B.R. (N.S.) 237, (sub nom. *First Investors Corp., Re*) 46 D.L.R. (4th) 669 (Alta. Q.B.) — considered

*Brake Pro Ltd., Re* (2008), 2008 CarswellOnt 3195 (Ont. S.C.J.) — considered

*Canadian Western Bank v. Alberta* (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

*Caterpillar Financial Services Ltd. v. 360networks Corp.* (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — considered

*Indalex Ltd., Re* (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

*Nortel Networks Corp., Re* (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.*) 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re*) 99 O.R. (3d) 708 (Ont. C.A.) — referred to

*Prizm Income Fund, Re* (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

*Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005), [2005] 1 S.C.R. 188, 2005 SCC 13, 2005 CarswellSask 162, 2005 CarswellSask 163, 250 D.L.R. (4th) 411, [2005] 9 W.W.R. 403 (S.C.C.) — considered

*Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

*Ted Leroy Trucking Ltd., Re* (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

*Timminco Ltd., Re* (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — followed

#### **Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "insolvent person" — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 2 — considered

s. 2 "secured creditor" — considered

s. 3(1) — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered



s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

*Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5  
Generally — referred to

s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

APPLICATION by members of insolvent group of companies for initial order under *Companies' Creditors Arrangement Act*.

***D.M. Brown J.:***

## **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.<sup>1</sup> 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,<sup>2</sup> 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 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 *Stelco Inc., Re* 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".<sup>3</sup>

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.

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.<sup>4</sup>

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 interconnectedness 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 reality is that "reorganizations of differing complexity require different legal mechanisms."<sup>5</sup> 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,<sup>6</sup> or to wind-up or liquidate it. In *Lehndorff General Partner Ltd., Re*<sup>7</sup> 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 exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality.<sup>8</sup>

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*.<sup>9</sup>

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*:

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.<sup>10</sup>

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.<sup>11</sup>

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.

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 Ltd., Re*<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

49 In his recent decision in *Timminco Ltd., Re*<sup>15</sup> ("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 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.<sup>16</sup>

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 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 oversimplification, 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".<sup>17</sup> 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",<sup>18</sup> 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."<sup>19</sup> Since 1960 the Supreme Court of Canada has travelled a "path of judicial restraint in questions of paramountcy".<sup>20</sup> 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,<sup>21</sup> unless (and it is a big "unless"), Parliament used very clear statutory language to that effect.<sup>22</sup>

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 creditors of the debtor.<sup>23</sup> 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* 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".<sup>24</sup> 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.

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.

*Application granted.*

## Footnotes

- 1 MacLeod Affidavit, paras. 104 to 106.
- 2 The Excluded LPs were identified in paragraph 134 of Mr. MacLeod's affidavit.
- 3 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]).
- 4 2011 ONSC 2061 (Ont. S.C.J.), paras. 26-27.

- 5 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), paras. 15, 77 and 78.
- 6 *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.), 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 (Ont. Gen. Div. [Commercial List]). In *Brake Pro Ltd., Re*, [2008] O.J. No. 2180 (Ont. 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."
- 8 *Associated Investors of Canada Ltd., 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.
- 10 *Century Services, supra.*, para. 23.
- 11 (2007), 279 D.L.R. (4th) 701 (B.C. C.A.), para. 42.
- 12 2011 ONCA 265 (Ont. C.A.).
- 13 *Ibid.*, para. 155.
- 14 *Ibid.*, paras. 178 and 179.
- 15 2012 ONSC 506 (Ont. S.C.J. [Commercial List]).
- 16 *Ibid.*, para. 66.
- 17 *Constitution Act, 1867*, s. 92 ¶13.
- 18 *Ibid.*, s. 91 ¶21.
- 19 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), para. 69.
- 20 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 (S.C.C.), para. 21
- 21 *Canadian Western Bank, supra.*, para. 74.
- 22 *Rothmans, supra.*, para. 21.
- 23 CCAA ss. 11.51(2) and 11.52(2).
- 24 *Indalex, supra.*, para. 176.

# TAB 11

2016 ABQB 522  
Alberta Court of Queen's Bench

Northern Transportation Co., Re

2016 CarswellAlta 1834, 2016 ABQB 522, [2016] A.W.L.D. 4360, [2016] A.W.L.D. 4370,  
[2016] A.W.L.D. 4371, [2016] A.W.L.D. 4378, [2017] 3 W.W.R. 371, 271 A.C.W.S. (3d)  
84, 40 C.B.R. (6th) 263

**In the Matter of the Companies' Creditors Arrangement Act,  
R.S.C. 1985, c.C-36, as amended**

In the Matter of a Plan of Arrangement of Northern Transportation Company Limited

C. Dario J.

Heard: August 9, 2016  
Judgment: September 22, 2016  
Docket: Calgary 1601-05256

Counsel: Ken Lenz, Q.C., for Applicant, Northern Transportation Company Limited  
Kibben Jackson, for Respondent, ITB Marine Group Ltd.  
Frank Lamie, for Respondent, Banking Syndicate

**Headnote**

Contracts --- Performance or breach — Time of performance — Miscellaneous  
Lessor I Ltd. provided vessels and assets to lessee NTC Ltd. pursuant to lease agreement that was in furtherance of purchase agreement — Lessee did not make two lease payments when due but did make payments after receiving notice of default — Lessor treated delay in payment as default under lease agreement and sought to enforce its rights — While parties were engaged in contractually mandated dispute resolution, lessee came under Companies' Creditors Arrangement Act protection — Lessee brought application for declaration that lease agreement was not in default — Application dismissed — Provision in lease agreement allowing for grace period when missed payments were due to "oversight, negligence, error or omission" was not applicable, so fact that lessee tendered late payments did not remedy default — Evidence supported contention that lessee intended not to pay two delayed lease payments in attempt to rationalize its operations — Lessee knew payments were due and chose not to pay at designated time — Intentional act of choosing to not make timely payment was not within meaning of

either “error”, “oversight”, “omission”, or “negligence” — Section 63(1)(b) of Alberta’s Personal Property Security Act, which allowed debtor to reinstate agreement by paying amounts actually in default together with reasonable expenses incurred by secured party, did not apply since agreements provided BC law governed, and event of default remained.

Conflict of laws --- Personal property and security — Miscellaneous

Reinstatement of lease — Lessor I Ltd. provided vessels and assets to lessee NTC Ltd. pursuant to lease agreement that was in furtherance of purchase agreement — Lessee did not make two lease payments when due but did make payments after receiving notice of default — Lessor treated delay in payment as default under lease agreement and sought to enforce its rights — Lessee brought application for order reinstating lease agreement — Application dismissed — Lease was not reinstated and event of default remained — Lease agreement was “security lease” and was registered on Alberta and NWT personal property registries — Section 63(1)(b) of Alberta’s Personal Property Security Act (Alta. PPSA), which allowed debtor to reinstate agreement by paying amounts actually in default together with reasonable expenses incurred by secured party, did not apply — Provisions in BC’s Personal Property Security Act (BC PPSA) applied, which entitled lessee to redeem collateral by tendering fulfilment of obligations secured by collateral — Debtor was in Alberta and collateral was in NWT, and lease agreement and purchase agreement contained choice of law provision designating that agreements be governed and construed in accordance with BC laws — Lessee’s rights were determined by s. 8 of respective statutes providing for substantive issues to be governed by proper law of contract between parties — In this factual matrix, policy interests served by enforcing freedom of contract were more compelling than affording lessee additional statutory protections — Exercise of discretion under s. 62(3) of BC PPSA was not appropriate in light of lessee’s intentional disregard of primary contractual obligation of lease agreement.

Commercial law --- Conditional sales — Rights and liabilities of parties — Vendor’s remedies on default — Acceleration clauses

Reinstatement of lease — Lessor I Ltd. provided vessels and assets to lessee NTC Ltd. pursuant to lease agreement that was in furtherance of purchase agreement — Lessee did not make two lease payments when due but did make payments after receiving notice of default — Lessor treated delay in payment as default under lease agreement and sought to enforce its rights by requiring payment of balance of purchase price for assets — While parties were engaged in contractually mandated dispute resolution, lessee came under Companies’ Creditors Arrangement Act protection — Lessee brought application for order reinstating lease agreement — Application dismissed — Lease was in default and would not be reinstated — There was no forfeiture in this case, as consequence of default was not to retain payments while lessee lost all interest in underlying assets, but rather, to accelerate payment of balance of purchase price — Lessee lost ability to pay purchase price over time but remained entitled to use and retain assets — Acceleration clause requiring full principal outstanding with interest to date when principal was paid did not constitute forfeiture and was not penalty clause.

Bankruptcy and insolvency --- Companies’ Creditors Arrangement Act — Initial application —

## Proceedings subject to stay — Miscellaneous

Lessor I Ltd. provided vessels and assets to lessee NTC Ltd. pursuant to lease agreement that was in furtherance of purchase agreement — Lessee's obligations were guaranteed under letter agreements by guarantor N Inc., which was 100 per cent owner of voting shares in lessee — Lessee did not make two lease payments when due but did make payments after receiving notice of default — Lessor treated delay in payment as default under lease agreement and sought to enforce its rights — While parties were engaged in contractually mandated dispute resolution, lessee came under Companies' Creditors Arrangement Act protection — Lessee brought application for order extending stay of proceedings to guarantor — Application dismissed — Stay of proceedings was not extended to guarantor in respect of this contract — Section 11.04 of Act specifically discussed non-application of stays to letters of credit and guarantees, providing that no stay order made under s. 11.02 had effect on any proceeding against guarantor who was not subject of stay order — Despite wording, there was guarantee structure to letter agreements, and N Inc. was guarantor of specified payment obligations of lessee under lease agreement and purchase agreement — Court could not extend stay to protect just one party's claim against third party N Inc., where that claim was in nature of guarantee — While potential consequences of not extending protection was possibly devastating to lessee and associated parties for which plan of arrangement pertained, consequences of neutralizing related company guarantee when debtor sought protection was more troubling.

## Table of Authorities

### Cases considered by *C. Dario J.*:

*Bank of Montreal v. Amar Enterprises Ltd.* (1994), 1994 CarswellBC 2213 (B.C. S.C.) — distinguished

*Bank of Montreal v. Burns* (1986), 76 A.R. 220, 1986 CarswellAlta 672 (Alta. Q.B.) — referred to

*Bradford Bachiniski Ltd. v. Merchant Capital Group Inc.* (2003), 2003 CarswellOnt 3974 (Ont. S.C.J.) — referred to

*Browne v. Southern Canada Power Co.* (1941), 23 C.B.R. 131, 71 Que. K.B. 136, 1941 CarswellQue 14 (C.A. Que.) — followed

*CTF Holdings Ltd. v. Flint Motors Ltd.* (1995), 14 B.C.L.R. (3d) 82, 10 P.P.S.A.C. (2d) 80, 1995 CarswellBC 970 (B.C. S.C. [In Chambers]) — considered

*Canada (Attorney General) v. Becker* (1998), 1998 CarswellAlta 802, 223 A.R. 59, 183 W.A.C. 59, 23 C.P.C. (4th) 188, 64 Alta. L.R. (3d) 292, [1999] 4 W.W.R. 347, 1998 ABCA 283 (Alta. C.A.) — referred to

*Cardel Leasing Ltd. v. Maxmenko* (1991), 2 P.P.S.A.C. (2d) 302, 1991 CarswellOnt 633

(Ont. Gen. Div.) — distinguished

*Charles Morissette inc., Re* (2014), 2014 QCCS 385, 2014 CarswellQue 929, 30 C.L.R. (4th) 73 (C.S. Que.) — considered

*Cohoon, Re* (2006), 2006 NSSC 30, 2006 CarswellNS 34, 17 C.B.R. (5th) 234, 9 P.P.S.A.C. (3d) 165, (sub nom. *Cohoon (Bankrupt), Re*) 247 N.S.R. (2d) 21, (sub nom. *Cohoon (Bankrupt), Re*) 785 A.P.R. 21 (N.S. S.C.) — distinguished

*Emerald Christmas Tree Co. v. Boel & Sons Enterprises Ltd.* (1979), 8 R.P.R. 143, 13 B.C.L.R. 122, 105 D.L.R. (3d) 75, 1979 CarswellBC 177 (B.C. C.A.) — referred to

*Freyberg v. Fletcher Challenge Oil & Gas Inc.* (2005), 2005 ABCA 46, 2005 CarswellAlta 152, 363 A.R. 35, 343 W.A.C. 35, 42 Alta. L.R. (4th) 41, [2005] 10 W.W.R. 87, 252 D.L.R. (4th) 365 (Alta. C.A.) — considered

*Freyberg v. Fletcher Challenge Oil & Gas Inc.* (2005), 2005 CarswellAlta 1695, 2005 CarswellAlta 1696, 348 N.R. 198 (note), 391 W.A.C. 398 (note), 401 A.R. 398 (note) (S.C.C.) — considered

*Guardian Trust Co. v. Gaglardi* (1989), 64 D.L.R. (4th) 351, 1989 CarswellBC 615 (B.C. S.C.) — referred to

*Houle v. BMW Financial Services* (2012), 2012 ABCA 333, 2012 CarswellAlta 1931, 20 P.P.S.A.C. (3d) 119, 539 A.R. 27, 561 W.A.C. 27, 84 Alta. L.R. (5th) 396 (Alta. C.A.) — considered

*Keddy Motor Inns Ltd., Re* (1991), 107 N.S.R. (2d) 419, (sub nom. *Keddy Motor Inns Ltd., Re (No. 2)*) 290 A.P.R. 419, 1991 CarswellNS 651 (N.S. T.D.) — followed

*MacDonald v. Searle* (1992), 1992 CarswellBC 2344 (B.C. S.C. [In Chambers]) — considered

*Raven Holdings Ltd. v. Lastiwka* (1980), 28 A.R. 199, 1980 CarswellAlta 423 (Alta. Master) — referred to

*Schell v. McCallum & Vannatter* (1918), [1918] 2 W.W.R. 735, 57 S.C.R. 15, 42 D.L.R. 563, 1918 CarswellSask 66 (S.C.C.) — referred to

*Sloan v. Dierden* (1984), 52 B.C.L.R. 193, 1984 CarswellBC 71 (B.C. S.C.) — referred to

*Target Canada Co., Re* (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — considered

*Ted Leroy Trucking Ltd., Re* (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C.

2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

*Vohra Enterprises Ltd. v. Creative Industrial Corp.* (1988), 47 R.P.R. 243, 23 B.C.L.R. (2d) 120, 1988 CarswellBC 49 (B.C. S.C.) — referred to

### **Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 179 — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.04 [en. 2005, c. 47, s. 128] — considered

*Personal Property Security Act*, R.S.A. 2000, c. P-7

Generally — referred to

s. 1(1)(tt) “security interest” — considered

s. 3(1)(b) — considered

s. 8 — considered

s. 8(1)(c) — considered

s. 56 — considered

s. 56(2) — considered

s. 62 — considered

s. 63 — considered

s. 63(1)(a) — considered

s. 63(1)(b) — considered



*Personal Property Security Act, R.S.B.C. 1996, c. 359*

Generally — referred to

s. 1(1) “security interest” — considered

s. 2(1)(b) — considered

s. 8 — considered

s. 8(1)(b) — considered

s. 55(4) — considered

s. 56 — considered

s. 56(2) — considered

s. 62 — considered

s. 62(1)(a) — referred to

s. 62(3) — referred to

s. 63 — considered

*Personal Property Security Act, S.N.S. 1995-96, c. 13*

Generally — referred to

***C. Dario J.:***

1 This action arises due to a delay in payments by the Applicant Northern Transportation Company Limited (“*NTCL*”) to the respondent ITB Marine Group Ltd. (“*ITB*”) owing pursuant to a Charter Party and Equipment Lease Agreement (“*Lease Agreement*”). Under the Lease Agreement, NTCL charters 19 vessels and related assets (collectively, the “*Assets*”) primarily located in the Northwest Territories to service remote communities. ITB treats the delay in payment as a default under the Lease Agreement. It seeks to enforce its rights under the Lease Agreement and a related purchase agreement (“*Purchase Agreement*”) between the parties, requiring NTCL to make immediate payment of the balance of the purchase price for the Assets. NorTerra Inc. (“*NorTerra*”), the 100% owner of voting shares in NTCL, entered into letter agreements with ITB in which NorTerra agreed to be jointly and severally responsible for the payment of the monthly lease payments and also for the balance of the purchase price in the

event of a default by NTCL.

2 ITB notified both NorTerra and NTCL of the event of default and its intent to enforce its rights. NTCL paid the outstanding monthly lease payments within 10 days of such notice and argues it made the delayed payments within the grace period as set out in the Lease Agreement. ITB continues to consider the delayed payments an event of default. While the parties were engaged in contractually mandated dispute resolution, NTCL came under *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA") protection.

3 The Assets are central to NTCL's operations; NTCL argues that ITB's enforcement of its contractual remedy — requiring NorTerra to make immediate payment of the balance of the purchase price - would defeat the purpose of the protection afforded by the CCAA.

4 NTCL seeks an order from this Court:

1) declaring that the Lease Agreement is not in default, either on its own terms or due to the right of reinstatement under the applicable *PPSA*,

2) reinstating the Lease Agreement, or

3) granting an order extending the stay of proceedings to NorTerra.

#### **A. Declaring the lease is not in default**

5 NTCL states that the Lease Agreement is not in default, either by virtue of its own terms or due to the right of reinstatement under the applicable *Personal Property Security Act* provisions.

#### ***Contract Terms:***

6 The parties entered into the Purchase Agreement to purchase the Assets in October 2013. This purchase was structured as a charter and lease for a period of time, with monthly lease payments followed by a Closing Date of the purchase and sale on May 31, 2018 (at which time the balance of the purchase price was due). The Lease Agreement was entered into by the parties contemporaneously with and in furtherance of the Purchase Agreement. The completion of the purchase is subject to an earlier closing date under certain circumstances, including upon an event of default by NTCL under the terms of the Lease Agreement.

7 The Lease Agreement defines an event of default at section 12.1, including ss. 12.1(a) - a failure to make punctual monthly payments, provided that if such failure is:

...due to oversight, negligence, errors or omissions on the part of [NTCL] or its bankers, [ITB] shall give [NTCL] ten (10) days in which to rectify the failure, and when so rectified within such period following [ITB's] notice, the [monthly lease] Payment shall stand as regular and punctual.

(Emphasis added.)

8 NTCL did not make the regular lease payments on February 29 and March 31, 2016, when due.

9 There is some dispute about the timing and nature of the communications the parties had after the missed payments. NTCL states it believed ITB was granting it a stay in enforcing its rights under the agreement, and that steps would not be taken as long as discussions were ongoing. ITB denies any such representation. The evidence supports a finding that the parties had a discussion about the late payments on March 31; however, there is no evidence of a prior communication that NTCL could be relying upon for its belief that a stay had been granted. Subsequent letters back and forth between the parties suggest they had a different impression of what ITB had agreed to in the March 31 meeting.

10 On April 8, 2016, ITB advised both NorTerra and NTCL that it considered the non-payments as an event of default. ITB demanded immediate payment of outstanding lease payments by NorTerra on NTCL's behalf, while reserving its rights to exercise other remedies under the agreements and under the NorTerra guarantee pertaining to the lease payments.

11 On April 14, ITB confirmed that it was electing to set an early closing date pursuant to s.13 of the Purchase Agreement, and provided confirmation of its intention to enforce security under the agreement.

12 NTCL made the delayed payments on April 18; ITB received those delayed payments under protest and placed the payments in trust with its counsel. Pursuant to the terms of the related Purchase Agreement, the parties entered a 30-day period of dispute resolution. During that period, on April 27, 2016, NTCL went into CCAA protection.

13 NTCL argues that it paid the outstanding amount on April 18, which is within 10 days of the notice demanding repayment of April 8, 2016. It argues that only upon receiving the demand notice of April 8 did it realize that ITB was not granting a stay during the negotiations. By paying within the 10 day period, NTCL argues it is within the terms of s.12.1(a) of the Lease Agreement.

14 The respondent (ITB) counters that by the time of the March 31 discussion and the April 8 demand notice, NTCL was already in default of the February 29 payment and therefore could not have been relying on any subsequent discussion for a stay relating to that default, nor could

the March 31 discussion be the basis of any mistake or error when the February 29 payment was due. Also, ITB argues that the Lease Agreement contains a provision requiring any amendment to the agreement to be in writing; therefore, NTCL could not rely on a representation that payment could be suspended unless NTCL obtained it in writing from ITB, which it did not.

15 To fit within the provision of s.12.1 (a), the Court must determine whether the acts of NTCL in not paying the two missed lease payments could be considered due to “oversight, negligence, error or omission”.

16 In this context, these terms are to be interpreted by looking and their plain and ordinary meaning, unless there is ambiguity or if doing so would create an absurd result. As noted in the CED 4th (online), *Interpretation of Contract*, “General Principles” (IX.1) at §552:

The objective of interpreting a contract is to discover and give effect to the parties’ true intention as expressed in the written document as a whole at the time the contract was made. In the absence of ambiguity, the plain, ordinary, popular, natural, or literal meaning of the words, read in light of the entire agreement and its surrounding circumstances, should be adopted, except where to do so would result in a commercial absurdity or create some inconsistency with the rest of the contract.

See also *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2005 ABCA 46, 252 D.L.R. (4th) 365 (Alta. C.A.) at para 65, leave to appeal to SCC refused, [2005] S.C.C.A. No. 167 (S.C.C.):

...reliance on the plain and obvious meaning of the words has the advantage of certainty and is to be preferred unless an absurd result would ensue.

### *Error*

17 NTCL asserts that the delay in payment was caused by an error (or misunderstanding) arising from the communications between NTCL and ITB, therefore bringing it within s.12.1(a) of the Lease Agreement. In its April 18, 2016 letter, it notes it was under the impression ITB was prepared to wait until mid-April for NTCL to provide an update on plans to make outstanding lease payments. In the same letter, and as confirmed by statements by its principal in support of this application, NTCL noted that during the withheld payments period it had been “looking to rationalize its operations, and has in recent weeks been considering various options in this regard”. ITB counters that the withheld payments were a tactic to put NTCL in a better position as it attempted to negotiate new contract terms with ITB. This view is supported by affidavit evidence of ITB’s Vice President, Finance that a verbal offer was made by NTCL on April 15, 2016, to make the delayed payments subject to ITB consenting to reduced payments through to November 2016. ITB declined that offer.

18 The evidence regarding the acts of NTCL supports the contention that it intended not to pay the two delayed lease payments in an attempt to rationalize its operations. NTCL knew the payments were due and chose not to pay at the designated time. It is not possible to characterize these intentional acts as an error in this context. In particular, any mistake or error arising from an understanding that came out of a discussion from the March 31 conference call does not retroactively bring the February 29 delayed payment within the confines of section 12.1(a) of the agreement. There is no evidence of discussions suggesting a stay of enforcement prior to March 31, nor is there a commitment to this effect in writing as required under the Lease Agreement.

19 While NTCL's actions resulting in the delayed payments may have been an error in judgment or in its understanding of NTCL's rights under the agreement, I find that this is not within the meaning of "error" in s.12.1(a) of the agreement.

#### *Oversight*

20 Similarly, based on the ordinary and natural meaning of the word, these intentional acts cannot be considered an "oversight".

#### *Omission*

21 Applying the principle of *ejusdem generis* (words of general meaning take their color from the words that precede it), an omission in this context in my view similarly cannot be an intentional act of choosing to not make timely payment, as this is not consistent with the unintentional element contained in the other words listed in that portion of the provision. Further, it would render specific words in s.12.1(a) superfluous. If so interpreted, any failure to pay (whether intentional or not) would require notice and a 10 day grace period within which NTCL could remedy the default; there would be no need to enumerate error, oversight or negligence as reasons for the failure.

#### *Negligence*

22 The meaning of negligence in this contract is also to be understood in its ordinary sense, being the "failure to take the care that a responsible person usually takes: lack of normal care or attention": *Merriam-Webster Dictionary* (online), *sub verbo* "negligence".

23 This is similar to our legal understanding of the word, which is defined in Black's Law Dictionary is as follows:

The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregarding of others' rights. ... **The term denotes culpable carelessness.** *Black's Law Dictionary*, 10th ed, *sub verbo* "negligence"; as applied in *Cambridge Realty (Ottawa) Ltd. v. Aviva Insurance Co. of Canada*, [2008] O.J. No. 3090, at para31.

[Emphasis added]

24 In the context of this provision, NTCL's intentional conduct does not fit within this definition either. NTCL was not careless when it failed to make payments on time, but intentionally chose not to. Similar to an "omission", in the context of this provision, to give effect to the words "error, oversight, negligence or omission", negligence could not be the result of a deliberate decision to not pay as required.

25 In light of the circumstances in which NTCL failed to make timely lease payments, I find s.12.1(a) of the Lease Agreement is not applicable. Based on the terms of the contract, at a minimum the delayed payment of February 29, 2016, constitutes an event of default.

### ***Statutory Right of Reinstatement***

26 NTCL alternatively argues that the lease is not in default, as the statutory regime allows debtors to reinstate the lease by making up the overdue payments, which it now has done. Specifically, s.63(1) (b) of the *Alberta Personal Property Security Act*, RSA 2000, c P-7 ("*Alberta PPSA*") allows a debtor to reinstate the agreement by paying the amounts actually in default together with reasonable expenses incurred by the secured party.

27 The parties treat the Lease Agreement as a "security lease" as it secures payment or performance of an obligation, namely the payment of the purchase price: per s.1(tt) and s.3(1)(b) *Alberta PPSA* and s.1 and s. 2(1)(b) *British Columbia Personal Property Security Act*, RSBC 1996, c 359 ("*BC PPSA*"). The Lease Agreement was registered on both the Alberta and Northwest Territories Personal Property Registries as a Security Agreement.

28 An issue in question is which *PPSA* legislation applies in this case. ITB disputes that the *Alberta PPSA* applies, as both the Lease Agreement and the Purchase Agreement contain a choice of law provision designating that the agreements be governed and construed in accordance with the laws of British Columbia, where ITB carries on its operations. NTCL argues that it has relied upon the Alberta statutory provisions to reinstate the lease, and such provisions supersede the contract provisions.

29 The BC *PPSA* right of redemption or reinstatement for non-consumer goods differs from the Alberta legislation. Under the Alberta *PPSA*, a debtor may *reinstate the security agreement* by merely paying amounts outstanding (exclusive of the operation of any acceleration clause, but including reasonable expenses of the secured creditor): Alberta *PPSA* s.63(1)(b). Under the BC *PPSA*, however, for non-consumer collateral, or if the debtor is a corporation, the debtor is only entitled to *redeem the collateral* by tendering fulfillment of the obligations secured by the collateral: BC *PPSA* s.55(4) and s.62(1)(a); the redemption right is also available per Alberta *PPSA* s.63(1)(a). Applying the BC *PPSA* provisions to the present case would require NTCL to make full payment of the purchase price upon which NTCL would redeem (or here retain) the Assets. That is the same relief that ITB is now demanding.

30 Alberta and BC *PPSA* legislation require that procedural issues involved in the enforcement of the rights of a secured party against tangible collateral be governed (for B.C.) by the law of the jurisdiction in which the enforcement rights are exercised, or (for Alberta) where the collateral is located at the time of exercise of enforcement rights. On the other hand, “substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor”: section 8(1)(c) Alberta *PPSA*; 8(1)(b) BC *PPSA*. ITB asserts, and NTCL does not contest, that the right of reinstatement after default of a contract is a substantive issue: in essence, this is the finding in *Houle v. BMW Financial Services*, [2012 ABCA 333, 539 A.R. 27](#) (Alta. C.A.).

31 NTCL states that despite the “applicable law” provisions contained in s.8 of the respective *PPSA* provisions, the parties are prohibited from contracting out of certain debtor protections, including the right of reinstatement contained in s.63 of the Alberta *PPSA*. It argues that inequality of bargaining power requires the court to apply the more favorable debtor protection legislation.

32 ITB argues that this position is only appropriate where the secured party is pursuing enforcement measures (e.g. attempting to seize the collateral in the domicile of the debtor).

33 The authority for NTCL’s proposition that the more favorable debtor protection legislation applies is based on provisions in the legislation that preclude waiver — by agreement or otherwise — of certain debtor rights and secured party obligations. These provisions, subsection 56(2) of the BC *PPSA* and 56(3) of the Alberta *PPSA* address the parties rights and remedies, and specifically reference the redemption and reinstatement provisions of the respective acts:

Except as provided in [various sections including in the Alberta *PPSA* s. 63, and in the BC *PPSA* s.62], no provision of [various sections including in the Alberta *PPSA*, s.63, and in the BC *PPSA* s.62], to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

Sections 63 and 62 of the Alberta and BC legislation respectively provide that the debtor can agree otherwise (which means it can waive the right of redemption (BC) or reinstatement (AB)) but only after the default has occurred.

34 The phrase “by agreement or otherwise” in the provision suggests that the waiver may occur otherwise than by the parties necessarily having intentionally addressed the issue specifically by agreement - even through the unintentional consequence of a choice of law provision. This broad wording is in keeping with consumer protection. One might argue, however, that the application of s.8 of the respective *PPSA* is not a waiver of the debtor rights, rather it is a determination of what rights the debtor has. As such, the function of the non-waiver provision of s. 56 is not to undermine the clarity or application of s.8.

35 While there is a concern that parties may use the choice of law provision to contract out of the debtor protection, it also does not seem appropriate that the debtor is entitled to benefit from being able to pick from the most favorable legal regime (e.g. under the law of the contract, or where the debtor is located) in every instance.

36 The present case highlights a tension between two conflicting policies: debtor protection on the one hand (especially consumer debtor protection), and on the other, freedom of contract, which allows the parties to create greater certainty in understanding the legal regime which governs their agreement.

37 If debtor protection policy is applied in this case, it would mean that NTCL would be entitled to benefit from the reinstatement rights permitted under the Alberta *PPSA* notwithstanding the choice of law provision in the contract, and the statutory recognition of that designation as it applies to substantive issues per s.8(1)(c). Arguments in favor of application of debtor protection include the express wording of s.56, including a specific reference to the reinstatement provision. Section 56 in effect states that no provision of s.63 (and other sections) that gives rights to NTCL or imposes obligations on ITB can be waived by agreement of the parties or otherwise (except where the waiver occurs after the default). Clearer still would have been to clarify within s.56 how s. 8 applies.

38 There is also some authority for the proposition that the *PPSA* legislation in the debtor’s domicile applies and the parties are not allowed to override the protective provisions of that *PPSA* regime when the debtor and collateral are both located in a jurisdiction with greater debtor protection legislation, notwithstanding the choice of law provision in the [security] agreement to the contrary: Ronald CC Cuming, Catherine Walsh, & Roderick Wood, *Personal Property Security Law*, 2d ed (Toronto: Irwin Law, 2012) at 229. See also for example *Cohoon, Re*, 2006 NSSC 30, 17 C.B.R. (5th) 234 (N.S. S.C.), and *Cardel Leasing Ltd. v. Maxmenko* (1991), 2 P.P.S.A.C. (2d) 302 (Ont. Gen. Div.), although these cases are highly distinguishable on the facts and issues in question.



39 In favor of the freedom of contract perspective in this case is the clear wording of s.8, that there is some nexus to the jurisdiction chosen in the contract (the secured party operates its business in B.C.) and the fact that the debtor and collateral are not in the same jurisdiction. The debtor is located in Alberta; the collateral is in neither BC nor Alberta, but in the Northwest Territories. Professor Cuming notes that this type of circumstance is less clear and there is little or no authority on the issue: *supra* at pages 230, 231. Instead, the author cautions against over-broad application of debtor protection principles. Speaking generally about the reach of debtor protection provisions, Cumming states at pages 230-231.

The discussion to this point has involved a scenario in which the only out of province element is the extra-provincial identity of the secured party. Where the connecting factors are more diffused, it may be appropriate for a court to take a more nuanced and restrained approach to determining the extra-territorial reach of mandatory debtor protection rules....

In addition, not every mandatory debtor protection rule necessarily implicates the fundamental public policy of the enacting legislature to the extent of commanding application even in secured transactions with an extra-provincial connection. ... if the consequences of non-compliance do not have a similarly substantive impact on the debtor's rights or liabilities, a case can be made for their non-application in transactions involving an out of province secured party or other extra-provincial element.

40 A further consideration is that the debtor protection in this case is not consumer in nature. While this distinction is not addressed in the *Alberta PPSA*, the non-consumer nature of the collateral and the corporate identities of the parties alleviates some of the concern around consumer protection. For example, the *BC PPSA* distinguishes between consumer and non-consumer collateral in setting out the redemption and reinstatement rights in s.62 of that act. This presumably is because the statutory protection is considered to be more necessary for consumer goods transactions where an inequality of bargaining power is more likely to be present than for transactions between parties dealing with non-consumer goods, as more often than not they are transactions between two sophisticated corporate entities, such as in this case. Similarly, the *BC PPSA* distinguishes between corporate and non-corporate actors, the latter of which cannot rely on the reinstatement right: *BC PPSA* s.55(4).

41 Regarding the argument of unequal bargaining power, the relevant time to consider the parties' relative positions is at the time of entering into the agreement - not the time of enforcing it. In the present case, it is not clear that ITB, a family owned operation, had greater bargaining power in negotiating the agreements than NTCL and its numerous related entity corporations. Arguably, where the parties are of equal bargaining power, it makes less sense to allow a debtor to rely on the more favorable legislative regime of its domicile when the parties have agreed to something else, particularly where the collateral is in a different location than the debtor.

42 In the factual matrix presented by this case, the policy interests served by enforcing

freedom of contract are more compelling than affording the debtor the additional statutory protections.

43 I find that determining the applicable legislation on substantive issues based on the location of the corporate debtor, independent of the location of the non-consumer good collateral, and in conflict with the governing law chosen by the parties in the contract, absent other factors, cannot be the result of the statutory regime. The debtor's rights in this case are determined by s.8 of the respective statutes. The BC *PPSA* provisions apply in this case to determine whether the debtor can reinstate the lease.

44 Although the right to reinstate a lease is more limited under the BC *PPSA* provisions, the legislation does give the court the ability to intervene, upon application by the debtor, to relieve the debtor from the consequences of the default, or to stay enforcement of any payment acceleration provision of a security agreement that triggers upon default: BC *PPSA* ss. 62(3). NTCL urges this Court to exercise such discretion in this case given that it has paid all of the arrears and has offered to pay for interest or costs arising from the late payment.

45 While contracting parties should be held to the bargains they have agreed to, this judicial discretion should be exercised where just and fair to do so: *CTF Holdings Ltd. v. Flint Motors Ltd.* (1995), 14 B.C.L.R. (3d) 82, [1995] B.C.J. No. 2305 (B.C. S.C. [In Chambers]) at para 11 [*CTF Holdings*]. Given that this is a form of equitable relief, the conduct of the parties, and particularly the defaulting party, is a primary factor to be considered: *CTF Holdings* at para 11.

46 Current case law on this issue deals with circumstances that lie at the ends of the spectrum: on one end, where the creditor agrees with the reinstatement: *MacDonald v. Searle*, [1992] B.C.J. No. 2865 (B.C. S.C. [In Chambers]); or where the default was unanticipated and beyond the control of the debtor (relief was granted to a mortgagor who defaulted when it failed to pay property taxes on time due to investments that would have been used to pay the taxes being tied up in the unanticipated bankruptcy of the company in which it invested): *Vohra Enterprises Ltd. v. Creative Industrial Corp.* (1988), 23 B.C.L.R. (2d) 120, 47 R.P.R. 243 (B.C. S.C.); or when relief was granted to a debtor who missed an instalment payment because of a bank error in clearing her cheque: *Sloan v. Dierden* (1984), 52 B.C.L.R. 193, [1984] B.C.J. No. 2897 (B.C. S.C.); to the other end where there has been a flagrant and contemptuous disregard of the parties contractual obligations. This was the case in *CTF Holdings*, where the conduct of the debtor in granting security to three other creditors in contravention of its security agreement with the plaintiff was considered flagrant and contemptuous disregard of contractual obligations, even though the plaintiff could have secured itself through registering its interest on the PPSR. The Court found there were no conditions it could impose to return the parties to their pre-breach positions.

47 In *Bank of Montreal v. Amar Enterprises Ltd.*, [1994] B.C.J. No. 648 (B.C. S.C.) [*Amar*], the Court granted relief from acceleration despite numerous acts that constituted breaches under

the mortgage agreement. The Court considered that the breach was not against payment of principal and interest in the mortgage itself, rather the breaches were in relation to other covenants under the agreement. It also noted that most of the defaults that could be rectified had been by then. This finding may seem at odds with the wording of s. 62(1)(a) of the BC *PPSA* (as if full or partial rectification were the only basis for granting this relief, there would be no reason for the difference in the redemption and rectification language between the Alberta and BC *PPSA* legislation). It is possible, however, that a central consideration in that decision was the fact that the breach was not against the mortgage payment itself but with respect to breaches of obligations to third parties - and thus the Court may have reasoned that it had greater jurisdiction to exercise its discretion. The Court did find the behaviour close to the line, noting “[c]learly the respondent corporation’s conduct has been imprudent and acutely lacking in diligence but I think it falls just short of constituting flagrant and contemptuous disregard of contractual obligations”, at para. 7. Even under the specific circumstances as found in *Amar*, the granting of this relief is discretionary.

48 In deciding when to exercise this discretion, one may consider whether the circumstances leading to the default are a flagrant and contemptuous disregard for contractual obligations, or if instead they are a result of an unanticipated event outside the debtor’s control (or at least intent) or are circumstances that otherwise make it fair and just for a court to intervene. The difference in the wording of the legislation suggests that something more than just payment of the default amounts outstanding and associated costs should be present to justify court intervention. A court must further consider whether, in granting such relief, the conditions of such relief could put the parties back in their pre-breach positions (even in circumstances where such default may be innocent). There will be cases that fall in the middle of this spectrum. In the present case, however, there was an intentional act which - unlike *Amar* - I find falls over the line; the court will not intervene to remedy an intentional disregard of a primary contractual obligation of the Lease Agreement.

49 As such, this is not an appropriate case in which the court should intervene, and the event of default remains; NTCL remains in breach of the Lease Agreement.

## **B. An order reinstating the lease**

50 In the event this Court finds that the lease is in a default position, NTCL asks the Court to provide an order reinstating the lease. NTCL notes that, given how much has already been paid by it to ITB in consideration of the \$12,900,000 purchase price (plus interest), it would be unjust to allow ITB to enforce its rights over what amounts to a six week delay in the payment of lease installments. Specifically, NTCL has already paid in excess of \$7,339,500 toward the purchase price of the Assets and has less than \$8,788,000 left to pay.

51 While NTCL argues it has also made two subsequent payments that were not protested,

ITB notes that these payments were electronic transfers and could not be refused, that ITB was not even immediately aware that the payments had been made, and once they were aware of a payment, provided it to their counsel to be held in trust consistent with ITB's prior communication to NTCL regarding payments received.

52 The Applicant argues that the court historically grants relief from forfeiture in cases where there has been a fully cured default of the lending agreement; and that in this case, the default has been fully cured.

53 Pursuant to section 13 of the Purchase Agreement, ITB had two contractual entitlements upon an event of default of the Lease Agreement: ITB could elect to a) terminate the Lease Agreement and repossess the vessels and additional Assets, or b) trigger an early closing for the purchase transaction, requiring payment of the balance of the purchase price for the Assets. It chose to exercise the latter.

54 As such, there is no forfeiture in this case. The consequence of the default is not to retain the payments while the debtor loses all interest in the underlying Assets, rather it is to accelerate payment of the balance of the purchase price. NTCL loses the ability to pay the purchase price over time, but remains entitled to use and retain the Assets. Thus, the debtor is not being deprived of real or personal property: *Raven Holdings Ltd. v. Lastiwka* (1980), 28 A.R. 199, [1980] A.J. No. 800 (Alta. Master) at para 13, [*Raven Holdings*]. An acceleration clause requiring, where payment due is not made, the full principal outstanding with interest to the date when the principal is paid does not constitute forfeiture: *Emerald Christmas Tree Co. v. Boel & Sons Enterprises Ltd.* (1979), 105 D.L.R. (3d) 75, 8 R.P.R. 143, [1979] B.C.J. No. 542 (B.C. C.A.) at para 16 [*Emerald Christmas* cited to QL]; *Bradford Bachinski Ltd. v. Merchant Capital Group Inc.*, [2003] O.J. No. 3947 (Ont. S.C.J.) [*Bradford Bachinski*] at para 44.

55 As there is no forfeiture, the Court cannot grant relief against it.

56 NTCL points to some authority for striking the acceleration clause when it is considered a penalty (as opposed to liquidated damages): S M Waddams, *The Law of Contracts*, 6th ed (Aurora Ontario: Canada Law Book Inc., 2010) 336 at para 463. In the present case however, we are not addressing the distinction between a penalty and liquidated damages. Even if we were, the agreements here deal with payment for the balance of the purchase price, which is similar to liquidated damages and not a penalty.

57 In any event, similar to its treatment of forfeiture, courts have found that acceleration clauses, where the creditor merely claims the amount of debt owing, are not a penalty; that it is impossible to hold that money due by contract can be converted into a penalty: *Raven Holdings* at para 11, citing *Thompson v Hudson*, 4 E. & I. App.1 (HL) at p 28. Stated another way, if a larger sum is to be paid upon default, it may constitute a penalty, however, a stipulation to pay upon default a sum not larger than the total amount initially intended is not a penalty: *Raven*

*Holdings* at para 12; see also *Emerald Christmas* at para 16; *Bradford Bachinski* at para 44. In the present case, all that NTCL is required to pay is the balance of the purchase price and in exchange it receives the Assets. The factors a court might rely upon to strike such a clause as a penalty are not present in this case.

58 Additionally, ITB argues that granting this equitable relief is not justified in this case. Here, the conduct of the Applicant was intentional and it has not come to seek relief with clean hands.

### **C. An order extending the stay of proceedings to NorTerra**

59 In the final alternative, NTCL requests that the Court extend the stay of proceedings to NorTerra, arguing that if ITB pursues NorTerra as guarantor the CCAA proceedings will be frustrated. NTCL has been granted a stay of proceedings by order dated April 27, 2016, and the stay was extended by orders dated May 26, 2016 and September 20, 2016. That extension expires on October 31, 2016. By separate order of May 27, 2016 ITB was stayed from taking any steps with respect to its claims against NTCL or NorTerra pending the disposition of this application.

60 Relevant to seeking an extension of the stay to NorTerra is the debt structure of NTCL and its related companies. NTCL is a subsidiary of NorTerra, a holding company, which is in turn owned by Inuvialuit Development Corporation (“IDC”). NorTerra has borrowed in excess of \$150 million, including \$72 million under a credit agreement pursuant to which NTCL and other NorTerra subsidiaries are guarantors, from a lending syndicate (the “*Syndicate*”). The Syndicate has subsequently entered into a forbearance agreement with NorTerra. If the NorTerra letter agreement commitment is invoked, obligating it to pay approximately \$9 million to ITB, NorTerra would be in breach of the credit agreement and/or the forbearance agreement (assuming NorTerra is not in a position to pay that amount within 15 days per the terms of the credit agreement), which could potentially cause the Syndicate to enforce its security.

61 Representatives of the Syndicate, present at the application, did not comment on what the Syndicate’s response would be in that eventuality.

62 ITB argues the Court must consider whether NTCL and NorTerra are so interrelated that enforcement against NorTerra would frustrate the CCAA proceeding.

63 If a default by NorTerra under the credit and/or forbearance agreement were to occur, NTCL argues that as a guarantor of that debt, the restructuring of NTCL would be directly and imminently threatened; cratering NTCL’s attempt at recovery. While the credit agreement was made available to this Court for review, the parties did not provide more detail around NorTerra’s financial position and whether it could fund the purchase price balance (although it

is acknowledged that the existence of the forbearance agreement, and the financial thresholds set out within the credit agreement, are fairly strong indicators). NorTerra is not seeking to be added to the CCAA proceedings generally, but only with respect to the Letter Agreement pertaining to the payment of the balance of the purchase price.

64 IDC is the Debtor-in-Possession Lender ("*DIP Lender*") under the CCAA proceedings, and has provided additional credit financing to NTCL. IDC is the parent company that owns NorTerra, and owns the non-voting shares of NTCL. It is not clear what IDC's financial situation is and whether a default by NorTerra would affect IDC and its ability to continue as the DIP Lender.

65 NTCL notes that the prejudice to its restructuring plan resulting from ITB's enforcement could be extreme, while the prejudice to ITB in the 6-week delay in payment is immaterial. Further, NTCL argues that ITB has first priority security against the vessels, limiting prejudice to ITB as the CCAA process is conducted.

66 In evaluating whether to extend the stay to NorTerra, I must consider the provisions of the CCAA governing stays. Section 11.02 is the provision authorizing the court to issue a stay of proceedings in respect of the debtor company on an initial application, and section 11.04 specifically discusses the non-application of stays to letters of credit and guarantees:

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, who is obligated under a letter of credit or guarantee in relation to the company.

67 Preliminary issues then are whether the letter agreements of NorTerra constitute guarantees, and if so, whether the legislation prohibits or permits the stay to extend to a guarantor.

68 ITB argues that the letter agreements are guarantees, and that section 11.04 specifically precludes the court from extending a stay to guarantor such as NorTerra. NTCL argues that the letter agreements are not guarantees. Additionally, it argues that section 11.04 is not a prohibition, but merely clarifies that an initial stay granted under s. 11.02 does not extend automatically to guarantors. NTCL submits that courts can extend stay of proceedings to guarantors in appropriate circumstances.

69 Addressing first whether the letter agreements are guarantees, I note the features of a guarantee include that there is primary and secondary liability, and only after the primary debtor defaults on some covenant or obligation is the secured party entitled to turn to the guarantor to make good on the guarantee:

The relationship thus created fits the classic definition of guarantee [as outlined in

McGuinness, *The Law of Guarantee* (Toronto: Carswell, 1986) at 1]: ... a guarantee is a promise by one person to answer for the due performance of the obligation of another person (whether imposed by law or contract) in the event that the other person fails to perform that obligation as required.

*Canada (Attorney General) v. Becker*, 1998 ABCA 283, 64 Alta. L.R. (3d) 292 (Alta. C.A.), at para. 53 Hunt J.A. (partially concurring)

70 The nature of a contract of guarantee is that the primary debtor will perform his contract and the guarantor has to answer for the consequence of the primary debtor's default: *Schell v. McCallum & Vannatter* (1918), 57 S.C.R. 15, [1918] 2 W.W.R. 735 (S.C.C.), at paras 50, 51 Brodeur J. (dissenting).

71 Alternatively, typically where parties are jointly and severally liable for a debt, it is not a guarantee as there is no primary and secondary liability: *Bank of Montreal v. Burns* (1986), 76 A.R. 220, 1986 CarswellAlta 672 (Alta. Q.B.) at paras 21, 25 and 26.

72 NTCL argues that the letter agreements are not guarantees because the joint and several liability constitutes a primary obligation to each of NTCL and NorTerra, and there is no condition which has to occur before the guarantee obligation of NorTerra can be invoked (as it can be drawn upon without proof of default).

73 In this case, although neither of the NorTerra letter agreements specifically use the term "guarantee" in the document, and the letters state that NorTerra will be jointly and severally liable with NTCL for the lease payments and the purchase price, the agreements also provide that "ITB must first take reasonable steps to seek recourse against and payment from NTCL before being entitled to seek payment from NorTerra" under that letter agreement. As such, there is a guarantor structure to the NorTerra letter agreements; the primary obligation is that of NTCL, and only in its failure to pay after reasonable steps have been taken could ITB turn to NorTerra for payment.

74 Given this structure, I find NorTerra is the guarantor of specified NTCL's payment obligations under the Lease Agreement and the Purchase Agreement.

75 As I have found the letter agreements constitute a guarantee, the language of s. 11.04 of the CCAA is particularly relevant; it stipulates s. 11.02 has no effect on any action, suit or proceeding against a person (other than the debtor) who is obligated under a guarantee in relation to the company.

76 Even though I find NorTerra a guarantor, NTCL posits that the Court may nonetheless extend the stay to NorTerra. Its position is that the language of s. 11.04 of the CCAA only clarifies that the initial order does not automatically extend to guarantors; it is not a prohibition.

NTCL argues that courts may exercise their inherent jurisdiction to extend the CCAA stay of proceedings to guarantors in appropriate circumstances; essentially, when such guarantor and the company in the CCAA proceedings are inextricably linked and refusing to extend the stay would frustrate the purposes and objects of the CCAA.

77 NTCL states the determination of whether to exercise such jurisdiction requires a balancing of interests, citing Houlden, Morawetz & Sarra, *The 2016 Annotated Bankruptcy and Insolvency Act* (Toronto: Thompson Reuters, 2016) at 1328:

In deciding whether to exercise its jurisdiction, the court must weigh the interests of the debtor company against the interests of the third parties who will be affected by the stay. If the prejudice to the third parties is greater than the benefit that will be achieved by the debtor company, the court should decline to exercise its authority: *Re Woodward's Ltd* (1993), 17 CBR (3d) 236, 79 BCLR (2d) 257 (S.C.)

Stay orders have been made against third parties who are not creditors of the debtor corporation where the actions of the third parties could potentially prejudice the success of the plan: *Re Lehndorff General Partner Ltd.* (1993) 17 CBR (3d) 24, 9 BLR (2d) 275 (Ont Gen Div [Commercial List]); *Norcen Energy Resources Ltd. v Oakwood Petroleums Ltd* (1988), 72 CBR (NS) 1, 63 Alta LR (2d) 361, 92 AR 81(QB); *Re T. Eaton Co.* (1997), 46 CBR (3d) 293 (Ont Gen Div).

78 While a court may weigh the interests of the parties and consider whether the actions of third parties could potentially prejudice the success of the plan, none of the referenced cases dealt with a situation of the third party being a guarantor to the debtor. On its plain reading as well as the existing case law, I do not find that the language of 11.04 is to be applied as NTCL suggests.

79 Instead I agree with the position of ITB that courts have been reluctant in the past (even prior to the enactment of s.11.04) to grant stays of proceedings against guarantors, and that s. 11.04 (enacted in 2009), reflects that position. In *Keddy Motor Inns Ltd., Re* (1991), 107 N.S.R. (2d) 419, [1991] N.S.J. No. 381 (N.S. T.D.) [*Keddy Motors* cited to QL], the Court heard an application to stay proceedings against guarantors of the debtor company. It reviewed section 11 (similar to the present 11.02), and found the section does not authorize a court to issue a stay against a guarantor, at pg. 4:

Since s-s. (a) deals with “proceedings ... in respect of the company under the Bankruptcy Act and the Winding-up Act or either of them”, since s-s. (b) deals with “any action, suit or proceeding against the company”, and since s-s. (c) deals with ordering that no suit, action or proceeding shall be commenced or proceeded with “against the company”, **it is clear that there is nothing in s. 11 which authorizes a court to stay in respect of or against any entity other than the debtor company. It does not authorize a court to stay in respect of or against a guarantor of any indebtedness of the company.**



[Emphasis added]

80 The Court in *Keddy Motors* affirmed the decision in *Browne v. Southern Canada Power Co.* (1941), 23 C.B.R. 131, 1941 CarswellQue 14 (C.A. Que.) [*Browne et al* cited to WL], which notes that the purpose of a guarantee to assure the solvency of the debtor, as stated by Barclay J, at para 21:

In my opinion, this argument loses sight of the fact that the *Companies' Creditors Arrangement Act* can only be invoked by a debtor company, which, under the terms of the Act, means 'any company which is bankrupt or insolvent or which has committed in an act of bankruptcy'. It is a somewhat startling proposition that a surety can avail himself of the bankruptcy of his principal debtor to avoid or modify his own obligation. A contract of commercial suretyship, such as under the consideration in the present case, is generally for the very purpose of guaranteeing the solvency of the principal debtor. ...

81 In *Browne et al*, Barclay J. further stated at para 22 that under such circumstances it is not even material whether the guarantor actually consented to the compromise, as it would not change their relations with respect to the sureties.

82 In addressing the public policy objectives of the *Act* to keep the debtor company in operation and to treat the creditors fairly, the Court in *Keddy Motors* further held at p. 5 that: “[s]uits against guarantors who are principles ought not to have any adverse effect upon the operations of the company; indeed, satisfaction of debts by realization of guarantee should enhance the financial position of the company. The principles — not the company — will suffer the effect.”

83 As noted, these cases were the position in the common law prior to the enactment of s. 11.04 of the *CCAA*; see also *Guardian Trust Co. v. Gaglardi* (1989), 64 D.L.R. (4th) 351, [1989] B.C.J. No. 2274 (B.C. S.C.). I do not see the enactment of s.11.04 as enhancing the court’s ability to extend the stay to a guarantor.

84 NTCL however notes the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at paras 57-58 that the *CCAA* is skeletal in nature and related decisions are often based on discretionary grants, and at para 59 that: “[j]udicial discretion must of course be exercised in furtherance of the *CCAA*’s purposes.” This may be true, but in that same decision, at para 65, the Court notes that in interpreting the *CCAA*, “...the most appropriate approach is a hierarchical one in which the courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding [citations omitted]. ... when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives...”

85 NTCL submits that the cases of *Target Canada Co., Re*, 2015 ONSC 303, [2015] O.J. No. 247 (Ont. S.C.J.), [”*Target*”] and *Charles Morissette inc., Re*, 2014 QCCS 385, 30 C.L.R. (4th) 73 (C.S. Que.) [translated] [”*Charles Morissette*”], which were both released after the enactment of s. 11.04, are relevant and bolster its position that the stay should be extended.

86 NTCL argues that *Target* is as an example of a case where the Court extended the stay of proceedings to Target Canada’s US parent in relation to claims that are derivative of the primary liability against the Canadian entities (those seeking CCAA protection).

87 Justice Morawetz’ decision in that case contained limited background or information regarding the scope of these derivative claims. His entire decision on this point is contained at para 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.

88 He goes on to note at para 81, many aspects of the initial order granted go beyond the usual first-day provisions in such cases, but he provided such broad relief to ensure the status quo is maintained. At para 82, he also clarified: “[t]he 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.”

89 Although the case does not specify the nature of the derivative claims, NTCL suggests the US parent had guaranteed lease obligations under the Canadian leases. At an earlier point in *Target*, Justice Morawetz extended the stay proceedings to the landlords who may have been exposed to claims by other tenants resulting from the anchor tenant becoming insolvent. The purpose of the stay being extended to these landlords was to provide time for the debtor party (the Canadian Target entities) to sublease the tenancies to new tenants. Depending on the identity of such new tenants, it may have affected the nature of the other tenants’ claims (or at least their damages). It is not clear to me based on this information whether the “guaranteed” obligation could be remedied during the stay.

90 In any event, the fact that the stay was extended to the US Target parent company in the initial order suggests that Justice Morawetz had not intended the stay to apply to the that parent company in respect of an enforceable letter of credit or guarantee made for the benefit of the Canadian Target entities, as this would be in conflict with the clear wording of section 11.04 of the CCAA.

91 NTCL states that in the present case, the claim against NorTerra is wholly derivative, as it is only by NTCL's failure that the payment obligation of NorTerra would become enforceable. Therefore, this guarantee obligation is similar to the nature of the claim which the Court in *Target* deemed fit for an extension of the stay. Under this definition of derivative claim, however, virtually every guarantee would qualify for an extension of the stay to the guarantor. This interpretation would render section 11.04 meaningless. Even though they may be a subset of derivative claims, guarantees are specifically addressed in the legislation and are dealt with differently. I note that *Target* contains no actual discussion of section 11.04, nor of guarantees, suggesting the issue before this Court may not have been expressly considered by Justice Morawetz.

92 Unlike the very general stay provided to the parent company in *Target*, ITB argues that this Court cannot extend the stay to protect just one party's claim (ITB) against a third party (NorTerra) where that claim is in the nature of a guarantee. Absent other considerations, I agree.

93 NTCL also cites the decision of the Superior Court of Quebec in *Charles Morissette* in support of the proposition that a stay may extend to a guarantor. The facts of that case are unclear, particularly in terms of the obligation to which the "surety" had committed. It appears that such party provided a letter of suretyship, and was prepared to assist the debtor company to continue operating during the CCAA proceedings, so long as it was not forced to defend itself in other matters arising out of the suretyship issued for the debtor company.

94 That Court considered whether s. 11.04 applied to the surety. In doing so, it distinguished suretyship from a letter of guarantee based on the use of the term "surety" by the legislature in s. 179 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3:

An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

Given that the BIA uses a different term, that Court reasoned that the reference to guarantee in s. 11.04 of the CCAA must mean something different. Based on this finding, the Court found s. 11.04 did not pertain to a suretyship, and therefore did not apply.

95 To the extent a difference was intended by parliament in the drafting of this legislation (a conclusion of which I am less certain than the court in *Charles Morissette*), the granting of a stay in *Charles Morissette* is not relevant to the present case. In *Charles Morissette*, the surety had clearly signed a letter of suretyship. Here, the obligation of NorTerra is in the nature of a guarantee. NorTerra's obligation is provided by separate agreement, liability is ancillary and derivative: ITB must first attempt to collect the debt from NTCL before looking to NorTerra for payment, and it is the creditor (ITB) who is obligated to inform NorTerra of a default by NTCL; ITB cannot attempt to collect the debt from either party independently of the other. As stated

already, I find the obligation of NorTerra to be a guarantee. Thus, the finding excluding application of s. 11.04 to sureties (as distinguished from guarantees) in *Charles Morissette* has no application here.

96 While that Court found it could exercise its discretion when the stay being extended to a third party is necessary for the success of the plan of arrangement under the CCAA, that determination was made after noting that s.11.04 did not apply to the surety. As the prohibition in s. 11.04 was not a consideration, it was perhaps easier for the Court to exercise its inherent jurisdiction. In any event, I have considered whether a stay is similarly necessary for the success of NTCL's plan of arrangement in this case, however, I was not provided with sufficient evidence to come to such conclusion.

97 Finally and in contrast to NTCL's position that the NorTerra obligation is an independent claim (rather than a secondary liability), NTCL also suggests that, since NTCL went into CCAA protection during the contractually mandated thirty-day dispute resolution period, the stay halts the expiry of that 30-day period. As the passage of time is "stayed", ITB has no claim against NorTerra until the passage of time can resume and the thirty-day period comes to an end.

98 No case or statutory authority was provided to support this view and the applicant bears the onus of establishing the basis for its claim in this matter. ITB argues that a stay is against the steps or proceedings taken - not against time. ITB's position is more consistent with the wording of the initial order granting the stay, as well as s.11.02 of the CCAA. Further, NTCL's interpretation could create a disincentive to parties agreeing to a dispute resolution period in contracts, which would not necessarily be beneficial to the efficient resolution of disputes. All that the NorTerra letter agreement requires is that "ITB must first take reasonable steps to seek recourse against and payment from NTCL". It has done so and clearly cannot take further steps against NTCL during the CCAA stay.

99 In conclusion, this Court is concerned that in allowing enforcement of the present claim against NorTerra, the secured lenders that have granted a limited forbearance agreement in favor of NorTerra may enforce their security should NorTerra be unable to pay, the result of which could possibly fully frustrate the purpose of the CCAA protection granted to NTCL in this case. Given NTCL, NorTerra and the parent entity IDC's roles in providing essential products to remote Northern communities, the consequence of a disorderly wind down or failure to restructure could negatively affect many people. It is not possible, however, based on the information in front of this Court to know whether payment of the purchase price as guaranteed would cause such a result.

100 While the potential consequences of not extending the CCAA protection in this case is troubling and possibly even devastating to NTCL and all associated parties for which the plan of arrangement pertains, the consequences of neutralizing a related company guarantee when the debtor seeks CCAA protection (and without more information) is far more troubling. Such a

determination could significantly negatively impact the ability of entities to obtain necessary financing with the assistance of a parent or related company guarantee.

101 I am not prepared to foreclose fully the possibility that this Court could exercise its inherent jurisdiction in exceptional cases to ensure that the intent and purpose of the CCAA proceedings are not frustrated. Sufficient evidence to establish the presence of such circumstances is however not present in this case for the Court to take such extraordinary measures in light of the clear wording of s.11.04.

## **Conclusion**

102 In conclusion, I find that there was a breach of the Lease Agreement, which triggers payment by NTCL (or NorTerra as its guarantor) of the balance of the purchase price for the Assets under the Purchase Agreement.

103 I do not find that the right of reinstatement applies in this case. The BC PPSA provisions apply, and the default has not been remedied. It is not be appropriate for the Court to exercise its discretion to relieve the debtor of the consequences of its default in this case.

104 Similarly, this is not an appropriate case in which the Court should grant an order reinstating the lease.

105 Finally, the Court is not able in in this case to extend the stay of proceedings to NorTerra in respect of this one contract.

106 As such, NTCL's application is dismissed.

107 Should the parties be unable to come to an agreement on costs of this application, they may apply to me within 45 days of this decision.

*Application dismissed.*

# TAB 12

1991 CarswellNS 651  
Nova Scotia Supreme Court (Trial Division)

Keddy Motor Inns Ltd., Re

1991 CarswellNS 651, [1991] N.S.J. No. 381, 107  
N.S.R. (2d) 419, 290 A.P.R. 419, 29 A.C.W.S. (3d) 187

**In the Matter of: The Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36**

In the Matter of: The Application of Keddy Motor Inns Limited, a body corporate  
with its registered office in the City of Halifax, County of Halifax, Nova Scotia

Nathanson J.

Heard: June 19, 1991

Heard: August 28, 1991

Heard: August 30, 1991

Oral reasons: August 30, 1991

Docket: S.H. 77974

Counsel: *J. Stringer, Esq., R.F. Redgrave, Esq. and R. Freeman, alc*, for the applicant, Keddy Motor Inns Limited.

*E.A.N. Blackburn, Q.C. and G.A. MacIntosh, Esq.*, for creditor, Eddy Group Limited.

*R.G. MacKeigan, Q.C. and Pamela Callow, alc*, for creditors, RoyNat Inc., Canadian Imperial Bank of Commerce, CIBC Mortgage Corporation, CIBC Leasing Limited and Elco Enterprises Ltd.

*G.R.P. Moir, Esq.*, for creditor, Central Guaranty Trust Company.

*J. McFarlane, Q.C. and K.A. MacDonald, Esq.*, for creditors, Royal Bank of Canada and Gem Construction Specialist Limited.

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.f Lifting of stay](#)

**Headnote**

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Order protecting guarantors from proceedings overturned -- Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36, s. 11 — N.S. R. 37.13.

Guarantor of debtor company obtained an order under the Act protecting it from any action by creditors. Creditor applied to amend the order to remove protection from guarantors. Held, the application was allowed. The Court had inherent jurisdiction to amend its order and reserved jurisdiction to do so in the original order. It also had statutory jurisdiction to amend its order under R. 37.13 and s. 11 of the Act.

**Nathanson, J. (orally):**

1 This is an application by a creditor to amend an order previously made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, Ch.C-36, which *inter alia* precluded any suit, action or proceeding against any guarantor of the obligations of the debtor company.

2 I granted the order upon the *ex parte* application of Keddy Motor Inns Limited on June 19, 1991. It included the following provision:

6. IT IS FURTHER ORDERED that all proceedings taken or that might be taken by any secured or unsecured creditor of KMI under the **Bankruptcy Act**, R.S.C. 1985, c. B-3, and the **Winding-Up Act**, R.S.C. 1985, c. W-11, or either of them, shall be stayed until further order of this Honourable Court, and that further proceedings in any action, suit or proceedings commenced by any secured or unsecured creditor against KMI or its assets be stayed until further order of this Honourable Court and that no suit, action or other proceeding may be pursued with or commenced against KMI or any guarantor of the obligations of KMI by any secured or unsecured creditor except with leave of this Honourable Court and subject to such terms as this Court may uphold. (Emphasis added)

3 The present application to amend is made by Eddy Group Limited, one of the creditors of Keddy Motor Inns Limited, and is supported by two other creditors, Royal Bank of Canada and Canadian Imperial Bank of Commerce. The application is opposed by the debtor company and by another creditor, Central Guaranty Trust Company. None of the creditors were given notice of, or appeared upon, the hearing held on June 19.

4 I note here that the applicant also filed a notice of appeal at the time it initiated the present application. No doubt that was done out of an abundance of caution pending this Court's determination of the issue of whether the Court has jurisdiction to vary its order of June 19.

5 The present application raises two issues for determination. The first issue is whether the Court has jurisdiction to vary the order of June 19. The second issue is whether the Court has jurisdiction to stay proceedings in respect of guarantees of debts owed by a company governed by the *Companies' Creditors Arrangement Act*.



## First Issue

6 The Court clearly has jurisdiction to vary the order which it previously granted. That jurisdiction is derived from four separate sources.

First, the Court has inherent jurisdiction. In *Becker v. Noel et al.*, [1971] 2 All E.R. 1248, Lord Denning, M.R. held:

...I am quite clear that not only may the court set aside an order made *ex parte*, but where leave is given *ex parte* it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension on new matters being drawn to its attention.

See also *WEA Records Ltd. v. Visions Channel 4 Ltd. et al.*, [1983] 2 All E.R. 589 where the Court of Appeal declined to hear an application to set aside an *ex parte* order because such orders are by nature provisional and are expected to be revised by the judge who made the order or another High Court judge in the light of subsequent evidence on argument; *Brail et al. v. Fayerman Brothers Ltd. et al.* (1986), 13 C.P.C. (2d) 161 (Sask. C.A., in Chambers) where it was held that one factor to be considered in deciding whether to grant leave to appeal an *ex parte* order was whether a request had been made to the original judge to modify the order sought to be appealed; and *City of Greenwood v. Canadian Mortgage and Investment Company, Limited*, [1921] 2 W.W.R. 746 (B.C.C.A.) where it was held that a judge may re-open and vary an order made by him so as to allow to be heard a claim not adjudicated upon and which there had been no opportunity to present.

Second, the Court has jurisdiction derived from *Civil Procedure Rule* 37.13 which authorizes a court to "set aside or vary an order made *ex parte*".

Third, the Court has statutory jurisdiction. Section 11(c) of the *Act*, which is relied on as the source of the authority for including par. 6 in the order of June 19, provides that the Court may stay proceedings "except with the leave of the court". Section 11(a) of the *Act* authorizes a stay "until such time as the court may prescribe or until any further order". These provisions imply the power to review and vary the original order.

Fourth, jurisdiction was explicitly reserved in the original order. Two paragraphs are significant:

19. IT IS FURTHER ORDERED that liberty be reserved to any and all parties interested to apply to this Honourable Court for a further or other order.

20. IT IS FURTHER ORDERED that all applications by any creditor of KMI to amend the terms of this Order shall be by way of application inter partes upon 10 days notice to KMI.

7 A substantial argument was made on behalf of the debtor company with respect to the nature of the appeal procedure set out in the *Act*. In my opinion, that argument has no application to an issue as to jurisdiction to vary.

## Second Issue

8 In my opinion, this Court does not have jurisdiction to stay proceedings against guarantors of the debtor company and, therefore, in the original order to purport to preclude any suit, action or other proceeding against any guarantor of the obligations of the debtor company.

9 The jurisdiction of the Court is statutory. The provisions of the statute govern what the Court has the power to do. The provision setting out the Court's jurisdiction to stay proceedings is s.11, which reads as follows:

**11.** Notwithstanding anything in the **Bankruptcy Act** or the **Winding-up Act**, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the **Bankruptcy Act** and the **Winding-up Act** or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes. (Emphasis added)

Since s-s.(a) deals with "proceedings ... in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them", since s-s.(b) deals with "any action, suit or proceeding against the company", and since s-s. (c) deals with ordering that no suit, action or proceeding shall be commenced or proceeded with "against the company", it is clear that there is nothing in s.11 which authorizes a court to stay in respect of or against any entity other than the debtor company. It does not authorize a court to stay in respect of or against a guarantor of any indebtedness of the company.

10 This position is supported in the case law cited.

11 In *Browne et al. v. Southern Canada Power Company Limited* (1941), 23 C.B.R. 131 (Que. K.B., Appeal Side), Barclay, J., speaking for the majority of the court, stated at p.135:

In my opinion, this argument loses sight of the fact that **The Companies' Creditors Arrangement Act** can only be invoked by a debtor company, which, under the terms of the Act, means 'any company which is bankrupt or insolvent or which has committed an act of bankruptcy'. It is a somewhat startling proposition that a surety can avail himself of the bankruptcy of his principal debtor to avoid or modify his own obligation. A contract of commercial suretyship, such as is under consideration in the present case, is generally for the very purpose of guaranteeing the solvency of the principal debtor. When the contract of suretyship was entered into, the sureties did not contract under more onerous conditions than the principal debtor; their obligations were precisely the same. But the principal debtor, by committing an act of bankruptcy, could no longer claim the benefit of the term (1092 C.C.), and his joint and several debtors were in the same position. The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties. **The Companies' Creditors Arrangement Act** is a special statute, to be restrictively interpreted, and its benefits accrue to those alone envisaged by the statute. Its provisions only come into play after the debtor has become bankrupt, thus involving the sureties, and what happens after that event affects the company only. Any delay given for payment of the company's debts as an insolvent and any modification of its debts, even with the consent of the creditors, operate as relief measures for the exclusive benefit of the company and do not and were not intended to operate as a release of any of the obligations of the company's guarantors. In that sense it is an exception purely personal to the debtor and not inherent in the debt....

This reasoning was later accepted in *Guardian Trust Co. v. Gaglardi et al.* (1989), 64 D.L.R. (4th) 351 (B.C.S.C.). This case is still under appeal.

12 Counsel presented arguments based upon whether the *Act* should be interpreted liberally or restrictively in accordance with various judicial comments in some decided cases such as: *Browne et al. v. Southern Canada Power Company Limited*, (*supra*), at p.135; *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.) at p.5; and *Chef Ready Foods Ltd. v. Hongkong Bank of Can.*, [1991] 2 W.W.R. 136 (B.C.C.A.) at p.144. See also the *Interpretation Act*, R.S.C. 1985, Ch.I-21, s.12. I do not feel compelled to become involved in this difference of opinion because it is possible to decide the present case without deciding that contentious point. I am content to accept and rely upon the everyday plain meaning of the words of s.11 of the *Act*.

13 It is submitted on behalf of the debtor company that two of the public policy objectives of the *Act* are to keep the debtor company in operation and to treat the creditors fairly; if certain creditors are allowed to pursue their guarantees and if the guarantors are also the principals of the company, it is likely that the first such objection will be defeated; and if those creditors which have guarantees are also able to realize on their guarantees in satisfaction of their debts, contrary to the best interests of the company, the second such objective will also be defeated. I do not accept this submission. Suits against guarantors who are principals ought not have any adverse effect upon the operations of the company; indeed, satisfaction of debts by realization of guarantee should enhance the financial position of the company. The principals -- not the company -- will suffer the effect.

14 I recognize that some recent decided cases in British Columbia seem to express a different point of view, reflecting a general attitude of allowing the *Act* to be used broadly to facilitate the re-structuring of corporate indebtedness. In this regard, I refer to several cases of the British Columbia courts all entitled *Quintette Coal Limited v. Nippon Steel Corporation et al.* (1990), 47 B.C.L.R. (2d) 193; (1990), 51 B.C.L.R. (2d) 105; and (1991), 56 B.C.L.R. (2d) 80. Although I favour that same purpose, I am unable to accept that the words of s.11 of the *Act*, which appear clear on their face, can be stretched without limit. If Parliament intends the *Act* to apply to guarantors, it would be a simple matter to amend the *Act* to say so explicitly. Until Parliament does so, I am of the view that the courts go too far if they implement a perceived intention of Parliament based not upon any specific language of the *Act* but, rather, derived from little more than the long title of the *Act*.

## Conclusion

15 In the result, the application is granted.

16 The Court has jurisdiction to vary the order of June 19. The Court does not have jurisdiction to stay proceedings against guarantors of the obligations of the debtor company. Therefore, the order of June 19 will be varied by deleting from par.6 thereof the words "or any guarantor of the obligations of KMI".

17 The successful creditors will have their costs of the application in any event, the amounts to be agreed upon or, in default thereof, to be directed at the time an order is taken out.

# TAB 13

1941 CarswellQue 14  
Quebec King's Bench, Appeal Side

Browne v. Southern Canada Power Co.

1941 CarswellQue 14, 23 C.B.R. 131, 71 Que. K.B. 136

**Browne and Another (Defendants) Appellants v. Southern  
Canada Power Company Limited (Plaintiff) Respondent**

Letourneau, Galipeault, Walsh, Barclay and McDougall ad hoc JJ.

Judgment: June 27, 1941

Counsel: *Campbell, Weldon, Kerry and Bruneau*, for defendants, appellants.  
*Merrill, Stalker and Howard*, for plaintiff, respondent.

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.3](#) Arrangements

[XIX.3.d](#) Effect of arrangement

[XIX.3.d.i](#) General principles

Bills of exchange and negotiable instruments

[IV](#) Promissory notes and bank drafts

[IV.6](#) Consideration

[IV.6.c](#) Simple contract debt

[IV.6.c.ii](#) Release of legal right

[IV.6.c.ii.A](#) Forbearance to sue

Contracts

[IV](#) Consideration

[IV.3](#) What constitutes consideration

[IV.3.c](#) Release of legal right

[IV.3.c.i](#) Forbearance (to enforce legal rights)

[IV.3.c.i.B](#) Miscellaneous

**Headnote**

Bills of Exchange --- Promissory notes — Consideration — Simple contract debt — Release of legal right — Forbearance to sue

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General

Surety — Debt Owning by Debtor Company for Goods Sold and Delivered — Promissory Note of Debtor Company Payable on Demand Personally Endorsed by Two Officers Taken in Amount of Debt — Compromise under The Companies' Creditors Arrangement Act, 16 C.B.R. 447 — Extension of Time for Payment of Debts Granted — Action against Endorsers for Payment of Note — Effect of Extension of Time — Judgment Granted against Endorsers — Appeal Dismissed.

The plaintiff, a power company, had sold or supplied to the City Gas and Electric Corporation Limited electric power. On February 28, 1939, the gas company owed the plaintiff the sum of \$4,876.20. The gas company was unable to make payment of its indebtedness to the plaintiff. Following out an arrangement the gas company gave to the plaintiff its promissory note on demand reading, in part, as follows: "On demand after date we promise to pay to the order of the Southern Canada Power Company Limited, exactly \$4,876.20, at the Provincial Bank of Canada for value received." The note was endorsed personally by the president and by the secretary-treasurer of the gas company. An extension of time for payment of its debts under *The Companies' Creditors Arrangement Act* was obtained by the gas company. Action was brought by the power company against the two endorsers of the promissory note and judgment was granted by Greenshields C.J. in favour of the plaintiff. An appeal was taken thereupon by the defendants.

*Held*, notwithstanding the extension of time in which to pay its debts obtained by the debtor company under *The Companies' Creditors Arrangement Act*, that the defendants were now liable for the amount for which they were sued. Any delay given for payment of the company's debts as an insolvent and any modification of its debt, even with the consent of the creditors, operate as relief measures for the exclusive benefit of the company and do not and were not intended to operate as a release of any of the obligations of the company's guarantors. In that sense it is an exception purely personal to the debtor and not inherent in the debt.

The appeal was accordingly dismissed.

***Barclay J.:***

1 This is an appeal from a judgment rendered on October 22, 1940, by the Superior Court sitting for the District of Montreal, maintaining an action on a promissory note endorsed by the appellants as a guarantee for the debt of a company of which they were officers.

2 The appellants are respectively the president and secretary-treasurer of the City Gas & Electric Corporation Limited, a public utility company distributing gas, electricity and water throughout various parts of the Province of Quebec.

3 In February, 1939, this company was indebted to the company respondent in the sum of \$4,876.20 for electric power supplied. The company respondent was pressing for payment and, to avoid action being taken against their company, the appellants agreed to and did endorse their company's promissory note for this amount, the note being dated

February 28, 1939, payable on demand. This note was not delivered, however, to the company respondent until March 20th. Receipt of this note together with an accompanying letter was acknowledged by the company respondent in a letter of the same date containing the following statement:

It is mutually understood that the note does not represent settlement of your indebtedness to this company, but is in the nature of a guarantee only.

4 At the same time it was agreed that the gas company, through its bankers, would collect the bills of its customers in the Yamaska division and use the amount so collected to pay its current monthly indebtedness to the company respondent, and the surplus, if any, was to be used in reduction of the amount of the promissory note. While this arrangement lasted there was never any surplus and therefore no reduction in the promissory note.

5 Shortly thereafter, in May, 1939, the gas company applied to the Courts for the purpose of taking advantage of *The Companies' Creditors Arrangement Act, 1933* [16 C.B.R. 447]. A meeting of the bondholders, shareholders and creditors, secured and unsecured was held on May 12, and the suggested compromise and arrangement was duly accepted by the requisite majority in each case. The arrangement was sanctioned by a judgment of the Superior Court rendered on May 16, 1939, and was further ratified and confirmed by supplementary letters patent issued on October 3, 1939.

6 Under this arrangement, the secured creditors were to receive 100 per cent. of their claims, to be paid in certain instalments spread over a number of years, the first of which is due in April, 1942. The unsecured creditors were to receive 75 per cent. of their claims, payable in like manner.

7 The company respondent neither attended the meeting of creditors nor voted on the compromise.

8 In November, the company respondent demanded payment from the gas company and the appellants and duly protested the note for non-payment and gave notice thereof to the appellants. Thereafter the present action was instituted.

9 To this action the appellants pleaded that they had endorsed the note as a mere act of accommodation and that in any event the compromise and arrangement were binding upon all parties and that they were entitled to the delay granted to the principal debtor and could not be called upon to fulfil the obligation of the gas company unless and until the latter was obliged and failed to do so, and that the respondent's action was therefore premature.

10 The action was maintained by the Superior Court and the various contentions of the appellants were dismissed.



11 While the action was taken on a promissory note, it was alleged in para. 3 that the note was endorsed by the appellants as guarantors. The learned trial Judge dealt with the obligations of the appellants as obligations arising under a contract of suretyship as known to our Civil Code, and it is on that basis that I will decide the questions now before us.

12 The appellants' first contention is that the note was endorsed as a mere accommodation and nothing else, no value having been received therefor.

13 This contention is untenable. The note was given and endorsed to induce the respondent company to abstain from taking legal proceedings to obtain its debt from the gas company. It is well settled that "an agreement to forbear either absolutely, or for a certain time, or for a reasonable time, to institute or prosecute legal or equitable proceedings to enforce a legal or equitable demand, is a sufficient consideration for the promise of the debtor, or of a third person, to pay the debt, or do any other act": *Chitty on Contracts* (1930) 18th ed., p. 25. An express or definite promise of forbearance is not essential to the validity of such a contract. It is sufficient if the circumstances are such as that the terms of forbearance may be implied (*Crears v. Hunter* (1887), 19 Q.B.D. 341, 56 L.J.Q.B. 518).

14 The evidence of Charles Johnson, treasurer of the company respondent, is uncontradicted.

Q. Will you tell the Court what was the culmination of the discussion, and how you came about to get that note?

A. Well, of course we were after our money, and as the money was not forthcoming we said that we would have to have some guarantee, otherwise we would have to take action.

15 By giving their guarantee as endorsers of a promissory note, the appellants became jointly and severally obliged with the principal debtor for the payment of the debt. Having bound themselves jointly and severally with the principal debtor, the appellants were not entitled to the benefit of discussion (art. 1941 C.C.). Even if they were, under the terms of art. 1942 C.C. a creditor is not bound to discuss the principal debtor unless the surety demands it when he is first sued, and in such case he must comply with the provisions of art. 1943. No such demand was made in this case.

16 The appellants contend that the company respondent was a secured creditor, because it held a promissory note endorsed by third parties and because the agreement as to the collection of rentals amounted in fact to an assignment of certain accounts accruing payable, or book debts of the gas company.

17 The holder of a promissory note endorsed by a third party as a guarantee of payment by the principal debtor is not a secured creditor within the meaning of *The Companies' Creditors Arrangement Act*, nor was the agreement to collect the rentals "an assignment, cession or transfer of any property of the debtor company" within the meaning of that Act. In any event, in the view which I take, it is quite immaterial whether the respondent company was a secured or an unsecured creditor.

18 The appellants' main argument is founded on arts. 1933 and 1958 C.C. These articles read:

1933. Suretyship cannot be contracted for a greater sum nor under more onerous conditions than the principal obligation.

1958. The surety may set up against the creditor all the exceptions which belong to the principal debtor and are inherent to the debt; but he cannot set up exceptions that are purely personal to the debtor.

19 The argument is that the debt of the gas company guaranteed by the appellants was modified by the compromise obtained under *The Companies' Creditors Arrangement Act* and, since the company respondent was bound by the compromise, the effect was to change the debt from one "on demand" to one with a term.

20 The appellants further contend that the debt, being that of a company incorporated by letters patent of the Dominion of Canada and in financial difficulties at the time the note was given, was the debt of a company potentially subject to the term of *The Companies' Creditors Arrangement Act*, or, in other words, the respondent company having accepted as its primary debtor a joint-stock company incorporated under the Dominion *Companies Act*, it was, to the knowledge of all concerned, inherent in such debt that, if applied for under *The Companies' Creditors Arrangement Act*, delay might be granted by the statutory majority of creditors, and therefore this potentiality was one inherent in the debt, within the meaning of art. 1958, and, if the sureties were not entitled to this delay, then their obligation was more onerous than that of the principal debtor.

21 In my opinion, this argument loses sight of the fact that *The Companies' Creditors Arrangement Act* can only be invoked by a debtor company, which, under the terms of the Act, means "any company which is bankrupt or insolvent or which has committed an act of bankruptcy". It is a somewhat startling proposition that a surety can avail himself of the bankruptcy of his principal debtor to avoid or modify his own obligation. A contract of commercial suretyship, such as is under consideration in the present case, is generally for the very purpose of guaranteeing the solvency of the principal debtor. When the contract of suretyship was entered into, the sureties did not contract under more onerous conditions

than the principal debtor; their obligations were precisely the same. But the principal debtor, by committing an act of bankruptcy, could no longer claim the benefit of the term (1092 C.C.), and his joint and several debtors were in the same position. The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties. *The Companies' Creditors Arrangement Act* is a special statute, to be restrictively interpreted, and its benefits accrue to those alone envisaged by the statute. Its provisions only come into play after the debtor has become bankrupt, thus involving the sureties, and what happens after that event affects the company only. Any delay given for payment of the company's debts as an insolvent and any modification of its debt, even with the consent of the creditors, operate as relief measures for the exclusive benefit of the company and do not and were not intended to operate as a release of any of the obligations of the company's guarantors. In that sense it is an exception purely personal to the debtor and not inherent in the debt. It is always possible that a debtor, whether a person or a company, will become bankrupt. That is not something inherent in the debt, but it is in most cases the reason why a guarantee is demanded. It becomes personal to the debtor, if an incorporated company, only when and because it becomes bankrupt. The law is designed to enable a bankrupt company to avoid going through the ordinary bankruptcy proceedings — special remedial legislation somewhat similar to *The Farmers' Creditors Arrangement Act* and with the same general object, that is, to assist the debtor if possible to avoid the full consequences of bankruptcy. Nevertheless the company debtor is bankrupt and these special proceedings are merely incidents in the bankruptcy.

22 I am prepared to go the length of saying that, under such circumstances, it is immaterial whether the company respondent actually consented to the compromise or not. It would not change their relations with the sureties one iota.

23 In this view it is unnecessary to consider whether the forced *remise de dette* is available to a surety or not. If I had to decide that question, I would answer it in the affirmative, but only because "l'exception de la caution qui entend se prévaloir de la libération du débiteur principal par l'effet d'un concordat n'est pas inhérente à la dette": Denis J. in *Dorval v. La Prévoyance* (1937), 75 Que. S.C. 40, 1937 Can. Abr. 475.

24 For these reasons, I find no error in the judgment *a quo* and I would in consequence dismiss the appeal with costs.

**Létourneau J.:**

25 J'en viens, comme mes collègues, à la conclusion de confirmer plutôt.

26 Je rejetterais en conséquence l'appel avec dépens.

**Galipeault J.:**

27 Partageant l'opinion de notre collègue, M. le juge Barclay, j'adopte ses conclusions.

28 Je confirmerais.

***Walsh J.:***

29 The appellants are officers of the City Gas & Electric Corporation Limited. When the latter was pressed for payment by the respondent, the appellants endorsed their company's note, covering the City Gas & Electric Company's indebtedness, though it was agreed that the note would not represent settlement; it was in the nature of a guarantee. It was also agreed that the City Gas & Electric Company would collect its bills from customers and pay its current accounts to respondent; the surplus would reduce the note. There was no surplus.

30 The City Gas Company took advantage of *The Companies' Creditors Arrangement Act*. A compromise was reached with creditors; this was sanctioned by the Court. Respondent has ignored these proceedings.

31 Respondent sued the appellants, who submitted that, though sureties, they are entitled to the same delay and benefits as the City Gas Company; that they could not be compelled to pay, unless their company had neglected its obligations; that the instrument was an accommodation note; that it had been endorsed by the appellants to obtain delay.

32 It cannot be entertained that the endorsement was without consideration, because the appellants obtained for their company the benefit of delay in respect of respondent's claim against the City Gas Company. This is sufficient to establish consideration for the note.

33 There is no doubt that the appellants guaranteed their company's debt; they assumed the obligation to pay what their company owed and had promised to pay.

34 The appellants now claim that they are also entitled to all the benefits accorded by *The Companies' Creditors Arrangement Act*. The City Gas Company could only bring itself within the scope of the Act by an act of bankruptcy; this operated to render the note due and exigible immediately; it operated against all the parties, who had rendered themselves liable jointly and severally for the debt: the maker and the endorser of the note.

35 *The Companies' Creditors Arrangement Act*, however, intervened in the case of the City Gas Company to grant the company favoured treatment; this Act does not extend its favours to others, who had guaranteed the debt. The appellants cannot claim the benefit of delay that the Act affords their company, because they became immediately liable by the default of the debtor, with whom they had bound themselves jointly and severally; and they did not demand the benefit of discussion.

36 The appellants cannot set up exceptions personal to their debtor, and *The Companies' Creditors Arrangement Act* is an exception that favours the company only; nothing was shown to extend its scope to the appellants.

37 It was the intention of the appellants to secure the respondent against bankruptcy and all its effects; but one of these effects was to permit the appellants the right to the same delay accorded the debtor, according to appellants' submission (assuming that the benefit of discussion had been sought). The appellants secured the debt, certainly believing that bankruptcy would not occur, with all its consequences of loss, of partial loss, and even of delayed payments. These appellants, in securing the payment, undertook to secure respondent against such bankruptcy and its consequences. How can they assert that bankruptcy and any of its consequences can now secure them against the respondent?

38 I would dismiss the appeal, with costs.

***McDougall J. (ad hoc):***

39 The facts of this case have been fully related in the judgment *a quo* and the notes of Barclay J., which I have had the advantage of reading.

40 I concur in the result for the reasons which he gives. I am prepared also to agree with the learned Chief Justice who rendered the judgment *a quo*, upon the more extended aspect of the case, viz.; that appellants, jointly and severally liable as guarantors or sureties of the debt, could derive no advantage from the enforced delay granted to the principal debtor under the terms of *The Companies' Creditors Arrangement Act*. Such arrangement enured to the benefit of the company, not to that of its guarantors. The exception which appellants seek to invoke is personal to the debtor and is not inherent in the debt (C.C. 1958): I think that the appellants are shut out from the suggested application of arts. 1933 and 1958 C.C. which they seek.

. . . . .

**The judgment appealed from, delivered October 22, 1940 was as follows *Greenshields C.J.:***

41 The defendants were the president and secretary-treasurer of the gas company, and knew the financial condition in which that company was. They were desirous of obtaining delay; they made an arrangement with the plaintiff by which it might receive payment of at least a part of its claim from time to time by what would have amounted to an illegal preference against the other creditors. To use an expression, which might not meet with judicial approval, that company, through its officers, the defendants, were fighting for delay; were struggling to avoid winding up in bankruptcy, and to obtain that delay from a large and pressing creditor, the plaintiff, and the defendants, representing as well the gas company as

their own interests, agreed to accept the promissory note and one, at least, suggested that all the directors of the gas company would endorse the note, and these circumstances amounted to a consideration. On the one hand the defendants say they endorsed that note without consideration, and in the next breath they say, "We willingly guaranteed the indebtedness of the gas company to the plaintiff, but we will not honour our guarantee until the principal debtor is forced or bound to pay its debt and makes default, and that time will not arrive till 1949, and no part will be paid before 1942". This brings up the real and interesting question, which is not altogether free from difficulty.

42 There is no doubt the acceptance of the promissory note had not the effect of novating the debt due by the gas company. This is of no importance whatever. The debt due by the gas company to the plaintiff was a commercial debt for goods sold and delivered, viz.: electric power, and the defendants by their endorsement of that note, and by their plea to the action, admit that they did guarantee or become a caution or surety for the payment of the debt. The whole question is, can the defendants be forced to pay that debt now when the original principal debtor has invoked a statute, and by a judgment of the Court under that statute (*The Companies' Creditors Arrangement Act, 1933* [16 C.B.R. 447]) the principal debtor has been given an extended time in which to pay its debt. That is the crucial question to be decided, and I proceed now to consider it.

43 The contract between the plaintiff and the defendants is evidenced by a promissory note, but notwithstanding what has been said by the learned counsel for the parties, for the purpose of determining the issue between the plaintiff and the defendants I accept that contract as a contract of suretyship as defined under title 15 of the *Civil Code*, arts. 1929 to 1961, inclusive, and my determination of the issue is based on my interpretation of the articles of this chapter of our Code, where and as they have application. The defendants were sureties as defined by art. 1929 C.C., and that suretyship was conventional as defined by art. 1930 C.C. It is also true in this case, that the sureties were bound only to fulfil the obligation of the debtor if and when the latter failed to do so. The obligation of the debtor in this case was a valid obligation (art. 1932). Art. 1933 C.C. provides, to paraphrase it: In the case of suretyship for the payment of a debt, it cannot be contracted by the sureties for a greater sum nor under more onerous conditions than the principal obligation. When the sureties signed the contract in this case, viz., the promissory note, they bound themselves for the same amount as the principal debtor, and under precisely the same conditions as, by the same contract, the principal debtor was bound. It follows that at the time the contract was made the present defendants could not escape liability under provisions of this article: art. 1934 C.C. requires no comment. The sureties in this case enter into the contract at the request, and with knowledge and for the benefit of the principal debtor. Articles 1935, 1936, 1937, 1938, 1939 and 1940 have no application and need not be further referred to. Art. 1941 requires some consideration. I quote:

The surety is liable only upon the default of the debtor, who must previously be discussed, unless the surety has renounced the benefit of discussion, or has bound himself jointly and severally with the debtor, in which case his liability is governed by the rules established with respect to joint and several obligations.

44 In the present case it may be safely said, that the sureties did bind themselves jointly and severally with the debtor. As already stated it was a conventional suretyship, as defined in art. 1930 C.C. and by the convention the sureties being joint and several debtors with the principal debtor, could not invoke the benefit of discussion. It is further observed, that the question of discussion of the debtor is nowhere suggested in the defendants' plea. This is emphasized for the reason that in art. 1942 C.C. the following provision is found: The creditor is not bound to discuss the principal debtor unless the surety demands it when he is first sued.

45 I here make reference to the valuable work of Mr. Mignault in *Droit Civil Canadien* 1909, vol. 8, pp. 352 and 353. The conclusion reached, for the reasons stated, is, that the art. 1941 is not applicable in the present case. Articles 1942, and 1943-1944 are corollaries of art. 1941.

46 I now come to a consideration of the provisions of art. 1958, which is found under the caption, "Of the Extinction of Suretyship". I quote the article:

The surety may set up against the creditor all the exceptions which belong to the principal debtor and are inherent to the debt; but he cannot set up exceptions that are purely personal to the debtor.

47 Mr. Mignault, in the same volume, on p. 380, refers to exceptions which the surety may oppose to the creditor under this article, and on p. 341, after quoting art. 1958, he says that the article is sufficiently explained by what has been said with respect to art. 1932. He states that art. 1958 is a corollary of art. 1932, which he discusses at p. 340, and among other statements he says, to translate:

The surety may guarantee a purely natural obligation, the principal debtor of which may discharge, by an exception which is purely personal to himself, viz.: and as an example, by pleading minority,

and he adds, which is elementary, that if the principal obligation is null, the suretyship is equally null; nevertheless, the suretyship is valid even if the principal obligation is purely natural, and even if the principal debtor could discharge that obligation by an exception purely personal; and he indicates examples of such an obligation, one is, an obligation for an illicit purpose; an obligation for a married woman without the authorization of her husband; a donation null for a defect as to substance or form; a contract by which an insolvent debtor

promises to pay one of his creditors a larger sum than he pays to others. These instances, says Mr. Mignault, come within the purview of art. 1958. Pothier, *Obligation* 1848, t. 2, no. 380, p. 200, states it in this way:

The surety may oppose the exceptions in rem, but not those in personam.

48 The remaining articles of the chapter are of no importance in the present case.

49 As recently as 1937 Mr. Justice Denis, of the Superior Court, gave a well considered judgment, which is reported in *Dorval v. La Prévoyance*, (1937) 75 Que. S.C. 40, 1937 Can. Abr. 475. The learned counsel for the defendant disposes of that case with the statement, that it does not apply. I am of a different opinion. The learned Judge based his judgment on the provisions of art. 1932 and 1958 C.C. and among other things he held (headnote):

Seule la remise volontaire libère la caution; la remise forcée v.g. celle qui résulte d'un concordat judiciaire, à la suite d'une cession autorisée, ne lui profite pas (C.C. art. 1185).

Le concordat, qui libère le débiteur failli d'une partie de son obligation est une exception purement personnelle au débiteur; la caution ne peut l'opposer au créancier (C.C. art. 1932 et 1958).

Cette remise laisse subsister une obligation naturelle pouvant être cautionnée (C.C. art. 1932).

L'exception de la caution qui entend se prévaloir de la libération du débiteur principal par l'effet d'un concordat n'est pas inhérente à la dette (C.C. art. 1958).

L'appel et les vicissitudes de la fortune de l'appelant ne peuvent, lorsque le jugement est confirmé, causer un préjudice au créancier qui adroit au remboursement par la caution de toute perte ou dommage qu'il peut souffrir pendant l'appel ou à cause de l'appel (C.P. art. 1214, avant la modification 23 Geo. V, c. 112, art. 2).

50 Mr. Justice Denis was considering the following conditions: A judgment in the Superior Court had been rendered in favour of one Dame Dorval, condemning one Rochon, to pay to her some \$3,500. The defendant entered an appeal from that judgment, and in order to prosecute his appeal he had to give a surety bond, in accordance with the provisions of art. 1214 C.P. The defendant company, La Prévoyance, gave that security, which is called either legal or judicial suretyship in art. 1930 C.C. On February 3, 1932, after the surety bond had been signed, and the La Prévoyance was bound by it, Rochon, the principal debtor, made an authorized cession of his property for the benefit of his creditors, and this was followed by a compromise (concordat), which was approved and accepted on March 22, 1932. On March 28, 1934, while the surety bond of the La Prévoyance Company was in full force, Rochon's appeal was dismissed. On April 30, 1934, after his appeal was dismissed, Rochon,



the principal debtor, made an offer or tender to the plaintiff, Dame Dorval, of the amount due by him, not in accordance with the judgment of the Superior Court, confirmed by appeal, but of the amount due under the compromise (concordat) of date March 22, 1932. That offer was refused, and the plaintiff issued a seizure against Rochon for the full amount of her judgment. Rochon made an opposition *à fin d'annuler* to that seizure, and again offered the amount of the debt according to the compromise, and deposited the same in Court. On April 9, judgment was rendered maintaining the opposition based on the compromise settlement. On May 16, 1935, an action was taken by Dame Dorval against the surety for the full amount, and the defendant, the surety, invoked the settlement made by Rochon with his creditors, and vigorously asserted that that settlement or compromise, which reduced the personal debt of the principal debtor, Rochon, relieved the surety for the payment of any sum greater than the amount of the compromise, and that was the question of law, pure and simple, that Mr. Justice Denis was called upon to decide, and he stated it in this way:

Translation:

Considering that the decision of the present case depends on the application of the rules of law concerning the contract of suretyship, and of the effect which should be given to a particular contract subsisting between the plaintiff in the case and the suretyship;

Considering that to liberate itself from its obligation as surety the defendant company invokes "la remise forcée" made by the creditor to the principal debtor in "un concordat judiciaire" obtained by the principal debtor.

51 The learned Judge then proceeds to a careful consideration of that question, and among other things he held and decided, that the "remise de dette" made a debtor by means of a concordat, is always regarded as forced, and leaves subsisting the natural obligation upon the debtor to discharge his debt. He held, moreover, that the exception pleaded by the surety is not one inherent to the debt, as provided in art. 1958, and cannot, therefore, be invoked by the surety, and he concluded to dismiss, and did dismiss the pretensions of the defendant in that case, and condemned it to pay the plaintiff under the surety bond. The learned Judge referred to Fuzier-Herman, Répertoire Co Cautionnement (1892, vol. 9, mé 93, p. 600, n. 102, p. 601) which he found, as I do, to support his view. There is also to be found a support for this view in Dalloz, Répertoire pratique 1911, vol. 2, Vo. Cautionnement, n. 195, 196, p. 276, which is quoted at length by the learned counsel for the plaintiff in his memorandum, which I refrain from reproducing. I am in full accord with Mr. Justice Denis in holding, that the exception invoked by the defendants in this case is not an exception or defence "inherent to the debt", but personal to the debtor.

52 The learned counsel for the defendants in a memorandum submitted to the Court refers to Laurent 1876, 3rd ed., vol. 28, at no. 163, p. 172. Laurent in that number deals entirely with the question of the benefit of discussion. I am of opinion that the question of discussion

of the principal debtor has no application in the present case for the reasons I have given, and the citation from Laurent is of no assistance. If the learned counsel for the defendants finds assistance from Mr. Laurent in vol. 28, at no. 163, p. 172, a contradiction in terms might be found in the same volume by Mr. Laurent under no. 285, 286, p. 286, I quote in part:

Translation:

There are releases which are not voluntary; such as those which the creditors accord to an insolvent debtor in consenting to a compromise. The creditors are forced to consent to this release in order to get the best part they can of their debt; that is why the advice of the majority binds the minority; they ought, therefore, to conserve their right, entire, against the surety, because they have stipulated the guarantee on the surety for the very case of insolvability that has forced them to content themselves with a partial payment.

53 Pothier, and following him, other modern authors, gave another reason: The compromise only extinguishes the civil debt for the party which is released, but there subsists a natural obligation which is a sufficient foundation to the obligation of the sureties; that supposes that natural debts can be guaranteed; that is very doubtful.

54 Under art. 1932 C.C., suretyship may, however, be for the fulfilment of an obligation which is purely natural, and that article would remove any doubt that Laurent may have had.

55 I find support for the conclusions which I have reached in the judgment of the Court of Review (now abolished, Feb. 14, 1920) rendered in *Leclaire v. Forest* (1884), 7 L.N. 383. The Court was composed of Torrance, Doherty and Papineau, JJ. I quote what they said:

Que dans le cas de composition et décharge entre un débiteur et ses créanciers, lorsque l'acte a lieu non pas à raison de l'intention des créanciers de donner au débiteur le montant de ses créances, mais parce qu'il ne peuvent pas avoir plus, la dette naturelle continuant à exister, la caution solidaire n'est pas déchargée.

56 If and when the creditor of the principal debtor receives payment from the sureties, they will be subrogated in all the rights of the creditor against the principal debtor.

57 Upon the whole I have reached the conclusion, that the plaintiff's action must be maintained:

58 Seeing art. 1930 C.C.;

59 Considering that the defendants, being jointly and severally sureties with the debtor, are not entitled, as against the claim of the creditor, to invoke the benefit of discussion:

60 Considering, moreover, in the present case, the defendants do not in their defence invoke the exception of discussion:

61 Considering the plaintiff, the creditor, did not freely consent to granting to the principal debtor, the gas company, an extension of time for the payment of its debt, or to a reduction in the amount of its debt, but such extension and reduction were forced by a majority of two-thirds of the principal debtor's creditors:

62 Considering, moreover, that the sureties were respectively president and secretary-treasurer of the principal debtor, the gas company, and with full knowledge of the financial condition of the company consented to become security for the plaintiff's debt, and thereby did assume, so far as the plaintiff was concerned, the risk of the insolvency of the principal debtor:

63 Considering the plaintiff's action against the defendants is well founded in law and in fact, and the defendants' plea is unfounded:

64 Judgment for \$4,876.20.

# TAB 14

**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 billion. 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 *Prizm 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 Prizm 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 CCAA 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 (4<sup>th</sup>) 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.

A handwritten signature in blue ink, appearing to read 'A. Morawetz R.S.J.', is written above a horizontal line.

Regional Senior Justice Morawetz

**Date:** January 16, 2015

# TAB 15

2010 ONSC 222  
Ontario Superior Court of Justice [Commercial List]  
Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J.  
No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

**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.**

Pepall J.

Judgment: January 18, 2010  
Docket: CV-10-8533-00CL

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

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.a Approval by creditors](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

**Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

## Table of Authorities

### Cases considered by *Pepall J.*:

*Anvil Range Mining Corp., Re* (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

*Anvil Range Mining Corp., Re* (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

*Canwest Global Communications Corp., Re* (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

*Grant Forest Products Inc., Re* (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

*Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

*Philip Services Corp., Re* (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.)  
— followed

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***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*<sup>1</sup> ("CCAA") proceeding on October 6, 2009.<sup>2</sup> 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 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.<sup>3</sup> As at August 31, 2009, the amounts owing by the LP Entities totaled \$953.4 million exclusive of interest.<sup>4</sup>

(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 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., Re*<sup>5</sup>. 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.

#### *(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: *Canwest Global Communications Corp., Re*<sup>6</sup> and *Lehndorff General Partner Ltd., Re*<sup>7</sup>.

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 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, if 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 *Philip Services Corp., Re*<sup>8</sup> : " 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 secured creditors or to unsecured creditors or to both groups."<sup>9</sup> Similarly, in *Anvil Range Mining Corp., Re*<sup>10</sup>, 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."<sup>11</sup>

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 *Anvil Range Mining Corp., Re*, 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.

*(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 *Canwest Global Communications Corp., Re*<sup>12</sup>, 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 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 online 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.<sup>13</sup> 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

- (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.

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 *Canwest Global Communications Corp., Re*<sup>14</sup> 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 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 *Canwest Global Communications Corp., Re*<sup>15</sup>, I approved the KERP requested on the

basis of the factors enumerated in *Grant Forest Products Inc., Re*<sup>16</sup> 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 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*<sup>17</sup> 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)*<sup>18</sup>. In that case, Iacobucci J. stated that an 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 *Canwest Global Communications Corp., Re*<sup>19</sup> 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 *Canwest Global Communications Corp., Re* 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 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.

*Application granted.*

### **Footnotes**

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.

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.

- 5     2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).
- 6     2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.
- 7     (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).
- 8     1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).
- 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) [2003 CarswellOnt 730 (S.C.C.)].
- 11    Ibid at para. 34.
- 12    Supra, note 7 at paras. 31-35.
- 13    This exception also applies to the other charges granted.
- 14    Supra note 7 at paras. 44-48.
- 15    Supra note 7.
- 16    [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).
- 17    R.S.O. 1990, c. C.43, as amended.
- 18    [2002] 2 S.C.R. 522 (S.C.C.).
- 19    Supra, note 7 at para. 52.

# **TAB 16**



2014 ONSC 6145  
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2014 CarswellOnt 16465, 2014 ONSC 6145, 20 C.B.R. (6th) 116, 247 A.C.W.S. (3d) 266

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36 as Amended**

In the Matter of a Proposed Plan of Compromise or  
Arrangement with Respect to U.S. Steel Canada Inc.

H. Wilton-Siegel J.

Heard: October 8, 2014  
Judgment: October 8, 2014  
Docket: CV-14-10695-00CL

Counsel: R. Paul Steep, Jamey Gage, Heather Meredith for Applicant  
Kevin Zych for Monitor  
Michael Barrack, Robert Thornton, Grant Moffat for United States Steel Corporation and  
the proposed DIP Lender  
Gale Rubenstein, Robert J. Chadwick, Logan Willis for Her Majesty the Queen in Right of  
Ontario and the Superintendent of Financial Services (Ontario)  
Ken Rosenberg, Lily Harmer for United Steelworkers International Union and the United  
Steelworkers Union, Local 8782  
Sharon L.C. White for United Steelworkers Union, Local 1005  
Shayne Kukulowicz, Larry Ellis for City of Hamilton  
Steve Weisz, Arjo Shalviri for Caterpillar Financial Services Limited  
S. Michael Citak for Various Trade Creditors  
Kathryn Esaw, Patrick Corney for Independent Electricity System Operator  
Andrew Hatnay for Certain retirees and, for the proposed representative counsel

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Employment

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.1](#) General principles

[XIX.1.d](#) Constitutional issues

Bankruptcy and insolvency

## **XIX** Companies' Creditors Arrangement Act

### **XIX.2** Initial application

#### **XIX.2.b** Grant of stay

##### **XIX.2.b.vii** Extension of order

Bankruptcy and insolvency

## **XIX** Companies' Creditors Arrangement Act

### **XIX.2** Initial application

#### **XIX.2.h** Miscellaneous

### **Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — At comeback motion, applicant sought approval of debtor-in-possession (DIP) loan facility; order as to priority of administration charge and director's charge; approval of key employee retention payments; appointment of six representatives and representative counsel to represent interests of group of active and retiree beneficiaries not represented by union U — DIP financing approved — Financing facility was critically important to ensure stable continuing operations — Condition precedent to DIP loan was order granting charge giving DIP lender priority over all security interests and encumbrances, other than administration charge, director's charge and certain priority liens — DIP lender's priority charge granted, as it would not prejudice any other parties with security interests in applicant's property — Doctrine of paramountcy invoked so provisions of CCAA would override provisions of Pension Benefits Act in respect of priority of DIP lender's charge, administration charge and director's charge — Super-priority for administration and director's charges was necessary to further objectives of CCAA proceedings — Beneficiaries of such charges would not provide services to applicant without security for fees and disbursements — Key employee retention program approved in sum of \$2,570,378 — Representatives were appointed — Unrepresented group of beneficiaries were important stakeholders and deserved meaningful representation, especially as there was solvency deficiency in applicant's pension plans.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Constitutional issues

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — Condition precedent to debtor-in-possession (DIP) loan was order granting charge in favour of DIP lender giving priority over all encumbrances, other than administration charge, director's charge and certain priority liens — At comeback motion hearing, applicant sought, inter alia, approval of DIP loan facility and charge, and order as to priority of administration charge and director's charge — Doctrine of paramountcy invoked so that CCAA provisions would override provisions of Pension Benefits Act in respect of priority of DIP lender's charge, administration charge

and director's charge — Super-priority for administration charge and director's charge was necessary to further objectives of CCAA proceedings — Beneficiaries of such charges would not provide services to applicant without proposed security for fees and disbursements — Financing was of critical importance to applicant to ensure stable continuing operations — DIP lender's charge did not secure any unsecured pre-filing obligations owed to DIP lender, and would not prejudice any other parties with security interests in applicant's property.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — At comeback motion, applicant sought extension of initial order, including stay provisions — Extension granted as it would further purposes of CCAA — Stay was necessary to provide stability required to allow applicant opportunity to work towards plan of arrangement — Without stay, applicant would have cash flow deficiency that would render successful restructuring unattainable — Applicant was acting in good faith and with due diligence to facilitate restructuring.

### Table of Authorities

#### Cases considered by *H. Wilton-Siegel J.*:

*Canwest Global Communications Corp., Re* (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

*Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed

*Indalex Ltd., Re* (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 354 D.L.R. (4th) 581, 2 C.C.P.B. (2nd) 1, 96 C.B.R. (5th) 171, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, D.T.E. 2013T-97, 301 O.A.C. 1, 8 B.L.R. (5th) 1 (S.C.C.) — considered

*Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — followed

*Timminco Ltd., Re* (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

*Timminco Ltd., Re* (2012), 2012 CarswellOnt 1466, 2012 ONSC 948, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 (Ont. S.C.J. [Commercial List]) — referred to

*Timminco Ltd., Re* (2012), 2 C.B.R. (6th) 332, 2012 CarswellOnt 9633, 2012 ONCA 552 (Ont. C.A.) — referred to

#### Statutes considered:

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

*Pension Benefits Act*, R.S.O. 1990, c. P.8

Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 10.01 — considered

R. 12.07 — considered

**Regulations considered:**

*Pension Benefits Act*, R.S.O. 1990, c. P.8

*Stelco Inc. Pension Plans*, O. Reg. 99/06

Generally — referred to

RULING on comeback motion regarding terms of initial order.

**H. Wilton-Siegel J.:**

1 U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

2 The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

3 In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

### **DIP Loan**

4 The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

5 The Term Sheet contemplates a DIP Loan in the maximum amount of \$185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of \$5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of \$3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

6 The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

7 A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

8 The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major

stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

9 The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

10 The Monitor, who was present during the negotiations regarding the terms of the DIP Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

11 The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

12 The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at paras. 32-34, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

13 First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

14 Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire

restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

15 Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

16 Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

17 Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

18 Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List]) at paras. 46-47, (Ont. C.A.) [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.) [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

### **Administration Charge and Director's Charge**

19 The Initial Order provides for an Administration Charge (Part I) to the maximum amount of \$6.5 million, a Director's Charge to a maximum amount of \$39 million, and an

Administration Charge (Part II) to a maximum amount of \$5.5 million plus \$1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

20 The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

21 As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

22 It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

23 In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

24 In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the



Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

### **The KERP**

25 The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

26 The maximum amount payable under the KERP is \$2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

27 The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

28 First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

29 Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

30 Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

31 Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para.73, (Ont. S.C.J. [Commercial List]). In addition, USS, the only secured creditor of the Applicant, supports the KERP.

32 Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

33 Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

#### **Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries**

34 The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

35 The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

36 In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328, [2010] O.J. No. 943 (Ont. S.C.J. [Commercial List]). In this regard, the following considerations are relevant.

37 The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to

matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

39 Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note that at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) at para. 62, (Ont. S.C.J. [Commercial List]) [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

40 Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of representative and of counsel.

41 Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

42 Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

### **Extension of the Stay**

43 Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

44 First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

45 Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

46 Third, the Monitor and the CRO support the extension.

47 Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the "SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

48 Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

*Order accordingly.*

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# TAB 17

2016 ONSC 6800  
Ontario Superior Court of Justice [Commercial List]

Performance Sports Group Ltd., Re

2016 CarswellOnt 17492, 2016 ONSC 6800, 272 A.C.W.S. (3d) 470, 41 C.B.R. (6th) 245

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY  
RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA  
INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/  
SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE  
GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER  
HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND  
SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC.,  
PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC. (Applicants)

Newbould J.

Heard: October 31, 2016  
Judgment: November 1, 2016  
Docket: CV-16-11582-00CL

Counsel: Peter Howard, Kathryn Esaw, for Applicants  
Robert I. Thornton, Rachel Bengino, for Proposed Monitor Ernst & Young Inc.  
Bernard Boucher, John Tuzyk, for Sagard Capital Partners, L.P  
David Bish, Adam Slavens, for Fairfax Financial Holdings Limited  
Robert Staley, for Board of directors of Performance Sports Group Ltd.  
Joseph Latham, Ryan Baulke, for Ad Hoc Committee of certain term lenders  
Tony Reyes, Evan Cobb, for Bank of America, the ABL DIP lender

Subject: Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.2](#) Initial application

[XIX.2.h](#) Miscellaneous

## Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Debtors, parent company and certain Canadian and U.S. subsidiaries, were involved in global sports equipment business — Debtors became insolvent and brought parallel insolvency proceedings in Canada and U.S. — Application by debtors for protection under Companies' Creditors Arrangement Act was granted with reasons to follow — Debtors sought to sell business as going concern and entered into asset purchase agreement with group of investors, which contemplated that businesses would continue as going concern — DIP loan facilities negotiated with debtors' current lenders should be approved, taking into account factors in s. 11.2(4) of Act — Without DIP financing, debtors lacked sufficient financing to continue operating business and pursue post-filing sales process — As s. 11.2(1) of Act provides that security for DIP facility may not secure obligation that existed before order authorizing security was made, provision was inserted in initial order expressly preventing use of advances under DIP facility to repay pre-filing obligations — Authorization granted to debtors to pay pre-filing amounts owing to certain suppliers, as interruption by critical suppliers could have immediate materially adverse impact and jeopardize ability to continue as going concern — Debtors sought administrative charge to cover Monitor's fees; U.S. and Canadian counsel to Monitor, debtors, and directors of debtors; and to cover fees incurred before and after making of initial order — As debtor intended to bring motion on come-back hearing to permit all past outstanding amounts to be paid to Canadian employees, administrative charge of \$7.5 million granted — As administration charge under s. 11.52(1) of Act can only be granted to cover work done in connection with proceeding under Act, it was not possible for such charge to protect fees of lawyers in other jurisdictions who might be engaged by debtor either in foreign insolvency proceedings or other litigation — Authorization granted to effect intercompany advances, secured by intercompany charge — Standard directors' charge for \$7.5 million approved — Chief Restructuring Officer appointment approved.

## Table of Authorities

### Cases considered by *Newbould J.*:

*Canwest Global Communications Corp., Re* (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to

*Fraser Papers Inc., Re* (2009), 2009 CarswellOnt 3658, 56 C.B.R. (5th) 194 (Ont. S.C.J. [Commercial List]) — referred to

*Walter Energy Canada Holdings, Inc., Re* (2016), 2016 BCSC 107, 2016 CarswellBC 158, 23 C.C.P.B. (2nd) 201, 33 C.B.R. (6th) 60 (B.C. S.C.) — referred to

### Statutes considered:

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered



- s. 11.2(1) [en. 2005, c. 47, s. 128] — considered
- s. 11.2(4) [en. 2005, c. 47, s. 128] — considered
- s. 11.4 [en. 2005, c. 47, s. 128] — considered
- s. 11.52(1) [en. 2005, c. 47, s. 128] — considered
- s. 11.52(1)(a) [en. 2005, c. 47, s. 128] — considered
- s. 11.52(1)(b) [en. 2005, c. 47, s. 128] — considered
- s. 11.52(1)(c) [en. 2005, c. 47, s. 128] — considered

REASONS for granting of debtors' application for protection under *Companies' Creditors Arrangement Act*.

***Newbould J.:***

1 On October 31, 2016 Performance Sports Group Ltd. ("PSG") and the other Applicants (collectively, the "Applicants" or the "PSG Entities") applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

2 PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

3 The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

4 The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

5 The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

### **Employees and benefits**

6 As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

7 The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

8 Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C\$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

9 Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C\$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

10 The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C\$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

11 Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees

falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

### **Assets and liabilities**

12 As at September 30, 2016, the Applicants had assets with a book value of approximately \$594 million and liabilities with a book value of approximately \$608 million.

13 The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

14 The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately \$330.5 million plus \$1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately \$159 million was outstanding under the ABL Facility.

### **Problems leading to the CCAA filing**

15 A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.

- b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.
- c. The PSG Entities' financial results have been negatively affected by currency fluctuations.
- d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.
- e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

### **Anticipated stalking horse bid sales process**

16 The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

17 As part of that process, the PSG Entities have entered into an asset purchase agreement (the "Stalking Horse Agreement") for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of \$575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

### **Analysis**

18 I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of \$5 million.

19 There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

(a) A group comprised of members of the ABL Lenders ("ABL DIP Lenders"), will provide an operating loan facility of \$200 million (the "ABL DIP Facility") pursuant to an ABL DIP Credit Agreement (the "ABL DIP Credit Agreement"). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of \$160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional \$25 million of liquidity as compared to what is currently provided under the ABL Facility.

(b) The Sagard Group (the "Term Loan DIP Lenders" and together with the ABL DIP Lenders, the "DIP Lenders"), will provide a term loan facility (the "Term Loan DIP Facility" and together with the ABL DIP Facility, the "DIP Facilities") in the amount of \$361.3 million pursuant to a Term Loan DIP Credit Agreement (the "Term Loan DIP Credit Agreement" and together with the ABL DIP Credit Agreement, the "DIP Agreements"). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately \$331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately \$30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

20 The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

21 I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility. The Monitor<sup>1</sup> is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

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.

23 The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

- (a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;
- (b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;
- (c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;
- (d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 — all of whom are entitled to be paid for their services under U.S. bankruptcy law; and

(e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

24 There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 43.

25 I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of \$10,000 will require Monitor approval.

26 The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

27 The PSG Entities seek an administrative charge in the amount of \$7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor,

U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

28 I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

29 Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

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

- (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.

30 Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language "for the purpose of proceedings under this Act" would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) "effective participation in proceedings under this Act".

31 In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the



Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

32 It appears clear, however, that an administration charge under section 11.52(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

33 The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

34 Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) and *Fraser Papers Inc., Re* [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], 2009 CanLII 32698.

35 In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

36 A standard directors' charge for \$7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

*Order accordingly.*

## Footnotes

- 1 Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst & Young in this decision as the Monitor.

# TAB 18

2016 BCSC 107  
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc., Re

2016 CarswellBC 158, 2016 BCSC 107, [2016] B.C.W.L.D. 844,  
23 C.C.P.B. (2nd) 201, 263 A.C.W.S. (3d) 300, 33 C.B.R. (6th) 60

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36 as Amended**

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as Amended

In the Matter of a Plan of Compromise or Arrangement of Walter Energy  
Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Fitzpatrick J.

Heard: January 5, 2016

Judgment: January 5, 2016

Written reasons: January 26, 2016

Docket: Vancouver S1510120

Counsel: Marc Wasserman, Mary I.A. Buttery, Tijana Gavric, Joshua Hurwitz, for  
Petitioners

John Sandrelli, Tevia Jeffries, for United Mine Workers of America 1974 Pension Plan and  
Trust

Matthew Nied, for Steering Committee of First Lien Creditors of Walter Energy, Inc.

Aaron Welch, for Her Majesty the Queen in Right of the Province of British Columbia

Kathryn Esaw, for Morgan Stanley Senior Funding, Inc.

Peter Reardon, Wael Rostom, Caitlin Fell, for KPMG Inc., Monitor

Neva Beckie, for Canada Revenue Agency

Stephanie Drake, for United States Steel Workers, Local 1-424

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.5](#) Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Insolvent corporations ("petitioners") were granted initial order under Companies' Creditors Arrangement Act — Petitioners were on path towards equity or debt restructuring, or sale and liquidation of their assets — Petitioners brought application for approval of sale and solicitation process, appointment of professionals to manage that process, key employee retention plan, and extension of stay — Application granted — Proposed sale and investment solicitation process represented best opportunity to restructure as going concern, was reasonable, was not opposed by any stakeholders, and was approved — It was appropriate to appoint chief restructuring officer (CRO) and financial advisor, as they were necessary for successful restructuring — Petitioners' assets and operations were significantly complex so as to justify appointments and proposed compensation and charges — Recommendations for financial advisor and CRO were accepted as being most qualified candidates — Key employee retention plan was approved, even in light of earlier salary raise and pension plan's objections, as employee was most senior remaining executive — Loss of this person's expertise now or during process would be extremely detrimental to chances of successful restructuring — Stay that was granted under initial order was extended in order to provide sufficient time to solicit letters of intent — Union was not entitled to proceed with its claims as it was not imperative that they be determined now.

#### Table of Authorities

##### Cases considered by *Fitzpatrick J.*:

*CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed

*Canwest Publishing Inc. / Publications Canwest Inc., Re* (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — followed

*Forest & Marine Financial Corp., Re* (2009), 2009 BCCA 319, 2009 CarswellBC 1738, 54 C.B.R. (5th) 201, [2009] 9 W.W.R. 567, 96 B.C.L.R. (4th) 77, 273 B.C.A.C. 271, 461 W.A.C. 271 (B.C. C.A.) — referred to

*Grant Forest Products Inc., Re* (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

*ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39, (sub nom. *Bricore Land Group Ltd., Re*) 296 Sask. R. 64 (Sask. Q.B.) — referred to

*Lehdorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

*PCAS Patient Care Automation Services Inc., Re* (2012), 2012 ONSC 2840, 2012 CarswellOnt 5922, 94 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]) — referred to

*Sahlin v. Nature Trust of British Columbia Inc.* (2010), 2010 BCCA 516, 2010 CarswellBC 3510, 296 B.C.A.C. 126, 503 W.A.C. 126 (B.C. C.A. [In Chambers]) — referred to

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v.*

*Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — referred to

*Timminco Ltd., Re* (2012), 2012 ONSC 506, 2012 CarswellOnt 1263, 95 C.C.P.B. 48, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

*U.S. Steel Canada Inc., Re* (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465, 20 C.B.R. (6th) 116 (Ont. S.C.J.) — considered

*Yukon Zinc Corp., Re* (2015), 2015 BCSC 1961, 2015 CarswellBC 3121, 5 P.P.S.A.C. (4th) 9 (B.C. S.C.) — followed

*8440522 Canada Inc., Re* (2013), 2013 ONSC 6167, 2013 CarswellOnt 13921, 8 C.B.R. (6th) 86 (Ont. S.C.J. [Commercial List]) — referred to

### **Statutes considered:**

*Bankruptcy Code*, 11 U.S.C.

Generally — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

*Employee Retirement Income Security Act, 1974*, Pub.L 93-406; 88 Stat. 829; 29 U.S.C. 18

Generally — referred to

s. 1001 — referred to

*Labour Relations Code*, R.S.B.C. 1996, c. 244

Generally — referred to

s. 54 — considered

APPLICATION by insolvent corporations for extension of stay of proceedings and other relief to lead to potential restructuring.

### ***Fitzpatrick J.:***

### **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. [Commercial List]); *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) 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 *CCA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). 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](#) (Ont. S.C.J. [Commercial List]) 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 *8440522 Canada Inc., Re*, 2013 ONSC 6167 (Ont. S.C.J. [Commercial List]) 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 (Sask. Q.B.) 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

- (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](#) (Ont. S.C.J.) 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./Publications Canwest Inc., Re*, [2010 ONSC 222](#) (Ont. S.C.J. [Commercial List]) 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 (S.C.C.) at para. 53; *Sahlin v. Nature Trust of British Columbia Inc.*, 2010 BCCA 516 (B.C. C.A. [In Chambers]) 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 (Ont. S.C.J. [Commercial List]) 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. [Commercial List]); 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 Corp., Re*, 2015 BCSC 1961 (B.C. S.C.). 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 SISF 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.

*Application granted.*

# TAB 19

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST



THE HONOURABLE MR  
JUSTICE HAINEY

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THURSDAY, THE 25<sup>th</sup>  
DAY OF JANUARY, 2018

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 CARILLION CANADA HOLDINGS  
INC., CARILLION CANADA INC., CARILLION CANADA  
FINANCE CORP. AND CARILLION CONSTRUCTION INC.  
(each, an "Applicant", and collectively, the "Applicants")

INITIAL ORDER

**THIS APPLICATION**, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the affidavit of Elizabeth Reynolds sworn January 24, 2018 and the Exhibits thereto (the "**Initial Affidavit**"), and the pre-filing report of Ernst & Young Inc. ("**E&Y**"), in its capacity as proposed monitor of the Applicants (in such capacity, the "**Proposed Monitor**") dated January 24, 2018 and on hearing the submissions of counsel for the Applicants, counsel to the Proposed Monitor, independent counsel to the Board of Directors of the Applicants (the "**Board of Directors**"), and on reading the consent of the Proposed Monitor to act as the Monitor of the Applicants (in such capacity, the "**Monitor**"),

**SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that (a) the entities listed on **Schedule "A"** hereto shall be referred to herein as the "**Outland Entities**", (b) the entities listed on **Schedule "B"** hereto shall be referred to herein as the "**Rokstad Entities**", (c) the entities listed on **Schedule "C"** hereto shall be referred to herein as the "**Services Entities**", (d) the entities listed on **Schedule "D"** hereto shall be referred to herein as the "**Other Carillion Canada Subsidiaries**", and (e) collectively, the Outland Entities, Rokstad Entities, Services Entities and Other Carillion Canada Subsidiaries shall be referred to herein as the "**Non-Applicant Stay Parties**" (and together with the Applicants, the "**Carillion Canada Entities**").

#### **APPLICATION**

3. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

#### **PLAN OF ARRANGEMENT**

4. **THIS COURT ORDERS** that the Applicants, individually or collectively, 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. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Applicants' Property**" and together with all of the Non-Applicant Stay Parties' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, the "**Carillion Canada Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Applicants' Business**" and together with the business of the Non-Applicant Stay Parties, the "**Carillion Canada Business**") and Applicants' Property. The Applicants are authorized and empowered to continue to retain and employ the employees, independent contractors, sub-contractors, advisors, 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 the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place among the Carillion Canada Entities as described in the Initial Affidavit, or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank or other institution 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 the Applicants 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 Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, except to the extent that such terms are expressly modified by this Order, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. **THIS COURT ORDERS** that (a) any segregated bank accounts established by the Applicants to hold funds advanced to them on the condition that such funds be used for a specific purpose in respect of a specific portion of the Carillion Canada Business (the "**Segregated Funds**") shall be used for such specific purpose, and (b) from and after the date of this Order, the Applicants may establish additional segregated bank accounts to hold any additional Segregated Funds that are advanced to them under such agreed upon arrangements.

8. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses and satisfy the following obligations whether incurred prior to, on or after the date of this Order:

- (a) all outstanding and future wages, salaries, commissions, employee and retiree benefits (including, without limitation, employee medical, dental, vision, insurance and similar benefit plans or arrangements) amounts owing under corporate credit cards issued to management and employees of the Applicants, pension benefits or

contributions, vacation pay, expenses and director fees and expenses, payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing practices, compensation policies and arrangements (but not including termination or severance payments), and all other payroll processing and servicing expenses;

- (b) all outstanding and future amounts owing to or in respect of individuals working as independent contractors in connection with the Applicants' Business;
- (c) the fees and disbursements of any Assistants retained or employed by the Applicants at their standard rates and charges; and
- (d) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Applicants prior to the date of this Order by third party suppliers up to a maximum aggregate amount of \$1 million (not including any amounts payable from the Segregated Funds), if, in the opinion of the Applicants, the supplier is critical to the business and ongoing operations of the Applicants.

9. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled, but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Applicants' Business in the ordinary course on or after the date of this Order, and in carrying out the provisions of this Order and any other Order of this Court, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Applicants' Property or the Applicants' Business (including the value thereof) including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Applicants following the date of this Order or payments to obtain the release of goods contracted for prior to the date of this Order.

10. **THIS COURT ORDERS** that the Applicants shall 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 the Applicants' employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services taxes, harmonized sales taxes or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; 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 realty, municipal business, workers' compensation 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 and which are attributable to or in respect of the carrying on of the Applicants' Business by the Applicants.

11. **THIS COURT ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants shall pay, without duplication, 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 to the landlord under the lease, but for greater certainty, excluding accelerated rent or penalties, fees or other charges arising as a result of the insolvency of the Applicants or the making of this Order) or as otherwise may be negotiated between the applicable Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each 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 the date of this Order shall also be paid.

12. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants 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 Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Applicants' Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Applicants' Business or pursuant to further Order of this Court.

13. **THIS COURT ORDERS** that, each of the Applicants are authorized to continue on and after the date of this Order, to: (a) enter into transactions, including, without limitation intercompany funding transactions among the Carillion Canada Entities, (b) buy and sell goods and services, including, without limitation, head office and shared services, and (c) allocate to, collect from and pay costs, expenses and other amounts of other Carillion Canada Entities (collectively, the "**Intercompany Transactions**") in the ordinary course of business. All ordinary course Intercompany Transactions shall continue on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures that the Monitor, in consultation with the Applicants, approves, or subject to further Order of this Court. Any Applicant making an advance approved by the Monitor from and after the date of this Order with respect to intercompany funding to another Carillion Canada Entity (collectively, the "**Intercompany Advances**") shall be entitled to the benefit of and is hereby granted a charge and security as against the applicable Carillion Canada Property of such Carillion Canada Entity receiving such Intercompany Advance (the "**Intercompany Charge**"), which shall have the priority set out in paragraphs 37 and 39 of this Order.

## **RESTRUCTURING**

14. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of the Applicants' Business or operations, and to dispose of redundant or non-material assets not exceeding \$1 million in any one transaction or \$5 million in the aggregate;

- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate;
- (c) vacate, abandon or quit any leased premises and disclaim or resiliate any real property lease and any ancillary agreements relating to any leased premises, subject to paragraphs 11 and 15 of this Order;
- (d) disclaim arrangements or agreements of any nature whatsoever with whomever, whether oral or written, as the Applicants deem appropriate, with the Monitor's consent or pursuant to further Order of the Court, in accordance with Section 32 of the CCAA; and
- (e) pursue all avenues of financing or refinancing, restructuring, selling, assigning or in any other manner disposing of and/or reorganizing the Applicants' Business or the Applicants' Property, in whole or part, subject to prior approval of this Court being obtained before any material financing or refinancing, restructuring, sale, assignment, disposition or reorganization,

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

15. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of an Applicant's 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 such Applicant's 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, such landlord and such Applicant, or by further Order of this Court upon application by such Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If such Applicant disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to such Applicant's claim to the fixtures in dispute.

16. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA by any Applicant, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving such Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against such Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE APPLICANTS, THE APPLICANTS' BUSINESS OR THE APPLICANTS' PROPERTY**

17. **THIS COURT ORDERS** that until and including February 23, 2018, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Applicants' Business or the Applicants' Property except with the written consent of the Applicants and the Monitor, or with leave of this Court. Any and all Proceedings currently under way against or in respect of the Applicants or affecting the Applicants' Business or the Applicants' Property are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

18. **THIS COURT ORDERS** that 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 the Applicants or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Applicants' Business or the Applicants' Property are hereby stayed and suspended, except with the written consent of the Applicants and the Monitor, or leave of this Court, including, without limitation, by way of terminating, making any demand, accelerating, amending or declaring in default, sweeping any cash in any of the Applicants' bank accounts (if available), exercising any option, right or remedy or taking any enforcement steps

under or in respect of any agreement or agreements with respect to which any of the Applicants are a party, borrower, principal obligor or guarantor, including, by reason of:

- (a) any of Carillion plc, Carillion Construction Limited, Carillion Services Ltd., Planned Maintenance Engineering Limited, Carillion Integrated Services Limited or Carillion Services 2006 Limited (collectively, the "**Carillion UK Entities**") being insolvent or having become subject to insolvency proceedings;
- (b) any of the Applicants being insolvent or having made an application to this Court under the CCAA or the granting of this Order;
- (c) any of the Applicants being party to these proceedings or taking any steps related thereto; or
- (d) any default or cross-default arising from the matters set out in foregoing subparagraphs (a) to (c),

provided that nothing in this Order shall:

- (a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;
- (b) exempt the Applicants from compliance with any statutory or regulatory provisions relating to health, safety or the environment;
- (c) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA;
- (d) prevent the filing of any registration to preserve or perfect a security interest; or
- (e) prevent the registration of a claim for a lien.

#### **STAY IN RESPECT OF THE NON-APPLICANT STAY PARTIES**

19. **THIS COURT ORDERS** that during the Stay Period, no Person shall (a) commence any Proceeding or enforcement process, (b) terminate, repudiate, make any demand, accelerate, alter, amend, declare in default, exercise any options, rights or remedies, or (c) discontinue, fail to

honour, alter, interfere with or cease to perform any obligation, pursuant to or in respect of any agreement, lease, sublease, license or permit with respect to which any of the Non-Applicant Stay Parties are a party, borrower, principal obligor or guarantor, by reason of:

- (a) any of the Carillion UK Entities being insolvent or having become subject to insolvency proceedings;
- (b) any of the Applicants being insolvent or having made an application to this Court under the CCAA or the granting of this Order;
- (c) any of the Applicants being party to these proceedings or taking any steps related thereto;
- (d) the stay granted pursuant to this paragraph 19; and
- (e) any default or cross-default arising from the matters set out in foregoing subparagraphs (a) to (d),

except with the written consent of the Applicants and the Monitor, or with leave of this Court.

#### **NO INTERFERENCE WITH RIGHTS**

20. **THIS COURT ORDERS** that 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, lease, sublease, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

#### **CONTINUATION OF SERVICES**

21. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all trademark license and other intellectual property, computer software, communication and other data services, centralized banking services, payroll and benefits services, insurance, warranty services, vehicle and transportation services, temporary labour and staffing services, freight services, sub-contractors, trade suppliers, equipment vendors and rental companies, utility, customs, clearing, warehouse and logistics



services or other services to the Applicants' Business or in respect of the Applicants' Property, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply or license of such goods, services, trademarks and other intellectual property as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of the trademarks and other intellectual property licensed to, used or owned by the Applicants, premises, telephone numbers, facsimile numbers, internet addresses and domain names and building and other permits, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the applicable Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

#### **NON-DEROGATION OF RIGHTS**

22. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Carillion Canada Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

23. **THIS COURT ORDERS** that, notwithstanding foregoing paragraph 22, any Person who has provided any kind of letter of credit, guarantee, surety or bond (collectively, "**Financial Assurances**") to or for the benefit of any of the Carillion Canada Entities on or before the date of this Order shall be required to continue honouring any and all such Financial Assurances in accordance with their terms, notwithstanding any default or cross-default arising from the matters set out in subparagraphs 19(a) to 19(d) of this Order.

#### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

24. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any

obligations of the Applicants 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 Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

#### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

25. **THIS COURT ORDERS** that the Applicants shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

26. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Applicants' Property, which charge shall not exceed an aggregate amount of \$11 million, as security for the indemnity provided in paragraph 25 of this Order. The Directors' Charge shall have the priority set out in paragraphs 37 and 39 herein.

27. **THIS COURT ORDERS** that, 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 Applicants' 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 25 of this Order.

#### **APPOINTMENT OF MONITOR**

28. **THIS COURT ORDERS** that E&Y is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants 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.

29. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicants' receipts and disbursements;
- (b) liaise with and assist the Applicants and the Assistants with respect to all matters relating to the Applicants' Business, the Applicants' Property and the Restructuring and such other matters as may be relevant to the proceedings herein;
- (c) if necessary or desirable, in consultation with the Applicants, develop such principles, policies and procedures as are satisfactory to the Monitor and the Applicants to govern any or all categories of Intercompany Transactions (the "**Intercompany Transaction Policies**");
- (d) review and monitor all Intercompany Transactions, including compliance with any applicable Intercompany Transaction Policies, in such manner as the Monitor, in consultation with the Applicants, considers appropriate;
- (e) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Applicants' Property, the Applicants' Business, and such other matters as may be relevant to the proceedings herein;
- (f) assist the Applicants, to the extent required by the Applicants, in their dissemination of financial and other information in respect of any Segregated Funds, in accordance with the terms on which such Segregated Funds were advanced;
- (g) advise the Applicants in their preparation of the Applicants' cash flow statements;
- (h) advise the Applicants in their development of the Plan and any amendments to the Plan;
- (i) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (j) have full and complete access to the Applicants' Property, including the premises, books, records, data, including data in electronic form, and other financial documents

of the Applicants, to the extent that is necessary to adequately assess the Applicants' Business and financial affairs or to perform its duties arising under this Order;

- (k) 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;
- (l) assist the Applicants, to the extent required by the Applicants, with any matters relating to any foreign proceeding commenced or impacting the Applicants, including, without limitation, by (i) acting as "foreign representative" of the Applicants in any proceeding outside Canada, including, without limitation, for the purpose of having these proceedings recognized in a jurisdiction outside Canada, and (ii) retaining independent legal counsel, agents, experts, accountants, advisors or such other persons as the Monitor, in consultation with the Applicants, deems necessary or desirable respecting the exercise of this power; and
- (m) perform such other duties as are required by this Order or by this Court from time to time.

30. **THIS COURT ORDERS** that the Monitor shall not take possession of the Carillion Canada Property and shall take no part whatsoever in the management or supervision of the management of the Carillion Canada Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Carillion Canada Business or the Carillion Canada Property, or any part thereof.

31. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Carillion Canada 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 *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational*

*Health and Safety 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. 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 Carillion Canada Property within the meaning of any Environmental Legislation, unless it is actually in possession.

32. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants with information provided by the Applicants 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 Applicants 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 Applicants may agree.

33. **THIS COURT ORDERS** that, 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, including, for greater certainty, in the Monitor's capacity as "foreign representative", save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

34. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, independent counsel to the Board of Directors and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or subsequent to the date of this Order, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, independent counsel to the Board of Directors and counsel for the Applicants on a weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, independent counsel to the Board of Directors and counsel to the Applicants, retainers in the aggregate amount of \$500,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

35. **THIS COURT ORDERS** that 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 Commercial List of the Ontario Superior Court of Justice.

36. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, counsel to the Applicants and independent counsel to the Board of Directors shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Applicants' Property, which charge shall not exceed an aggregate amount of \$5 million, as security for their professional fees and disbursements incurred at their respective standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 37 and 39 hereof.

#### **VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

37. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge and the Intercompany Charge (collectively, the "**Charges**"), as among them with respect to the Applicants, shall be as follows:

First – Administration Charge (to the maximum amount of \$5 million);

Second – Directors' Charge (to the maximum amount of \$11 million); and

Third – Intercompany Charge (to the maximum amount outstanding from time to time).

38. **THIS COURT ORDERS** that the filing, registration or perfection of Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

39. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Applicants' Property (other than the Segregated Funds) and the Intercompany Charge shall, to the extent applicable, constitute a charge on the applicable Carillion Canada Property of the Carillion Canada Entity receiving such Intercompany Advance, and such Charges shall rank in

priority to all other security interests, trusts (including deemed or constructive trusts), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (including, without limitation, any deemed trusts that may be created under any statute, including, without limitation, the Ontario *Pension Benefits Act*) (collectively, "**Encumbrances**") in favour of any Person, except for (a) any Person who is a "secured creditor" as defined in the CCAA that has not been served with the Notice of Application for this Order, or (b) any statutory super-priority deemed trusts and liens for unpaid employee source deductions or pension obligations.

40. **THIS COURT ORDERS** that the Applicants shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrance over which the Charges have not obtained priority.

41. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any of the Applicants' Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor and the other beneficiaries of the affected Charges, or further Order of this Court.

42. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges and (collectively, the "**Chargees**") thereunder 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 or receivership order(s) issued pursuant to the BIA or otherwise, or any bankruptcy or receivership 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 governing documents, loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Carillion Canada Entities, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by the Carillion Canada Entities of any Agreement to which they are a party;

- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any obligation or Agreement caused by or resulting from or the creation of the Charges; and
- (c) the payments made by the Applicants pursuant to this Order 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.

43. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases and any Intercompany Charge created by this Order over leases of real property in Canada shall only be an Intercompany Charge in the Non-Applicant Stay Party's interest in such real property leases.

#### **SERVICE AND NOTICE**

44. **THIS COURT ORDERS** that the Monitor shall (a) without delay, publish in The Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (b) within five (5) days' after the date of this Order, (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than \$1,000 (excluding any individual employees, former employees with pension and/or retirement savings or benefits plan entitlements, and retirees and other beneficiaries who have entitlements under any pension or retirement savings plan), and (iii) 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, provided that the Monitor shall not make the claims, names and addresses of individuals who are creditors publicly available, unless otherwise ordered by the Court.

45. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice->



commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: [www.ey.com/ca/carillioncanada](http://www.ey.com/ca/carillioncanada) (the "**Monitor's Website**").

46. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in these proceedings (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's Website, provided that the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

47. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or other electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution shall be deemed to be received: (a) if sent by courier, on the next business day following the date of forwarding thereof, (b) if delivered by personal delivery, facsimile or other electronic transmission, on the day so delivered, and (c) if sent by ordinary mail, on the third business day after mailing.

48. **THIS COURT ORDERS** that the Applicants, the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and Orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

## SUBSEQUENT HEARINGS

49. **THIS COURT ORDERS** that, subject to paragraph 50 hereof, all motions in these proceedings are to be brought on not less than seven (7) calendar days' notice to all Persons on the Service List. Each Notice of Motion shall specify a date (the "**Return Date**") and time for the hearing.

50. **THIS COURT ORDERS** that motions for relief on an urgent basis need not comply with the notice protocol described herein.

51. **THIS COURT ORDERS** that any interested Person wishing to object to the relief sought in a motion must serve responding motion material or, if they do not intend to file material, a notice, in either case, stating the objection to the motion and the grounds for such objection in writing (the "**Responding Materials**") to the moving party, the Applicants and the Monitor, with a copy to all Persons on the Service List, no later than 5:00 p.m. (Toronto time) on the date that is four (4) calendar days prior to the Return Date (the "**Objection Deadline**").

52. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the judge having carriage of the motion (the "**Presiding Judge**") may determine:

- (a) whether a hearing is necessary;
- (b) whether such hearing will be in person, by telephone or by written submissions only; and
- (c) the parties from whom submissions are required

(collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

53. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the Service List of the Hearing Details and the Monitor shall

report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in the proceedings.

54. **THIS COURT ORDERS** that if any party objects to the motion proceeding on the Return Date or believes that the Objection Deadline does not provide sufficient time to respond to the motion, such objecting party shall, promptly upon receipt of the Notice of Motion and in any event prior to the Objection Deadline, contact the moving party and the Monitor (together with the objecting party and any other party who has served Responding Materials, the "**Interested Parties**") to advise of such objection and the reasons therefor. If the Interested Parties are unable to resolve the objection to the timing and schedule for the motion following good faith consultations, the Interested Parties may seek a scheduling appointment before the Presiding Judge to be held prior to the Return Date or on such other date as may be mutually agreed by the Interested Parties or as directed by the Presiding Judge to establish a schedule for the motion. At the scheduling appointment, the Presiding Judge may provide directions, including a schedule for the delivery of any further materials and the hearing of the contested motion, and may address such other matters, including interim relief, as the Court may see fit. Notwithstanding the foregoing, the Presiding Judge may require the Interested Parties to proceed with the contested motion on the Return Date or on any other date as may be directed by the Presiding Judge or as may be mutually agreed by the Interested Parties, if otherwise satisfactory to the Presiding Judge.

#### **GENERAL**

55. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court to amend, vary, restate or supplement this Order or for advice and directions concerning the discharge of their respective powers and duties under this Order.

56. **THIS COURT ORDERS** that 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 Carillion Canada Entities, the Carillion Canada Business or the Carillion Canada Property.

57. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, United Kingdom, United States or any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the

Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants 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 Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

58. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered 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.

59. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary, amend, restate or supplement this Order on not less than seven (7) days' notice to the Service List and 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.

60. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto time) on the date of this Order.



ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

JAN 25 2018

PER / PAR:



**Schedule "A"**

**(Outland Entities)**

1. 491313 BC Ltd.
2. Outland Resources Inc.
3. Outland Resources Inc.

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 FORME DEVELOPMENT GROUP INC. AND  
THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO (the  
"Applicants")

Court File No:

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**Proceeding commenced TORONTO**

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**BRIEF OF AUTHORITIES OF THE APPLICANTS  
(returnable November 6, 2018)**

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**GOLDMAN SLOAN NASH & HABER LLP**

480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Fax: 416-597-6477

**Mario Forte (LSUC#: 27293F)**

Tel: 416.597.6477  
Email: [forte@gsnh.com](mailto:forte@gsnh.com)

**Jennifer Stam (LSUC#: 46735J)**

Tel: 416.597.5017  
Email: [jstam@gsnh.com](mailto:jstam@gsnh.com)

Lawyers for the Applicants